driver trett
ANALYSIS ACTION RESOLUTION

THE DIGEST NEWSLETTER

Issue 2 | March 2013

Roger Trett joins the Driver Trett team

I am very pleased to be joining Driver Trett, albeit on a part time basis, to assist in the development of the Driver Trett and DIALES expert witness brands. I am pleased that Trett has joined a group that understands its business. I am also very proud that the Trett name has been retained, not for me personally, but as recognition of the hard work that all my colleagues put in over the 33 years together. It will be good to work with and meet old friends and colleagues, and to make new friends and colleagues. □

In this issue...

Welcome to the Driver Trett Digest

Paul Blackburn
UK issue – Technical Editor

Welcome to the second issue of the Driver Trett Digest. As promised in the November edition, this issue has a distinctive UK focus; with a little bit of Europe and International thrown in for good measure (we do not want anyone feeling left out). This theme will continue for future copies of the Digest, with all our global regions getting the chance to further explore and explain how they support engineering and construction projects around the world.

The UK focus includes a nod towards the opening of our new Aberdeen office, with Richard Burke contributing two articles on current topical subjects; delays, and protecting investment. Having caught the writing bug from the first two articles, he has also provided a fascinating piece on the use and abuse of performance bonds. Responsible for our Aberdeen office, you may have guessed that Richard is heavily involved in the oil and

gas sector (opening an office in Aberdeen was a bit of a clue!).

Not content with opening a new office, which is a major event given the current depressed state of the construction industry, Driver have opened two! More details of the new Germany office, in Munich, can be found within.

Driver are also delighted to announce that Roger Trett (founder of the recently acquired Trett Consulting) has joined the Group to help us achieve the ambitious goals we have set for 2013. Roger is well known in the field of dispute resolution and is a welcome addition to the team. Talking of the team we have an 'Interview with a Mediator'; our very own Mark Wheeler – managing director for Europe, who gives an interesting insight into the world of mediation.

Finally, and to show that the UK has not forgotten its overseas colleagues, we have an interview with Martin Woodall – managing director for the Americas; along with a number of other pieces that we are sure will have something to tempt all our readers including some topical articles on delays and termination, words of wisdom from Driver's DIALES experts and the Corporate Services team, and the introduction of Digest Bytes – snippets of previously published articles that you can download from our website.

I hope you enjoy this issue and encourage you to contact **info@drivertrett.com** with any comments, article ideas, or submissions you would like to see in the next edition.

All in all a varied and topical Digest – read on. □

driver trett ANALYSIS ACTION RESOLUTION DIGEST NEWSLETTER

Sense must be a common feature

DAVID WADDLE – DIALES DELAY EXPERT, EXPLORES THE APPLICATION OF 'COMMON SENSE' IN VARIOUS DELAY ANALYSIS JUDGEMENTS OF THE LAST DECADE AND EXPLAINS WHY EXPERIENCE WILL ALWAYS TRIUMPH OVER BLINDLY FOLLOWING TECHNOLOGY.

Recently I was called to the Bar by one of my lawyer type colleagues, okay it wasn't 'the' Bar more of a case of 'a' bar (www.drinkaware.co.uk). As we drank a glass of lemonade and pondered life, conversation came around to experts and their selection as is normal in these circumstances. He told me that he always started his selection interview in a relatively simple way and gave me his opening question, "What were you doing in 1978?"

Realising that he was talking about work I explained to him that in 1978, I was on site working as a bonus surveyor, carrying out work study exercises, measuring site works, and calculating bonus payments. Over the next 20 years I continued to live on site working my way from bonus to planning engineer to project manager before making the move to consultancy.

What was his point? He was trying to ascertain my depth of practical experience and determine my suitability as, in my case, a delay expert.

Does such practical experience really matter? There are a few clients that have been involved in some high profile disputes who might now think so.

Much has been written about the recent case of Walter Lilly[i], but a useful aspect of the judgement is that Akenhead J. brought together a summary of the most notable case law covering the subject of concurrent delay into one single reference document.

One such notable case was City Inn[ii]. Again much has been written about this dispute but not so much about the technical aspects of the delay analysis. During the hearing many issues were raised over the detail of the as-built critical path programme, which formed the basis of the City Inn analysis. The contractor's expert pointed out that logic had been added to the programme which did not make sense, for example it was agreed by City Inn's Delay Expert that there was in fact no logical reason why the stair flights at level 5 to 6 should be linked to the commencement of stud partitions at level 1. Lord Drummond Young commented that, "it was difficult to see why there should be any such relationship, as a matter of common sense."

Does such practical experience really matter? There are a few clients that have been involved in some high profile disputes who might now think so.

You are probably thinking that the use of such dodgy logic (apologies for the use of jargon) must have been very obvious; to the experienced technician it was, but apparently not to the less experienced eye.

2011 saw Hamblen J. provide his judgement in the case of Adyard Abu Dhabi and SDS Marine Services[iii]. Adyard argued that it was entitled to an extension of time based simply on the premise that if it received an instruction after the passing of the original Completion Date, it must be entitled to a revised Completion Date irrespective of its own culpable delays. The opposing expert offered a common sense, practical example to explain why this view is not necessarily correct.

He described a situation where a contractor was in an irrecoverable culpable delay when the employer issued an instruction to change the paint colour to a wall. In his example the paint would take 5 weeks to procure but it would still arrive before the wall had even been built. Using the Adyard method of analysis it would argue, he theorised, that it was entitled to an extension of time whereas the application of practical experience and common sense would tell the analyst that this could not be correct. The contractor was not entitled to a single days' extension of time.

Practical experience cannot be gained by simply reading a book, it can only be found the hard way.

This echoes the findings in the Hong Kong case of Leighton Contractors and Stelux[iv], the subject of an earlier arbitration. Leighton claimed that the arbitrator had erred in making her decision. Leighton argued that certain events caused actual delay, not theoretical delay. This included the late provision of information by Stelux and this, Leighton said, caused a critical delay. The arbitrator had noted that although the information was indeed late, the Works were already in delay and so she concluded, the late information could not have caused actual delay. Ultimately the judge agreed with the arbitrator and leave to appeal was refused.

Back to Walter Lilly. One of the issues considered by Akenhead J. was a comparison of the approaches in analysing concurrent delay. The Scottish school is one of apportionment, whereby a judgement is made as to who is entitled to what but, this is a very subjective approach and there are no 'hard and fast rules' in making such an assessment. Under English law, he concluded that apportionment was not the correct approach, clause 25 of the JCT contract does not provide for a reduction in the extension of time if the causation criterion is established. Akenhead J. noted that, "provided that the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time".

A common theme running through this selection of cases is the need for a practical common sense approach to delay analysis. Practical experience cannot be gained by simply reading a book or even attending a training day to learn how to use a particular piece of software, it can only be found the hard way.

By the way, our barman charged us £5 for two £2 drinks: why? Because that is what his computerised till told him was the answer, being experienced as we are, we challenged this and of course paid him the correct amount. □

[i] Walter Lilly & Company Ltd v Mackay and Anor [2012] EWHC 1773 (TCC)

[ii] City Inn Ltd v Shepherd Construction Ltd [2007] ScotCS CSOH190

[iii] Adyard Abu Dhabi v SDS Marine Services [2011] EWHC 848 (Comm)

[iv] Leighton Contractors (Asia) Ltd v Stelux Holdings Ltd HCHK [2004]

Q&A: Houston, we have lift off...

AFTER THREE YEARS WITH DRIVER PROJECT SERVICES IN THE UK, MARTIN WOODALL TALKS ABOUT HIS RECENT MOVE TO THE USA AND HIS ASPIRATIONS FOR THE BUSINESS ACROSS THE AMERICAS.

Previously you were the managing director of Driver Project Services, what is your new role in Driver Group?

I am now the managing director for the Americas and have accepted the challenge of developing the business across the Americas region.

What are your aims for the business in the region?

In line with Group plans I want to get to a place where Driver is providing all of our service offerings in the Americas. Our complete range of services includes;

- Consultancy – Commercial, Contract and Programme Advisory
- Project Services – Contract Administration, Planning and Project Controls
- Dispute Avoidance and Resolution – Claims Management, Quantum and Delay Analysis
- Corporate Services – Project Monitoring, Insolvency, and Due Diligence
- Expert Services – Litigation Support and Expert Witness
- Strategic Project Management-Concessions, PPP, Project Management, and Transaction Advisory
- Training – Commercial, Contract, and Programme awareness seminars and training events

That sounds like a big ask!

If you look at where we are now in the region and think of it as one task then it is a big ask. However we have started the journey already by building on and investing in the Trett Consulting brand that Driver acquired last year, which already operates effectively in the US. By doing this, and calling on the resources and capabilities in the wider business, we can introduce the broad range of services to the markets across the Americas as awareness of service availability increases.

Martin Woodall – managing director, Americas

It's a big region, which business centres are you intending to develop?

The region is geographically huge and encompasses many different cultures and practices in the vast array of engineering and construction sectors we are capable of servicing. Ultimately we will have offices staffed in several major centres focussing on clients and projects in all the major centres but we are initially focussing on the energy sector, particularly projects that are based out of the Houston area. Our Houston office is close to the 'Energy Corridor' in North West Houston and we already service several clients from there including operators, EPC contractors and power generation companies.

What services are you currently providing in Houston?

Primarily we are providing contract administration and dispute avoidance services. We have listened to our clients and they tell us that although contractual and commercial problems arise, they want to see them coming and deal with them as they arise to avoid formal disputes crystallising. It is our philosophy to seek first to understand our clients' business needs and then tailor our knowledge and services to meet those needs.

