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The Waiting Game: Extensions of Time

Determining extensions of time can be as sophisticated an art as designing a building in the first place. Juggling cost, time and quality is a routine part of every job, but deciding whether a contractor has a just claim for an extension of time is something that can only be learned through experience. To make life even more difficult, adjudication, introduced in May 1998, has made it cheaper and easier for a contractor or client to challenge an architect's award.

January's quiz, devised by Ian Salisbury, discussed the case of *Henry Boot v Malmaison* (see (1999) *Construction Industry Law Letter*, p1575). In this case, Henry Boot was engaged by Malmaison under JCT 1980 (private edition with quantities) to construct a hotel in Manchester. Delays occurred. The architect, using the power in clause 25 to grant extensions of time before practical completion, extended the date for completion to 6 January 1998. Practical completion occurred on 13 March of the same year. Henry Boot considered the architect was wrong not to give it more time and referred its disputed claims for extensions of time beyond 6 January to arbitration.

Henry Boot's argument was that if the impact of relevant events (those entitling it to an extension of time) was considered, it could be shown that these had delayed completion beyond 6 January. Malmaison sought to argue that there were numerous other events (which did not entitle Henry Boot to an extension of time) that had delayed effective progress. Henry Boot said that the architect could not consider such other events when assessing whether it was entitled to an extension of time, and that they were outside the arbitrator's jurisdiction. The issue was referred to the court on a preliminary question. Not surprisingly, the court rejected Henry Boot's argument and decided that neither the architect nor the arbitrator was prevented by the wording of clause 25 from considering the effects of other events when deciding whether a relevant event had, or was likely, to cause delay beyond the date for completion. The case contains some interesting observations on the interaction between relevant events and other events when evaluating extension of time claims which are used to analyse the problems in the quiz.

Observation one

The purpose of granting an extension of time is to fix the period by which the completion date ought to be extended, depending on the incidence of relevant events and measured by the standard of what is fair

and reasonable. The revised date is not the date by which the contractor ought to have achieved completion, but the end of the total number of working days, starting from the date of possession, within which the contractor ought fairly and reasonably to have completed the works.

This observation derives from the case of *Balfour Beatty v Chestermount* (see (1993) *62 Building Law Reports 1* and *RIBA Practice issue 96* June 1993, pages 1-3). The court approved the net extension approach to assessing extensions of time for delay caused by relevant events (otherwise known as 'excusable delay') that occur after the completion date and during a period of delay for which the contractor is responsible ('culpable delay'). Under the net extension approach, the period of excusable delay is separately assessed and added to the existing completion date. The contractor is not entitled to an extension of time for the full period (including the period of culpable delay) from the existing completion date to the end of the period of excusable delay (the 'gross extension' approach).

Observation two

If there are two concurrent causes of delay, one of which is a relevant event (such as exceptionally inclement weather preventing all work on site) and the other which is not (for example a shortage of labour) 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. Provided this is established, the architect cannot refuse to grant an extension of time merely because the delay would have occurred in any event.

This observation, which was accepted by both Henry Boot and Malmaison, is a consequence of the link between the extension of time clause and the employer's right to damages for delay. The employer must prove its entitlement to such damages and cannot do so where the period of delay is caused concurrently by two events, one of which entitles the contractor to an extension of time. The situation is, of course, reversed where, in cases where the relevant event is one that carries an entitlement to loss and expense, the contractor is seeking prolongation costs in respect of such a delay. Given the concurrence of the other event the contractor cannot prove its claim.

Observation three

When deciding whether a relevant event has caused or is likely to cause delay to the works beyond the completion date, consideration should be given firstly to whether the relevant events were likely to, or did in fact cause any delay (for instance because the affected activities are not on the critical path) and secondly whether the true cause of any delay was something else. In carrying out this exercise the architect is entitled to consider the impact of other events on progress and completion.

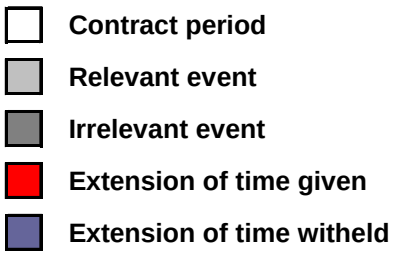
The inter-relationship between the second and third of these observations is not altogether clear. Where both relevant events and

other events have occurred, how can the architect both consider the impact of the latter on progress and completion, and apply the principle that the contractor is entitled to an extension of time where delay is caused concurrently by a relevant event and another event?

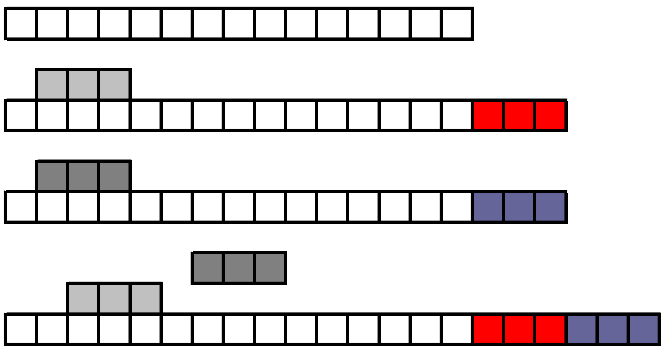
What appears to be envisaged is that the architect should analyse the contractor's actual progress on site in the light of any culpable delays and other events up to the time when the relevant event occurred. The purpose of this analysis is to establish the actual programme of construction and critical path (which may be quite different from the contractor's planned programme). The true impact of the relevant event can then be assessed. If there is no impact on the completion date, for instance because, as a result of other events, the activity affected by the relevant event is no longer on the critical path, the contractor is not entitled to an extension of time. But if at the time the relevant event occurs it delays, or is likely to delay, activities on the actual critical path at that time, such delays cannot be disregarded merely because they would have occurred in any case because of other events.

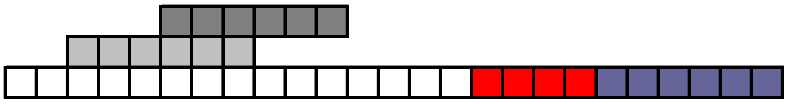
Quiz results

The following examples, used as the basis for a quiz in the January 2000 edition of the RIBA Journal, illustrate the application of these principles, particularly the first two observations. The quiz, devised by Ian Salisbury RIBA, asked readers to consider the following bar programs and decide, in each case, whether the architect had given the correct extension of time, having regard to the contract period and the relevant and irrelevant events identified.



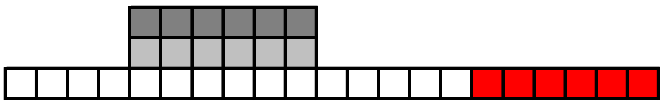
The first four examples explain how the quiz works. The numbered examples then show circumstances where extensions of time have been considered. The question in each case is, did the architect give the correct award?





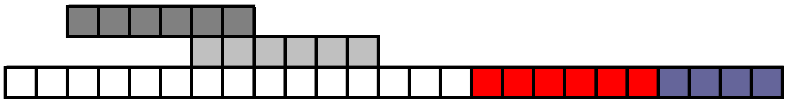
Example 1

The architect gave an incorrect extension of time, there being no perceptible relationship between the events that occurred during the contract and the 'four unit' extension of time granted. Since the relevant event was already causing delay at the time the irrelevant event occurred, the latter would not, of itself, mean that the architect could restrict the extension of time to 'three units'. A 'six unit' extension would be appropriate.



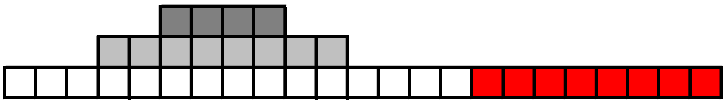
Example 2

This is a classic example of concurrent causes. The architect gave the correct extension.