It is our philosophy to seek first to understand our clients' business needs and then tailor our knowledge and services to meet those needs.

Which other major centres do you intend to service

We are continually assessing the market sectors and regional cities that might provide the best locations for Driver Group offices, and currently Calgary is the next likely location. We are also seriously considering Toronto to service the construction market there and investigating the North East coast in the US where there will be major projects in infrastructure development, including sub-sea projects, an area Driver Trett has extensive experience in.

Further into the future we expect to be looking at locations in Central and South America as those economies continue to develop their infrastructure, petrochemical, and energy projects.

It sounds like there will be lots of career opportunities for people in Driver Group

Yes absolutely. Driver is a dynamic and growing business with all sorts of opportunities for passionate and committed people to join us and contribute to the development of the business. In my region alone we are seeking people of all grades to form the nucleus of each office cluster in the cities mentioned where we want to be.

And finally, how do you find living in the US?

Well I have only been here a few weeks to date, and I can only speak for Houston but I am impressed how open and friendly the people in business are. From a personal point of view I think I am going to really enjoy the weather, outdoor living and hopefully make time to play a bit of golf with the sun on my back on the fantastic courses out here.

Well thanks Martin, good luck with the new role

Thanks and come back and talk to us in 12 months and see how we are doing. □

High-tech planning and controls for high-tech platforms

Embracing the 'other' kind of technology

RICHARD BURKE – DIRECTOR, DRIVER TRETT UK EXPLORES HOW WE SHOULD BE PROTECTING INVESTMENTS IN OIL AND GAS USING MODERN COST AND SCHEDULE CONTROLS.

Facing the Challenge

You are perhaps tired of reading articles which start with statements such as... "What lies ahead, is by far the most challenging era for the industry that any of us has encountered". Well unfortunately, this type of foreboding appears to reflect precisely what does face the oil and gas market; with consequences for most of the major players in this sector, from owners, to contractors to subcontractors and vendors.

When we read the reports of the sector's leading monitoring bodies, we learn that the fundamental challenge is that worldwide production of crude oil could drop from existing levels by nearly 40 million B/D by 2020, whilst at the same time there will be a need for an additional 25 million B/D of oil production to keep pace with consumption. Understandably, the race is on to develop new technology to maximise recovery from fields old and new.

Every bit as much of a challenge is that operators, contractors and service companies need to find ways to achieve this, while minimising project and operational costs, reducing environmental imprint, and of course maintaining safety. Quite a challenge indeed, so let's consider what can be done to control the costs of these oil and gas projects at planning and execution stage.

> The goal, for project reporting, should be a single source of easily accessible, real-time data.

Overruns and Overspending

It is reported that fifteen years ago, only ten percent of major oil and gas projects ran over budget by more than half. By last year, that number had nearly tripled to 28 percent. According to a Schlumberger Business Consulting report, this budget-draining trend is expected to not only continue, but worsen, by 2015; the report states, 'the industry's capacity to deliver these projects is not keeping pace, and as a result, significant overruns in budgets and schedules are rising in frequency.'

Statistics like this will surely be grabbing the attention of the oil and gas industry and causing corporations to think about how they can arrest, or reverse the trend.

Utilising Technology to Reduce Costs and Delays

Among the most effective ways to mitigate these risks, is to increase the effectiveness of project controls, enabling the capture and immediate reporting of accurate data regarding cost, resourcing and schedule; allowing quicker and more efficient decision making to head off delays and overspends.

So how can companies improve the type of controls and data intelligence that they

CONTINUED ON PAGE 5

CONTROLLING PROJECTS IS A TEAM ACTIVITY

Ben van den Biggelaar – Associate, Driver Trett Netherlands

Many companies have recognised that controlling a project relies on the input of the various members of the project team and have introduced 'Convergence Management'.

This involves assigning team members with specific monitoring packages that have to pass gates; the gates will comprise of certain deliverables relative to the package of work of the project they are monitoring. The responsibility of deliverables remains with other team members as part of their normal project tasks.

In a large, complex project with a substantial number of scheduled activities this helps the focus on checking if the project is on time, and thus within budget! During scheduled gate reviews, it is important to note that if crucial deliverables cannot proceed (passing the gate) they will impact on schedule and/or cost. A well worked out convergence plan regularly focuses on timely deliverables ensuring convergence. A gate review cannot be left to a computer programme; it is about evaluating where you want to check the packages are on progress, when everybody in the review is satisfied, then the project can proceed through the gate. This remains the sole preserve of the members of the project team and not a computer.

CONTINUED FROM PAGE 4

already possess? After all, the oil and gas industry is no stranger to the cost control discipline. Companies have been wrestling with schedule and cost data for decades; so perhaps it is not surprising that much of the reporting from this data which has been compiled by hand, entered manually, and therefore produced inefficiently, is often inaccurate and too historical to be used as a proactive management process.

Technology investments for the industry tend to centre around furthering subsea capabilities or drilling advancements. In the meantime business-driven technology, like cost controls and project management software, is a relatively small but beneficial investment when compared to the money and time lost when a large project runs over schedule and budget. Surprisingly, it would appear to be one of the best kept secrets in the oil and gas industry that there are accomplished software solutions out there. These can integrate cost control with schedule management and provide the key to long-term cost reduction and better project controls.

Mind you there is an 'if' (a big one). It needs to be stressed that what we are talking about here are some fantastic technological solutions which will be effective, only if combined with best practice in terms of contract, cost and schedule management. For the moment however, let's consider what the modern systems themselves can do to improve the unfavorable trend facing the industry.

What can the right software solution improve?

With the typical project control methods adopted by even the largest companies involved in oil and gas projects, it's just not possible to produce reports fast enough to provide timely insight into project performance. Systems and processes are not in place to provide early warning of the impact on cost that a change in scope or a change in schedule will create; in these situations variations, disruption, and delays become the silent monster which can financially cripple a project.

Effective cost controls not only improve profitability, but they are the key to building accurate budgets, maintaining data integrity, measuring project expenditures, gathering data in a timely and accurate fashion, and reporting in a clear, routine, and understandable format.

Embracing new technology to give projects greater control and financial success.

Shared visibility and transparency

On a major project, it can be overwhelming to keep track of the interaction between a large number of contracting parties, interfacing their schedules, integrating resource allocation and performance. Typically data remains in separate silos with a lack of transparency between the many stakeholders of those projects.

The solution to this begins with the method of data collection. Project cost and schedule management has relied on manual processes, or antiquated tools, that limit the speed and accuracy of data capture and reporting. The goal should be a single source of data that can be accessed in real-time for reporting on project specifics, through informative dashboards, on-demand cost reports, and via web-based access. There are systems and solutions available which would allow costs incurred in Aberdeen, to be reviewed on that same day by someone in Houston; similarly, web-based dashboards showing as-built progress, burnt man-hours versus budget (and more) are all possible, but the technological solutions enabling this are only just beginning to be adopted by the leading players in the world's oil and gas industry.

Companies which wouldn't hesitate to invest millions in new subsea technology, continue to overlook a smaller investment which can tighten control and make the difference between successful return on investment (ROI) and a financial disaster.

An owner engaging an engineering procurement construction (EPC) contractor for a large project often doesn't have any true transparency into how the project is progressing...discovery of cost or time issues are commonly realised too late to be influenced. The owner will say the risk rests with the contractor, but does it really? What happens when the project is tracking on target but suddenly falls behind? The owner often has no way of knowing. The contractor may be close to delivering that new refinery, but if it isn't producing by the deadline, then for the owner the revenue isn't flowing either. Recoverable penalties and liquidated damages from the contractor are unlikely to be an adequate compensation for lost project revenue. In this case, where does the risk actually sit, and how do you assess and mitigate that risk before it's too late?

The types of systems we have been discussing can offer multiple party access to real time project data, therefore giving owners the opportunity to track the project as it progresses, helping to uncover issues before they become insurmountable difficulties. Conversely, contractors can see problems as they begin to emerge and have the opportunity to correct them before delays and overruns cut into margins.

As the oil and gas industry continues to flourish and projects become more expensive and more complex, the industry must embrace new technologies to drive their projects with greater control to promote financial success. All spending is under scrutiny today, and the oil and gas majors must pay attention to more effective cost controls. It is clear that the oil and gas industry can benefit from the available technology that standardises and automates established practices, in order to deliver mega projects more easily, on time, and closer to budget than in the past.

See dashboard reporting article on page 6 for further examples of controls reporting on a construction project. □

Processing live project data

USING THE PAST TO PREDICT THE FUTURE

We know in the world of project controls that the best indicator of the future is to examine the past. Study the patterns of past project performance through data collected over time. The trends established can be used to project an expected outcome if things continue on the same course. If that trend is anything other than desirable, the data will serve as a predictive red flag helping to actively plot a new course forward.

Technology today can help companies analyse historical data to provide more realistic forecasts that should inform management of current and future situations. Being able to track your project and predict potential outcomes ahead of time can make the difference between finishing a project successfully and seeing a disaster unfold. By having the historical data as a guide and current data at your fingertips in real-time, you have the tools to make sure bad history isn't repeated and to make better, more informed decisions, during the course of the project.

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Seeing the wood for the trees

CRAIG PALMER – SENIOR CONSULTANT, DRIVER TRETT UK EXPLAINS THE BENEFITS OF DASHBOARD REPORTING IN DATA CONSOLIDATION AND MANAGEMENT REPORTING.

A dashboard is a method of presenting executive information in a format which is simple to read and easy to understand, similar to that of a motor vehicle dashboard. They allow the consolidation of different sources of information into a single graphic providing the user the information at one glance.