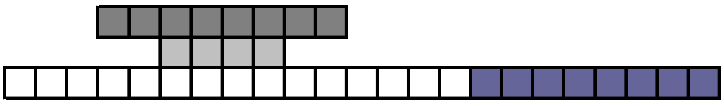
Example 3

In practice the previous occurrence of the irrelevant event should lead the architect to enquire whether the relevant event did affect the critical path at the time it occurred. But if, as the quiz assumes, both the relevant and irrelevant events were equally effective causes of delay to the critical path, the architect granted the correct extension of time.



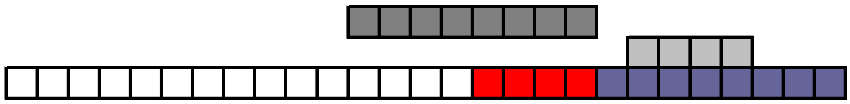
Example 4

This is a typical case of concurrent causes. The architect gave the correct extension.



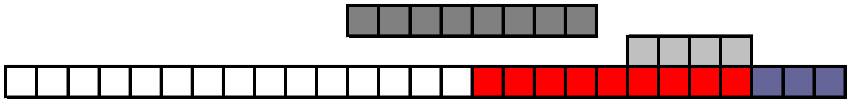
Example 5

In practice, the previous occurrence of the irrelevant event and its persistence beyond the duration of the relevant event should lead the architect to enquire whether the relevant event did affect the critical path. Nevertheless, on the assumption that both the relevant and irrelevant events were equally effective as causes of delay to the critical path, the architect failed to grant the correct extension of time. A 'four unit' extension should have been given.



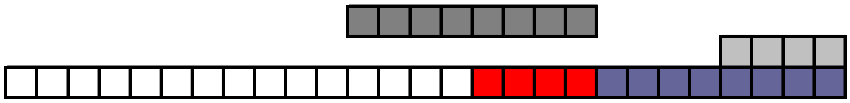
Example 6

This is a typical example where the 'net extension' method should be used. The architect gave the correct extension of time.



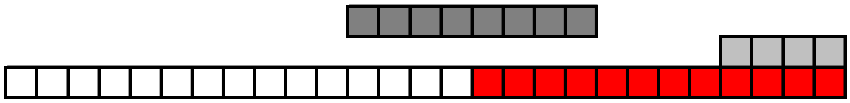
Example 7

The architect has used the gross, rather than the net extension method and has, in consequence, given an incorrect extension. A 'four unit' extension should have been given.



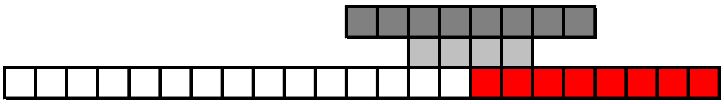
Example 8

The architect has correctly applied the net extension method and given the correct extension of time.



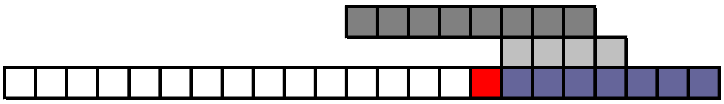
Example 9

The architect has used the gross rather than the net extension method and has, in consequence, given an incorrect extension. A 'four unit' extension would have been appropriate.



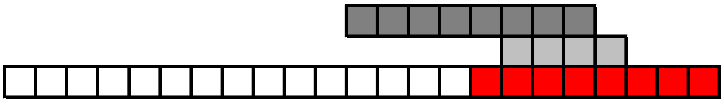
Example 10

The architect has not given the correct extension of time. There is no relationship between the duration of the relevant event and the 'eight unit' extension granted. Applying the same assumptions as those discussed in example 5, a 'four unit' extension would have been appropriate.



Example 11

The architect has given an incorrect extension of time. Applying the same assumptions as those discussed in example 5, a 'four unit' extension would have been appropriate. A 'one unit' extension would only have been appropriate had the architect concluded that during the 'three unit' period of overlap the relevant event was not a concurrent cause of delay.



Example 12

The architect has not give the correct extension of time. There is no relationship between the relevant event and the 'eight unit' extension granted. Applying the same assumptions as those discussed in example 5, a 'four unit' extension would have been appropriate.