The information presented within a dashboard could be for:

- A single project (or division of the company)
- Multiple projects (or divisions)
- All projects (or divisions within the company) thereby allowing the user to monitor overall performance within their company

It is a dynamic graphic that moves and changes with the flow of information used; although you can go back in time if the need ever arises. Dashboards also allow the user to capture and report specific data points to give a snap-shot, for example a project specific report date; or a financial period in relation to a division or company.

Example

Fig.1 is an example of a dashboard for use on a construction related project. Explanations of the various components are further annotated below/overleaf.

A – At the top there is space for the contract number and the name of the commercial manager, project manager or construction manager.

B – This part of the dashboard provides basic contract information including form of contract, planned and actual start and finish dates.

C – This example dashboard uses a traffic light system allowing easy status identification. From top down the dials indicate:

- The project's risk of liquidated damages
- Progress
- The number of accepted compensation events
- The number of unapproved compensation events

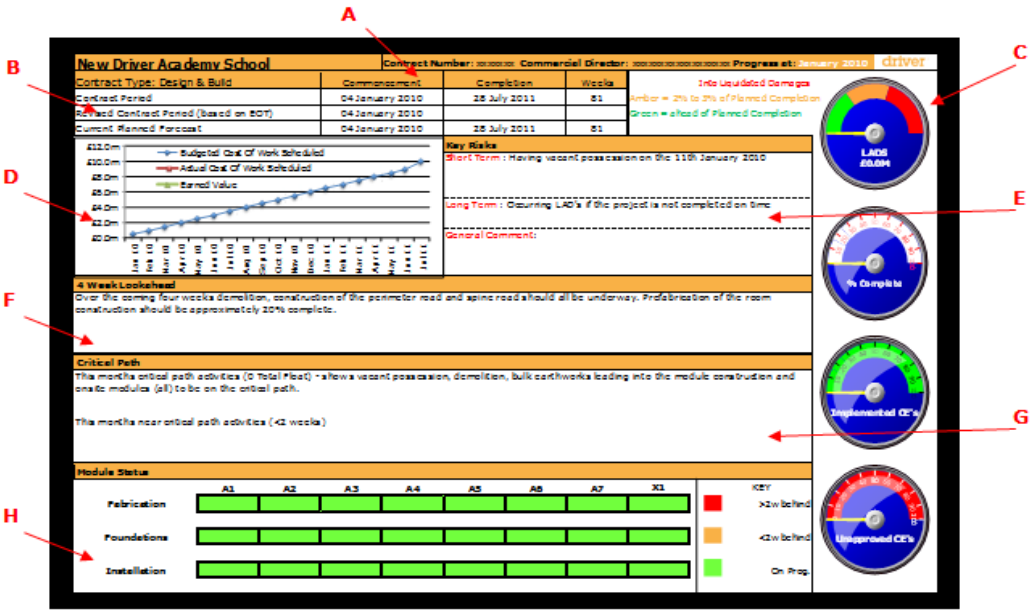

Fig. 1 Sample construction dashboard

D – One thing that is slightly different about this particular dashboard is that a section for earned value has been included.

- The blue line is the budget for the works as planned
- The green line will be plotted to represent earned value as the project progresses

As long as the green and blue lines follow the same curve things are ok. If the green line is below the blue line, then either not as much progress has been achieved as planned, or the project is not making as much money as was expected.

E – Provides a section for key risks to be identified. On this particular example project, having vacant possession on a specific date has been noted.

F – Provides details of the works to be undertaken in the following four weeks, together with any pertinent comments and observations relevant to those works.

G – Details the critical and near critical activities on the project programme, identified together with any relevant comments and observations.

H – Shows wrapped up sections of the project programme. Each line could represent 50 or 60 line items on the programme. As long as they are green the project is on programme. If they are amber, the project is a little late, less than two weeks. If they go red, the project is more than two weeks late.

Essential to the successful delivery of projects is having a clear complete overview of the current status and performance trends. Including elements, not otherwise visible from Gantt or PERT charts, dashboards are one way to provide such an overview. Driver is able to develop bespoke dashboards for this purpose, we advise on solutions from a complete business integrated solution involving third-party software developers and solution providers, to bespoke project-specific managed dashboards which are enhanced with our own unique added value. □

BENEFITS OF USING DASHBOARDS INCLUDE:

- Visual presentation of key performance indicators (KPI's)
- Allows the user the ability to identify trends and take appropriate corrective actions
- Providing a measure of efficiency or inefficiency
- The elimination of duplicate data entry
- Standardisation of data presentation to speed understanding
- The ability to generate detailed reports showing new trends
- Enabling companies to align strategies and organisational goals
- Providing the ability to make more informed decisions based on collected business intelligence (BI)

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Beware of the dangers of thinking in JCT under NEC 3 conditions

JOHN TEMPRELL – ASSOCIATE, DRIVER TRETT UK EXPLORES THE SUBTLETIES OF CONTRACT LANGUAGE, AND THE IMPORTANCE OF ENSURING YOU CLEARLY UNDERSTAND THE NUANCES AND DIFFERENCES BETWEEN JCT AND NEC3 INTERPRETATION.

There are many obvious differences between JCT and NEC and much has been written about the dangers of applying JCT thinking to NEC provisions.

A small but interesting example arose in connection with mechanical and electrical (M&E) works on a major project involving an interface between new and existing buildings, which could have had much wider implications had circumstances been slightly different.

The main contract and the M&E sub-contract were both placed under NEC 3 terms. The works were in delay, including M&E works, but the employer needed to put customers through a part of the building where the works were not complete, to enable works to be carried out in another part of the building.

Clause 35.2 of the main contract provides that "the Employer may use any part of the works before completion has been certified. If he does so, he takes over the part of the works when he begins to use it....." [with exceptions which are not relevant here].

Similarly clause 35.2 of the subcontract has like provisions; "the Employer or the Contractor may use any part of the subcontract works before Completion has been certified. If he does so, the Contractor takes over the part of the subcontract works when the Employer or the Contractor begins to use it ....." [with like exceptions].

With the employer using the building, letting its customers through, 'JCT thinking' kicked in within the M&E sub-contractor organisation.

You can relate to the feeling of comfort; the employer is in the building using it to run his business despite incomplete M&E, we are safe!

So let us return to the world of NEC 3. What the wording of clause 35.2 says is "... the contractor takes over the part of the subcontract works when the employer or the contractor begins to use it ...".

The small word "use" has great significance to M&E works. Under NEC 3, the air conditioning system that is not functioning, i.e. is not capable of being used, is not taken over despite the employer using the building.

M&E contractors; beware the distinction between 'possession' under JCT and 'use' under NEC 3. □

Remember the case of Skanska Construction (Regions) Limited v Anglo-Amsterdam Corporation Limited (2002).

This dispute arose out of a JCT 1981 With Contractor Design form with amendments. The definition of practical completion made the test more stringent than the standard wording.

The issues involved the determination of whether or not the whole of the works had been taken into partial possession on 12 February 1996 before the works had achieved practical completion, not before 25 April 1996.

At 12 February 1996 and thereafter, there were outstanding works and defects, in particular the air conditioning system was not functioning, or was faulty, and Skanska had failed to produce operating and maintenance manuals. This would have prevented practical completion being certified.

Anglo-Amsterdam never issued a certificate of partial possession. It did inform Skanska, by letter, that the employer's tenants would be commencing its fit out works on 12 February 1996, and they subsequently did so.

The tenant did not take exclusive possession of the building. Skanska continued to complete its works concurrent with the fit out works.

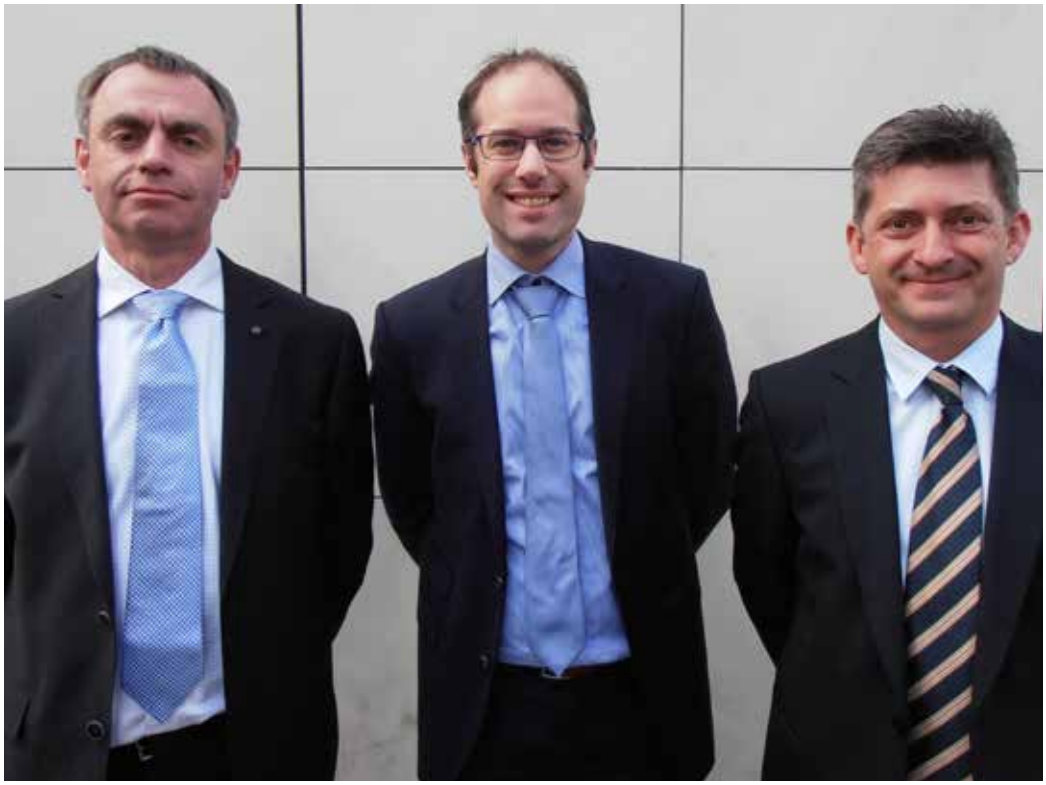
One of the questions to be decided was whether the wording of clause 17 was such that the clause could apply at all to partial possession of the whole of the works. In other words, whether the application of clause 16 was ousted by clause 17, when partial possession of the whole of the works was taken by the employer.

In the appeal, from an earlier arbitration that went against Skanska, HHJ Thornton QC decided that clause 17 does apply in circumstances where the employer has taken partial possession of the whole of the works. In other words clause 16 is ousted by clause 17 when partial possession of the whole of the works was taken by the employer; even in circumstances where the test of practical completion was more stringent to the standard form wording.

The fact that the air conditioning system was not functioning, or was faulty, and Skanska had failed to produce operating and maintenance manuals, had no significance to the deeming of practical completion under clause 17.

A tale of two cities

MARK CASTELL – REGIONAL MANAGING DIRECTOR, DRIVER TRETT MAINLAND EUROPE INTRODUCES DRIVER'S NEWEST GLOBAL OFFICE, AND HIS PLANS TO OFFER CLIENTS LOCAL SUPPORT WITH GLOBAL EXPERTISE ACROSS MAINLAND EUROPE.



Mark Castell, Hugo Frans Bol, and Ian Smith

In early February 2013, Driver Trett opened its second permanent office within Mainland Europe in Munich, Germany. Complimenting our existing office in Goes, The Netherlands, both now offer our clients the provision of bi-lingual commercial and contract consultancy and expert services from a local base.

Ian Smith, who recently joined Driver Trett, will run the German operation. He brings with him over 26 years of experience in the construction industry with particular knowledge of power and energy projects. Ian has spent the last 17 years of his career in contract consultancy providing advice to clients at all stages of projects, conducting training workshops on contract and claim related subjects, and has acted as expert witness in arbitration on industrial plant projects. Ian has been resident in Germany for 13 years and is fluent in the German language.

In addition to building up a local team, Ian will be able to draw upon Driver Trett's global resources to support clients on projects throughout Germany and in its neighbouring countries.

This local office will maintain a close working relationship with the office in the Netherlands, and build on work previously done within Germany but managed from the Netherlands. In recent times, this has included the provision of claims support during construction of a new ship and contract and claims advice on an offshore wind farm project.

Established in 1999 under the name of Trett Consulting the Netherlands office has evolved considerably, and not just in becoming a Driver Trett office. For many years, much of our work was undertaken in the English language. Clients benefitted from an Anglo Saxon philosophy from consultants who lived in, and understood the Mainland European and in particular, the Dutch way that business is conducted. Whilst this philosophy remains, the office is now made up of British, American, and Dutch staff who support clients throughout Benelux, and further afield, in the English, Dutch and French languages.

The Netherlands office is managed by Hugo-Frans Bol, having joined us over nine years ago. Hugo provides contractual support on a variety of projects for clients in both English and Dutch. He is supported by staff with particular specialisms in building, marine and shipbuilding, offshore, and infrastructure projects; and on various different forms of contract including UAV and FIDIC. □

The term 'made in Germany' has long been recognised as one which projects a sense of quality, reliability, and sustainability. Globalisation has meant that many German organisations, be they contractor or employer, have had to adapt to the ever growing need for contractual and commercial awareness within their businesses. This has in many instances demanded a shift in the cultural approach to the commercial management of major projects. The German construction industry is now embracing the principles of contract and claim management but at the same time maintaining the standards that are expected of the 'made in Germany' brand.

Driver Trett are world leaders in contract and claims management, and now bring that same quality, reliability, and sustainability in contract and claims management to the German market.

RECENT EXAMPLES OF THE TYPE OF WORK UNDERTAKEN FROM THE NETHERLANDS OFFICE INCLUDE:

- Contract advice on an offshore wind farm in Belgium.
- Planning / delay analysis on infrastructure (rail) projects in the Netherlands.
- Expert witness for Arbitration proceedings on an infrastructure (road) project in Poland.
- Contract and claims support during the construction of modules for an offshore platform.
- Arbitration and litigation support on several buildings projects in the Netherlands.
- Contract management and FIDIC specific training workshops.

OBEY! OBEY!
You will be exterminated!

CONTRACT TERMINATION CAN EASILY MAKE YOU WANT TO HOLD YOUR HANDS UP AND SURRENDER. MICHAEL FOSTER – DIRECTOR, DRIVER TRETT UK OUTLINES THE SIMPLE STEPS THAT CAN HELP MAKE YOUR TERMINATION EXPERIENCE MORE PALATABLE.

Termination is never this simple

During the last five years I have been instructed on over half a dozen major projects that ended in catastrophic failure where the employer brought the contract to an end. Prior to this, I had spent 15 years in industry without encountering one single termination! Has something in the world recently changed?

This article sets out some of my quantity surveying experiences associated with evaluating completed works. There is much to be said on this matter, which may need to be addressed in subsequent editions of this Digest.

Termination provisions

Agreements generally include two routes: the first is termination for convenience, and secondly breach of contract. I have not witnessed a 'friendly' termination for convenience but experienced lots of 'unfriendly' ones for breach of contract.

A typical contract will set out the agreed procedure, which usually starts with a letter setting out the breaches relied upon and a period (of say 14 days) for the offending party to correct it. If the breach continues, a further notice is served, implementing the often chaotic hand-over of the partially completed work and associated documentation.

A second key process is determining the final amount to be paid to the contractor (or the amount he owes the employer). The evaluation rules are usually prescribed in the agreement and specify exactly what the contractor is to be reimbursed. This includes the contractor's right to expect the works to be measured, and valued, in accordance with the same measurement rules used to price the contract at award stage, because this is the basis on which he priced the works.

Will the parties agree the evaluation?

The contractor will claim his measured works, variations, extensions of time, and the usual claims for disruption, delay, and acceleration. He will also seek damages for alleged wrongful termination that will include redundancy costs and the like.

On the other hand, the employer blames the contractor and seeks a significantly lower measured works, variations, and defects evaluation. Damages will be sought for employing a much more expensive replacement contractor; and let's not forget the delay damages, because the job will now not be completed in the foreseeable future.

Because the project abruptly came to an end, easy aspects of evaluation that two site based surveyors would amicably agree face-to-face now become difficult, and what could and should be agreed gets replaced with an entrenched position to agree nothing.

Will a quantum expert be required?

Whilst the parties argue over whether the termination was lawful or not, my past roles (being a simple QS) related to the evaluation of the final amount due and who owes what.

Resolution of the final evaluation becomes highly disputed territory and a quantum expert is usually on the cards. He needs robust and neatly preserved records that provide a snap-shot of the works when on-site operations ceased. Past experience confirms this is one big challenge for the parties and a quantum expert.

Preservation of factual records – a snapshot in time

Typically, a contractor will no longer have access to site to accurately establish the completion status of the works. This becomes a major hurdle in a future arbitration or litigation. A detailed final evaluation is required and it is necessary to create an easily retrievable dossier, permanently preserving an accurate record of the complete (and incomplete) works.

A positive experience from the past relates to a curtain walling contractor who was unceremoniously kicked off the job. His records were seized by the main contractor and access to site, to make a permanent record of the completed work, was refused.

Fortunately, the works were 40 storeys high and could be seen from the road around the building. This made the task of establishing a permanent record quite easy: a digital camera, marked up drawings, the bill of quantities and a sensible quantum expert were key to the success.

My experiences from other sectors of the industry, such as underground utilities, oil, gas, and petrochemical projects were not as straightforward. For obvious reasons, it was not possible to peer over the perimeter fence. In such cases, don't expect an invitation from the employer to pop round for coffee and access the site to do your final evaluation!

The solution

The contracting fraternity who end up in this situation should not expect to have the curtain walling contractor's good fortune, who was able to see his work from the highway. That's too easy!

The answer lay in good contemporaneous record keeping. Engineers and supervisors should contemporaneously mark-up drawings as works proceed. A set of highlighters and a calendar are essential tools, and don't forget the need for a top class site based planner and quantity surveyor to accurately record actual progress.

The effort required after a project abruptly comes to an end is significant and more complicated than anyone can imagine. Any party faced with this situation needs to take stock and seek advice on what to do. Many in the industry don't have first-hand experience of this situation and it is therefore sensible to seek professional guidance from someone who does. □

London city

THE BORROWERS

PHIL RYLANCE EXPLORES THE STRATEGIES AND REALITIES OF SECURING DEVELOPMENT FUNDING IN THE CURRENT UK PROPERTY FINANCE MARKET.


Birmingham city

Development finance in the UK Property Sector appears to be showing signs of making a comeback, with some lenders now providing facilities for schemes previously not considered to be viable. However the majority of these lenders are currently focusing on Central London opportunities with the availability of finance diminishing the further you get beyond the M25; only a few lenders are currently offering development finance outside of the South East.

Lender's general criteria

Currently only up to 70% of the loan to value (LTV) ratio required for development loans is generally on offer. However, another ratio now more widely used by lenders to assess the acceptable level of risk they are willing to incur on a scheme is the loan to cost (LTC) ratio, with levels of up to 60% available outside of Central London and up to 80% in Central London. Most lenders require

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PLANNING AHEAD

Developers, who plan to refinance a scheme, commence a new scheme, or have an existing loan term coming to an end, should consider the following points:

- Start the Process Early: A typical finance deal is taking an average of three months from the start of the formal application process to the first draw-down being made available, with a period of six months (or more) not being uncommon.
- Make the Right Approach: It is vital to approach the right person at the right lender; an approach to the wrong office or individual can result in that source of lending being permanently closed.
- Consider the criteria indicated above: The less risk that the lender perceives exists on a scheme, the more likely they are to agree to fund it with more favourable terms.
- Watch the lease lengths, longstop dates and determination clauses with the end user/buyer: The more onerous they are when compared with the development programme/specification, the more risk is perceived when the lender comes to make a decision on the funding. If refinancing an existing scheme, properties with leases of less than five years left to run are not currently favourable to lenders.

THE REALITY

Developers seeking finance for schemes should be aware of, and be prepared for, the following:

- Lending Costs: Rates generally range from 3% over Bank of England base rate to 10% over London InterBank-Offered Rate (LIBOR). This is generally dependent on the level of risk on the scheme, which is assessed by the lender; also both lenders initial and exit fees together with the lenders advisor's fees are charged to the developer.
- Base and LIBOR rates: The consensus among lenders is that the Bank of England base rate will not increase significantly during the next year and it is noted that LIBOR (UK one month and three month) is currently* running at approximately the same level as the Bank of England base rate.
- LTV/LTC ratios: More favourable ratios are achievable to those already indicated but the developer will generally have to demonstrate a robust 'exit strategy'. An example of this would be pre-lets approaching 100% of the scheme with long term leases (no break clauses – see below) of 15 or more years together with appropriate step in rights for the lender.
- Loan Terms: Most lenders are now offering loan terms of up to five-years, with amortisation profiles of between 15 and 20 years (as a consequence of Basel III rules).
- Break Clauses: Regardless of the actual term of any leases agreed on the scheme, all lenders now generally assume, as a matter of course that, if there is a break clause in a lease, then this is when the lease will end.

** at the end of December 2012/beginning of January 2013*

There is generally a requirement to demonstrate a significant and successful track record on previous similar schemes.

the developer to provide the balance of the costs 'up front', to fund the scheme before they will release their own loan funds; additionally once the level of the loan amount is agreed this tends to be fixed. This results in any additional funding required, as the project is progressing, needing to be made available by the developer from their own sources (generally before any further funding from the lender is released once this need is identified).

Other requirements generally imposed by lenders, to reduce their perceived risk exposure, revolve around the implementation of the scheme and the exit strategy. There is generally a requirement for the contractor, professional team, and developer to be able to demonstrate a significant and successful track record on previous similar schemes (both in size and type). Also the lender will be looking for defined and confirmed exit strategies as opposed to market research or perceived demand.

Going forward

Despite the encouraging signs, there is still continued caution exercised when assessing whether to provide funds for development projects or not, with pre-let projects and a substantial up-front equity injection from the borrower gaining more favour when projects are being considered. □

Driver Corporate Services have a wealth of experience in dealing with the issues associated with funding developments. To discuss these or any related issues please contact our team or visit our website www.drivercorporateservices.com or corporate@driver-group.com

The Driver Trett and DIALES team for Asia Pacific

DRIVER TRETT AND DIALES LAUNCH IN ASIA PACIFIC

January 2013 saw the official launch of the Driver Trett and DIALES brands across the Asia Pacific region, with events in Singapore and Malaysia at the official residences of the British High Commissioners.

We were delighted to be joined by our current clients, and a distinguished list of guests, at two truly unique venues. Both events were well attended and each evening was punctuated by the constant buzz of in-depth conversation, good food and drink, entertaining speeches, and two lucky winners of a Kindle Touch complete with a copy of our very own Peter Davison and John Mullen's book – Evaluating Construction Claims, second edition.

Further details of the services and locations of our Asia Pacific offices can be found in the last edition of the Driver Trett Digest and on our website www.drivertrett.com

Alastair Farr, Managing Director – Asia Pacific, and his team would be happy to hear from clients requiring support across their region, and Peter and John would welcome any feedback or questions from those two lucky Kindle winners!

Unscrupulous Calling of Performance Bonds – what's the problem?

RICHARD BURKE – DIRECTOR, DRIVER TRETT UK UNPICKS THE WEB OF CONSTRUCTION INDUSTRY PERFORMANCE BONDS, WHO HOLDS WHAT RESPONSIBILITY, AND THE ASSOCIATED RISKS AND PITFALLS TO WATCH OUT FOR.

Performance bonds and other forms of bank guarantee are a common requirement in most construction and engineering projects. Owners and employers require contractors to provide them; those contractors require their subcontractors and vendors to provide bonds on similar terms and with amounts related to their contract sums. The bonds are typically issued by banks and insurance companies ('Bondsmen'), and the beneficiaries of bonds require them to 'secure' satisfactory performance of the bond provider during the execution and maintenance period of the underlying contract; they are also used to secure repayment of any advance payments made. Bondsmen will invariably seek a counter-indemnity from the party requesting the bond; for a contractor this is generally secured against its overdraft facility by the bank issuing the bond.

On a single major project, there may be dozens of individual bonds provided by, and to, the benefit of the various parties. It is worth considering that commonly the amount of a performance bond would be 10% of the contract sum; this means that an engineering, procurement, construction (EPC) contractor undertaking a £100 million project, will have had to arrange for his bank to issue a bond to the employer for £10 million; but it doesn't stop there. The contractor is likely to procure subcontracts and supply contracts for at least 70% of the project value, so each of those companies is likely to similarly provide 10% security for the performance of their own contracts by way of bonds in favour of the contractor; in turn, those firms will most often seek security by way of bonds from their own subcontractors suppliers and service providers. By the time we add 10% advance payment guarantees to that network of interfacing contracts, it is highly likely that the total value of bank bonds in play during that project would exceed £20 million. That's a lot of bonds – and a lot of risk and exposure for those providing them – and a lot of trust placed with the beneficiaries, that they will not unfairly call any of those bonds at some point of the execution or maintenance stage of the project. There lies the subject of this article.

In England fraud is the only ground justifying an injunction against a call on a performance bond.

How great is the exposure?

A problem for a contractor is that, quite apart from the cost of providing a bond through a bank, its value is considered an amount of 'borrowing' until the bond has expired or been returned by a beneficiary; therefore a contractor having several project contracts running which are secured by bonds, may often have aggregate borrowing running to several millions of pounds as a result of bonds and guarantees alone. If a party has reached its maximum borrowing ceiling, then it will be restricted from entering into new contracts, until existing bonds are no longer valid.

For the parties requiring bonds to be provided under the contracts they are awarding, the greatest security is afforded by 'on-demand' bonds; the terms and model wording of which is normally set out in the contract terms. They are typically and alarmingly onerous for the provider; the terms and conditions of a bond between the issuing bank and the beneficiary, usually having autonomy from the terms of the underlying contract for which performance is being 'secured'. The beneficiary of an on-demand bond can issue a demand to the bank for payment of the whole amount of it, without being required to establish or demonstrate that the contractor is in breach of the underlying contract. This means that provided that a beneficiary of an on-demand bond submits the right documentation when making a call, the bank has no option but to pay the full amount of the bond.

Adjudication bonds are common in UK PFI/PPP projects.

As can be expected, not all beneficiaries play fair and some abuse the security they have in hand. It is no longer uncommon for a beneficiary calling a bond to apply pressure to 'resolve' (or instigate negotiation) of a dispute relating to the underlying contract. The financial implication of such action can sometimes be crippling to a contractor, subcontractor, or vendor.

How can we restrain a call on a performance bond?

In England, and many other jurisdictions, it is extremely difficult for a contractor to get the courts to intervene if a call on a bond is made unfairly. In fact the position

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in England is that fraud is the only ground justifying an injunction against a call on a performance bond.

How can a contractor mitigate the risk of unfair calls on performance bonds?

Irrespective of the relevant court jurisdiction, which may enable a contractor to seek restraint of a bond by reason of fraud or unconscionability, what about the feasibility of seeking the intervention of a court... before a performance bond is called? Time is not usually on the contractor's side; he will need advance warning that the bond is to be called, and have time to build an evidenced case which could persuade a court to step in and restrain the calling of the bond. Only in the rarest circumstances is there sufficient opportunity to win a successful interim injunction, on either the bank or the beneficiary, to restrain the calling of a bond.

The major international banks could surely use their substantial influence to improve the standard wording of on-demand bonds, to reduce the risk of unfair calls being made. Unfortunately, this would not seem to be about to happen any time soon, so it's down to the individual party to better protect its position in future, when entering into contracts requiring performance to be secured by bonds.

In these circumstances, without any constraints on the wording being exercised by banks, contractors having to provide bonds must consider for themselves how best to mitigate the risks when negotiating future contracts. Points to consider:

- Scrutinise the employer's model wording to be adopted in the bond, together with the contract conditions governing the operation of bonds and performance guarantees. Recognise the danger of accepting bond wording which effectively make it an 'on-demand' bond; once issued, consider the chances of preventing it being called to be virtually nil.
- If at all possible, seek to negotiate a 'conditional' bond; conditional in the sense that it specifies within the wording of the bond itself, the grounds on which the bond may be called. If the beneficiary makes a call when the circumstances don't justify it, the contractor has a better chance of recovering his loss, if not preventing the call. Employers will fiercely resist agreeing to conditional bonds, and much will depend on the strength of the contractor's negotiating position for that particular contract. Remember, an employer's main concern is often the ability to call a bond in the event of a contractor's insolvency. By ensuring that the employer has on-demand rights to call in those circumstances, it may be possible to negotiate conditional terms for other calls related to performance of obligations according to the underlying contract.
- Seek agreement to an 'Adjudication Bond'. This is a conditional bond requiring the bondsman to pay out on an adjudicator's decision. Incorporation of such a dispute resolution mechanism into the bond itself can offer some protection against unfair calls. Provided that the dispute resolution mechanism provides for a decision of a third party within a short period of time, an employer has less reason to object to such a proposal as it should not prejudice his position to any serious extent. Adjudication bonds are common in UK PFI/PPP projects. As adjudication is becoming more common internationally, it may be that adjudication bonds will become more common outside the UK. □

In other jurisdictions such as Singapore and Malaysia, there is a glimmer of hope for contractors by comparison; the courts have departed from the English position by recognising a second ground of 'unconscionability' for resisting a call on a bond. The door to this additional ground is generally seen to have opened in 1995, with the judgment by the Singapore Court of Appeal in Bocotra Construction Pte Ltd & Ors v A-G (No 2)[1995] 2 SLR 733.

That judgement did not clearly define the term, but subsequent cases have reaffirmed the principle and added some broad guidelines as to what may be considered 'unconscionable' action or conduct of a beneficiary to a bond. The definition given in the High Court case of Raymond Construction Pte Ltd v Low Yang Tong and AGF Insurance (Singapore) Pte Ltd has often been cited in subsequent decisions, as follows:

"The concept of 'unconscionability' to me involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party..."

Of further interest, is that the Singapore courts have not taken an all-or-nothing approach to deciding whether a call on a performance bond should be allowed and in instances have allowed for restraints only on part of the call considered to be excessive and unconscionable for it to call upon. In these cases it meant that the contractor could succeed in restraining part of the value of the bond and avoid being entirely out of pocket.

The beneficiary of an on-demand bond can issue a demand to the bank for payment of the whole amount of it, without being required to establish or demonstrate that the contractor is in breach of the underlying contract.

CONTACT DRIVER TRETT WORLDWIDE

UK

Aberdeen
T: +44 (0) 1224 244332
F: +44 (0) 1224 899076

Bedford
T: +44 (0) 1234 248 940
F: +44 (0) 1234 351 186

Bristol
T: +44 (0) 1454 275 010
F: +44 (0) 1454 275 011

Coventry
T: +44 (0) 2476 697 977
F: +44 (0) 2476 697 871

Edinburgh
T: +44 (0) 131 200 6241
F: +44 (0) 131 226 3548

London
T: +44 (0) 20 7377 0005
F: +44 (0) 20 7377 0705

Haslingden
T: +44 (0) 1706 223 999
F: +44 (0) 1706 219 917

Reading
T: +44 (0) 118 931 1684
F: +44 (0) 118 931 4125

Teesside
T: +44 (0) 1740 665 466
F: +44 (0) 1740 644 860

MAINLAND EUROPE

Germany
T: +49 (0) 89 208 039 535

The Netherlands
T: +31 113 246 400
F: +31 113 246 409

AFRICA

Johannesburg
T: +27 (0) 11 315 9913
F: +27 (0) 86 641 7003

AMERICAS

Houston
T: +1 713 547 4888
F: +1 713 547 4884

MIDDLE EAST

Abu-Dhabi
T: +971 (0) 2 678 0466
F: +971 (0) 2 678 0463

Doha
T: +974 (0) 443 58663
F: +974 (0) 446 22299

Dubai
T: +971 (0) 4 328 5508
F: +971 (0) 4 330 6164

Muscat
T: +968 (0) 2 461 3361
F: +968 (0) 2 449 7912

ASIA PACIFIC

Australia
T: +61 (7) 3053 8089

Hong Kong
T: +852 2503 3435
F: +852 2541 5900

India
T: +91 11 4151 5454
F: +91 11 4151 5318

Japan
T: +81 3 5530 8187
F: +81 3 5530 8189

Malaysia
T: +603 (0) 2162 8098
F: +603 (0) 2162 9098

Singapore
T: +65 6226 4317
F: +65 6226 4231

For more information please email info@drivertrett.com

driver trett ANALYSIS ACTION RESOLUTION DIGEST NEWSLETTER

Offshore installation delays – to foresee or not to foresee

MICHAEL TURGOOSE – DIRECTOR, DRIVER TRETT UK EXPLORES THE COMPLEXITY OF DELAYS IN THE OFFSHORE ENVIRONMENT.

This article touches on the various challenges encountered in the analysis of a contractor's contractual entitlement to extensions of time and additional costs incurred during the offshore installation of mono-pile foundations to an offshore wind farm. More importantly, this article highlights issues concerning where liability lies in relation to delay events and additional costs, and may provide some food for thought when drawing up conditions of contract for future installation works. Despite numerous pages of conditions, lengthy schedules and extensive employer's requirements incorporating innumerable appendices, annexes, technical requirements, and responsibility matrices the answers to certain practical issues may not always be immediately apparent.

As an example, consider a contract where the employer provides and makes available installation vessels free of charge in accordance with the scope of supply and as defined in the employer's requirements, to enable the contractor to execute the works. In the event that the vessels are not in sound operational condition, safe and fit for use as set down in the contract or the employer was otherwise in breach of its obligations, then the contractor was entitled to give notice and apply for an extension of time to any key date and/or of the time for completion and also payment of additional costs, subject to other criteria on timing of submissions and form being met. This is mirrored under the extension of time clause which provides that the contractor may claim for an extension of time if the works are or will be delayed by a breach or default by the employer in providing the installation vessels. There's nothing unusual in any of that you may say.

Moreover, the contract also requires that the employer shall be responsible for ensuring that the employer's personnel and the employer's other contractors on the site cooperate with the contractor's efforts. A further contractual provision obliges the contractor to afford appropriate opportunities to the employer's personnel, other contractors employed by the employer, and the personnel of any legally constituted public authority to carry out work. However, it also provides that any such opportunity shall constitute a variation if, and to the extent that it, or the cost incurred by it, were 'unforeseeable'.

The contractor argued that it was not foreseeable that it would be delayed as a result of various matters notified to the employer; and if the employer did not accept that there had been a variation then any changes to the employer's requirements or the works (scope and/or method of working) would amount to a breach of the contract or default thereunder by the employer and/or delay, impediment or prevention caused by or attributable to the employer, the employer's personnel, or the employer's other contractors on the site.

Whilst recognising that responsibility for adverse weather and all mechanical breakdowns to the installation vessels including amongst others, hydraulic leaks, crane breakdowns, and leg jacking problems and the demonstrated critical delay to the schedule of installation rests with the employer, the liability for other claimed delays was not so clear cut and more precisely, could not be readily considered as 'unforeseeable'.

The term 'unforeseeable' was simply defined as meaning not reasonably foreseeable by an experienced contractor by the base date. Clearly this is not particularly helpful.

Now consider the following delaying events: compliance with the directions of such personnel as the marine warranty surveyor, the vessel master and the lifting supervisor on the employer's vessels or the harbour authorities. Also consider:

- Crew changes by the vessel operator
- Jacking down for bunkering of fuel or water
- Rest periods by the vessel engineer
- Loading of stores and spare parts in port
- Waiting on ferry traffic or the harbour pilot

Or even

- Waiting for the arrival of the marine mammal observer to board the installation vessel.

All of the foregoing matters could be considered as ordinary everyday activities associated with the running of a vessel on a 24/7 basis. Arguably, waiting on port traffic in a working port environment is a stoppage which is neither unexpected nor 'unforeseeable'. Should such activities be viewed as examples of delay, impediment or prevention attributable to the employer, the employer's personnel, or the employer's other contractors on the site? Should such operations be considered as a variation or as giving rise to an extension of time and additional costs?

As in all such matters the answers should lie in the express contract wording. Clarity in the drafting of the conditions of contract should prevail to ensure all parties recognise where the liability for delaying events and the financial consequences fall. □

Interview with a mediator

MEDIATION GREW DRAMATICALLY IN ITS MUSE AND POPULARITY IN THE UK IN THE EARLY 2000'S. ITS USE WAS IMMEASURABLY BOOSTED BY CASES LIKE DUNNETT V RAILTRACK IN 2002 AND HALSEY V MILTON KEYNES IN 2004. MEDIATION ALMOST BECAME COMPULSORY OVERNIGHT, AS TO REFUSE UNREASONABLY, WAS TO PLACE RECOVERY OF YOUR COSTS AT RISK, EVEN IF YOU EVENTUALLY SUCCEEDED IN LITIGATION. BUT TEN YEARS ON, WHERE IS MEDIATION IN THE CONTEXT OF CONSTRUCTION DISPUTES? THE DIGEST ASKS MARK WHEELER – MANAGING DIRECTOR EUROPE, AND A PRACTISING MEDIATOR BASED IN THE UK.

DTD – What first attracted you to mediation, and how long have you been mediating?

MW – I first trained as a mediator about ten years ago after taking part in a mediation. I remember being very impressed with the way that facilitated communication could break down the barriers and allow a direct exchange – leading to a settlement. By comparison the cost of litigation makes it very appealing.

DTD – What kind of barriers are we talking about?

MW – Mediation is all about people. When people who have had a long standing relationship in business, often talking daily and even socialising together have a falling out, those relationships break down and it's very hard to stop communicating through lawyers once you start.

DTD – Does this apply to all of the mediations you work on?

MW – Many, but by no means all. If you have large corporate parties, insurers for example, there is no pre-existing relationship. In those cases, it's all about understanding the issues and the scope they have to settle. In the end though, if you can get the people together, you can usually get an agreement.

DTD – How often do you get a deal?

MW – Many people have views on this. In my experience, about 70% will settle on the day, with a further 10% within two weeks of the mediation.

DTD – That sounds pretty good, why do some take an extra two weeks to settle?

MW – Sometimes the parties get close, move beyond where they thought they might, but just can't move that last little bit to close a deal. Often they discover new information that takes time to settle in. Sometimes they are just not ready to settle and need that extra time to come to terms with the situation.

DTD – We have heard about a BATNA and a WATNA. What on earth are these terms about?

MW – Personally, I am not keen on using terms to define the way in which you get parties to start to talk to each other. Everyone and every case is different and has its own dynamic. The key is getting to understand that very quickly. To answer the question though, they are the 'best alternative to a negotiated agreement' (BATNA) and 'worst alternative to a negotiated agreement' (WATNA). In essence you set out the range of what might happen if you go to court and win, or lose. Inevitably costs and their recovery or otherwise are the central issue. It focusses the parties' minds on the real commercial position. It does not however take account of other issues.

DTD – What kind of other issues are there?

MW – Sometimes a party feels wronged and wants a simple apology. Often people need to just vent their feelings. The other party can find this a challenge to deal with. Pride and reputation issues are also important to consider. Often they will have come a long way with their legal team and costs can be a big problem, especially if there is a fee agreement or costs are disproportionate.

DTD – So should everyone always go to mediation?

MW – No. Not all cases are suited to mediation, but timing is important. Cases that involve a point of law for example, may need a court to decide on that point first. Sometimes there is an all or nothing point that should be taken first as a preliminary issue. When these stumbling blocks are dealt with however, mediation can be a good way of dealing with the detail of a settlement, quantum, and precise terms, etc.

DTD – Why is timing important?

MW – If you mediate too soon, the parties will not both be aware of all of the issues, or the full scope of their respective claims and the other side's counterclaim. The parties need to know what their case is and what the case against them amounts to, in order to make informed decisions. Conversely if you mediate too late, costs will have risen dramatically and themselves become a barrier to settle. I would add that if you go to mediation too soon, the cost is limited and you will learn a lot about the other side's case, you can also go again when you are ready. So on balance, sooner is perhaps better.

DTD – What does a mediation cost?

MW – That's a tough question. Each one needs to be considered carefully, but to give you an idea, I would expect a one day, two party mediation to be between £2,500 and £3,500. In addition there might be room hire if neither party can host and some time for each side in preparing a brief case statement. If the parties have lawyers representing them, this will also add some costs. Obviously multi-party disputes can run for several days with a much wider cast, and will cost considerably more.

DTD – What kind of future do you see for mediation in the UK?

MW – Mediation is now firmly embedded as a key process in our dispute resolution armoury. The success rates are high and the costs low, so it is sure to be a key part of the tool box for the future. That said I think it has reached a point where there is limited further growth in its use, and there are plenty of trained mediators out there to deal with the current workload. In summary, it's here to stay and the end users in the process are, in my view, better off as a result. □

Go with the flow

ANDREW NAISMITH – DIRECTOR, CORPORATE SERVICES EXPLORES THE EFFECTS OF CASH FLOW UNCERTAINTIES THROUGHOUT THE SUPPLY CHAIN, AND HOW THE RISK OF A COMPANY'S SUCCESS, OR FAILURE, IS DICTATED BY ITS APPROACH TO THIS MATTER.

It will have escaped nobody's attention that the economy in general, and therefore construction in particular, is expected to suffer a continued setback in the coming year. It is well known that this was originally driven by the enormous write-downs the global banking community had to implement due to its exposure to the US 'sub prime market'.

Quite what all this means will probably be lost on the small subcontractor facing severe cash flow problems in the heat of battle with his employer. Nor, indeed, will he care. In the final analysis, his problems are closer to home.

In most cases, construction insolvency is due to cash flow or, more particularly, the lack of it. How many times has it been said that turnover is vanity, but cashflow is king?

All too often, company directors embark on missions of rapidly increasing turnover in the mistaken belief that to do so will undoubtedly improve the bank position and, therefore, profitability. If only they would realise that returning a loss of, say, £10,000, on a turnover of £1m, is more than likely to result in a loss of at least £20,000 on a turnover of £2m, and in all probability much more than that. The wise directors will turn to reducing overheads and costs, while carefully selecting the project upon which they both wish to be engaged and can afford to take on.

Cash flow is directly related to the management of risk, be it while preparing a bid, performing on site, or dealing with change when on site. Early identification of a contractual problem, followed by swift attention to it, will invariably result in the protection of cashflow. Indeed, this is the main thrust of adjudication under the Housing Grants Construction and Regeneration Act. Failure to identify risk to cash flow, will inevitably result in problems with suppliers and subcontractors, causing damage to contract programmes and relationships with employers. On some occasions, insolvency may result.

In earlier years, the main subcontractors were afforded some financial protection and enjoyed nominated status, but this has virtually disappeared now. The contractual stability and protection that employers want from a suite of contracts, cascading down from principal contractor to the very lowest level of supplier, is understandable given the need for diminution of liability. But the financial effects of the economic failure of one of the companies in the chain, while shared by all, is mostly felt by those lower down.

The government's initiative to see the introduction of project bank accounts seems laudable on the face of it, but the system will not be legally enforceable at the outset, will only benefit the key subcontractors and suppliers wanting to enter into the trust arrangement, and is likely to be tested by the interruption of an insolvency event.

There is also likely to be much debate about rights to set-off, and the fact that it will only be the main contractor that decides how much is due. Furthermore, from what information is available, monies in such a fund will only represent the current month's certified sums, and will not address work in progress. However, it is a step in the right direction, but may not satisfy small subcontractors.

One issue that frequently arises in dealing with construction company investigations is retention. There are not many businesses in the contracting world that regularly return more than between 4% and 5% gross profit on a year's trading. Some do, some don't. If you were to take an industry average of withheld retention of around 2% to 3%, the significance of this figure to cashflow and profitability becomes apparent.

Subcontractors particularly feel the impact of being denied this money and

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frequently have great difficulty in recovering it. Indeed, many businesses believe it is irrecoverable in real terms.

Employers have been encouraged to set up trust funds to afford some protection to these monies in the event of an insolvency, but in practice the industry seems not to have adopted the idea. As an alternative, retention bonds can be offered, but it is likely that these have only been economic where sums in retention funds are large.

In former years, construction companies had large asset bases centred on property, land, equipment and so forth; 'fixed' items against which the high street banks were prepared to lend money to facilitate cashflow as and when required. The banks held fixed charge debentures on these items as security against the loans, and, in the event of a company breaching a lending covenant, were able to appoint administrative receivers over the charged assets and be first in line to recover their monies.

> Turnover is vanity, but cash flow is king

Some years later, when assets such as these were in short supply, the banks frequently relied upon a 'floating' charge against book debts for principle security. Recently, however, the courts have decided that the manner of operation of the company's main trading bank account is significant in determining whether or not a floating charge exists, with the result that the banks found that their floating charges were not as secure as they had thought.

This is one of the main reasons why the number of appointments of administrative receivers has declined in recent years. The focus now is on business turnaround which, together with the Enterprise Act, encourages and promotes recovery rather than closure.

With this change in emphasis in security, and with most banks presumably finding it difficult to get sufficiently large personal guarantees from company directors to cover a loan or overdraft facility, alternative means were needed to provide financial support to businesses.

This saw an increase in schemes such as factoring, invoice discounting and so on, and opened the market to institutions from the secondary finance arena (which has hitherto avoided construction companies like the plague) particularly as most contractors merely made applications for payment, rarely raised invoices, and were never sure how much they would receive at the end of the month. Now we see banks competing in this market themselves via their own specialist divisions.

The real significance of the cashflow issue is aptly illustrated when we act for administrators. Advice given on the continuation of any contracts in progress at the time of their appointment relies almost exclusively on the availability and security of cashflow, either by way of realising book debt elsewhere, or coming to satisfactory commercial arrangements with the contracting parties concerned. Administrators never use their own money – perish the thought – only that which is available to the company.

The real issue with the downturn in the financial markets is that finance will be more difficult to obtain. Actually, that's not strictly true; it will still be available, but at a greater cost. Projects that may have once seemed economically viable are being shelved now that anticipated profits will be consumed by the extra cost of finance. Completed commercial developments will be more difficult to move on when the cost of borrowing is prohibitive.

With this uncertainty in the marketplace, fewer developments getting off the ground, pressure on tenderers to submit prices to fit a tighter business model, but with the same number of participants all needing to feed at the table, businesses will find their resources being stretched even more thinly just to stay afloat.

Cashflow will become vital for survival.

Is there a moral to this story? To our little subcontractor, who has only ever taken on jobs he knows he can afford, has a few bob in the bank, and sees some of his competitors going to the wall because of a lack of proper financial planning, this downturn will be just like the last one – no problem! □

Who are Driver Project Services?

PART OF THE DRIVER GROUP, AND WORKING CLOSELY WITH THE CONSULTANCY TEAM AT DRIVER TRETT, MIKE NOTEYOUNG – DIRECTOR, DRIVER PROJECT SERVICES (DPS) UK, EXPLAINS MORE ABOUT THE PROJECT CONTROLS SUPPORT THAT THE GROUP DELIVERS AROUND THE WORLD.

Driver Group have been involved in claims since 1978, and recognise the need to be involved at the onset of construction projects, rather than being drafted in when they go wrong.

DPS specialise in the development and delivery of customer focused project control solutions, aimed at servicing projects from inception to final account. This can include contract advice, contract management, commercial services, quantity surveying, planning and claims support. Tailored to meet each clients' needs, the team are currently engaged at various stages of the project lifecycle; from concept, feed, detailed design, construction, and commissioning to full lifecycle asset management throughout the maintenance and shutdown regime.

We support clients globally, across a wide range of sectors including rail, oil and gas, petrochemical, renewable energy, pharmaceutical, infrastructure, civil, heavy industry, offshore platform fabrication, general construction and asset management. The team are experienced on projects of all sizes and have successfully engaged with clients who adopt their own systems of work and procedures; as well as development and introduction of processes and procedures; or from offering a managed service, supported by back office staff; to part time support and full time dedicated personnel.

DPS welcome and adapt to change in the marketplace, with our clients and colleagues, with technology, our industry, and governments throughout the world.

Working together with our colleagues in Driver Trett and DIALES, to harmonise efficiency and expertise, the Group is able to provide a true 'start to end' service offering.

To explore the DPS service offering please contact our team or visit our website: www.driverprojectservices.com or **info@driverprojectservices.com**.

"Driver has recently assisted us to complete a very large tender. They provided excellent support, at very short notice, on both a commercial and quantative basis. Their staff are very knowledgeable, professional and integrated very well into our large team."
BAM Nuttall

"We have used Driver Group for pre-construction billing services on many occasions and have always received a prompt and professional service."
Kier Construction

"The Driver team have embedded well into the SSI site team and have delivered a first class service."
SSI UK

Severance in Adjudication:
Has Lidl -v- Carter changed anything?

MICHAEL CONWAY EXPLORES HOW RECENT JUDGEMENTS HAVE INFLUENCED THE ADJUDICATION PROFESSION'S VIEWS ON ACCEPTABLE SEVERANCE.

This article was prompted by a discussion on LinkedIn back in November 2012 started by Andrew Kearney of St John's Chambers in Bristol who was Counsel for Lidl.

Andrew had read a blog in which it was suggested that Lidl v Carter[1] had lowered the bar for severing decisions because the judge had severed 'part of the essential dispute referred'. Andrew disagreed with that view but raised the question is there anything new in Lidl? This case law review and investigation addresses that question.

Challenging an adjudicator's decision has never been easy and the successful challenges have mainly been based on assertions that an adjudicator has acted in excess of jurisdiction or in breach of the rules of natural justice. The question that then arises in such cases is whether such failure should taint the whole decision or whether an adjudicator's decision can be severed, so that the part of it that was within jurisdiction and was reached without any breach of the rules of natural justice is still capable of enforcement?

This issue arose tangentially in a number of cases between 2000 and 2005[2] but it was not until 2008 and the case of Cantillon v Urvasco[3] that the issue was addressed directly.

Here, Akenhead J indicated, that enforceable parts of an adjudicator's decision could be severed from unenforceable parts.

He summarised the position at paragraph 64 of his judgement:

(1) "Where two or more disputes are referred to an adjudicator, a valid objection to one decision on jurisdiction or natural justice grounds, will not necessarily affect the validity and enforceability of the adjudicator's decision on the other dispute or disputes.

(2) Where a single dispute is referred to one adjudicator, it may not be severed so as to excise a part of the decision to which valid objection is taken, on jurisdiction or natural justice grounds, leaving the balance valid and enforceable. A decision on the single dispute is either valid and enforceable or invalid and not enforceable.

(3) It follows that an adjudicator's decision may not be corrected to take account of a jurisdiction objection, with the result that a sum larger than that in the adjudicator's decision may be enforced by a claimant."

At paragraph 65 the judge then went on to make some additional observations. Whilst making it plain that these were obiter, the judge clarified that what was being considered concerned a decision which properly addressed more than one dispute, either because it was permitted by the contract or because the parties had agreed that the adjudicator would have that power. Sub-paragraph (f) reiterates the point, that where the decision was on one dispute or difference, and there had been a material breach of natural justice or the adjudicator had acted in excess of jurisdiction, the decision would not be enforced.

What must be stressed is that Cantillon involved more than one dispute. Since the vast majority of adjudicator's decisions relate to a single dispute, it follows that the vast majority of those decisions would not be severable. This was confirmed in a number of subsequent cases.

In Quartzelec v Honeywell Controls[4], His Honour Judge Stephen Davies made reference to the judgement in Cantillon and said[5] that, whilst it may at first impression appear unfair, it was a consequence of the court's inability to sever the decision that allowed a party, who was otherwise liable to pay on an adjudicator's decision the sum of £135,000, to avoid any liability at all due to the adjudicator's failure to consider a defence worth £36,500.

Similarly in Cleveland Bridge[6] v Whessoe, Ramsey J refused to sever a decision that related to claims arising out of both 'construction operations' under S105(1) of HGCRA 1996 and excluded operations under S105(2), which the adjudicator had no jurisdiction to decide. One consequence of that result was that Cleveland Bridge was deprived of about £100,000 that it would have otherwise been due in relation to those works that the adjudicator had the jurisdiction to decide. Ramsey J said[7]:

"I do not consider that it is the role of the court to act by opening up, reviewing and revising an adjudicator's decision in enforcement proceedings, where part of

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that decision is made without jurisdiction and making a revised enforceable decision".

It appeared therefore that where a single dispute was the subject of an adjudicator's decision, as most are, it could not be severed for the purposes of enforcement. A high bar then? Well, maybe.

In Bovis v The London Clinic[8], Akenhead J, who had first considered 'severability' directly in Cantillon almost a year earlier suggested, albeit obiter[9], that he might have concluded that, even if the adjudicator had had no jurisdiction to deal with the claim for loss and expense, he would have enforced that part of the decision that demonstrably related to the extension of time claim and the recovery by the contractor of liquidated damages. This was on the basis that the decision was, in the judge's words 'eminently severable'. This seems to have been said without consideration as to whether the judge was dealing with one or more than one dispute. The judge appeared to be preparing for a fundamental change in approach.

In Pilon v Breyer[10], The Honourable Mr Justice Coulson reviewed Cantillon in addressing Issue 4 in his judgement[11] said:

"The next issue is whether the decision is severable (i.e. whether, even if Pilon are not entitled to the full sum, they are entitled to the balance of £60,000 odd). The starting point is the decision of Akenhead J in Cantillon v Urvasco. As to severability he said: "65 .....

a) The first step must be to ascertain what dispute or disputes has or have been referred to adjudication. One needs to see whether in fact or in effect there is in substance only one dispute or two and what any such dispute comprises.

b) It is open to a party to an adjudication as here to seek to refer more than one dispute to an adjudicator. If there is no objection to that by the other party or if the contract permits it, the adjudicator will have to resolve all referred disputes or differences. If there is objection, the adjudicator can only proceed with resolving more than one dispute or difference if the contract permits him to do so.

c) If the decision properly addresses more than one dispute or difference, a successful jurisdictional challenge on that part of the decision that deals with one such dispute or difference will not undermine the validity and enforceability of that part of the decision which deals with the other(s).

d) The same logic must apply to the case where there is a non-compliance with the rules of natural justice which only affects the disposal of one dispute or difference.

e) There is a proviso to c) and d) above which is that, if the decision as drafted is simply not severable in practice, for instance on the wording, or if the breach of the rules of natural justice is so severe or all providing that the remainder of the decision is tainted, the decision will not be enforced.

f) In all cases where there is a decision on one dispute or difference and the adjudicator acts, materially, in excess of jurisdiction or in breach of the rules of natural justice the decision will not be enforced by the courts."

The judge concluded that the case before him was a case where there was said to be one dispute: namely 'what, if anything, was due as a result of the interim application of September 2009'. On the basis of the approach in Cantillon the judge found it difficult to see how the decision could sensibly be regarded as severable. On the contrary, in accordance with paragraph 65 of the judgement of Akenhead J in Cantillon (detailed above) it seemed to His Honour that the adjudicator's decision was not severable.

No change there then? No lowering of the bar?

Perhaps not but Judge Coulson fired a warning shot when he added:

"I acknowledge that it may soon be time for the TCC to review whether, where there is a single dispute, if it can be shown that a jurisdiction/natural justice point is worth a fixed amount which is significantly less than the overall sum awarded by the adjudicator, severance could properly be considered. That was, after all, the basis on which summary judgment applications were routinely decided before the HGCRA. However, as a result of my other findings, this is not the place to consider that issue further."

In Working Environments v Greencoat[12] the severability issue arose again before Mr Justice Akenhead. Here the judge was required amongst other things to examine the extent to which certain issues within a withholding notice fell within the adjudicator's jurisdiction and if they did not, whether it was possible to sever the adjudicator's decision to exclude those issues which fell outside of the crystallised dispute. The judge noted that there were only two items within the withholding notice which were not within the confines of the crystallised dispute as, "they had not been mentioned before they emerged 22 days into the adjudication process". In light of this, the judge then considered whether it was possible to sever the adjudicator's decision so that the references to the two items which were not within the confines of the dispute could be removed. He decided that there was no reason why the substance of the adjudicator's decision should not be enforced albeit that the amended decision relating to the sum of £250,860 exclusive of VAT should be reduced by £21,149 exclusive of VAT producing a net sum of £229,711 exclusive of VAT.

Is this not "opening up, reviewing and revising an adjudicator's decision to reach an enforceable Decision" to which Ramsey J was so opposed in Cleveland Bridge?

In Beck Interiors v UK Flooring part of Beck's award was good but another part was not because it was not in dispute at the time. Akenhead J considered it legitimate to sever the adjudicator's decision and extract the part of the decision that was in dispute before the notice of adjudication was dispatched. The adjudicator had cast his decision so that a claim for costs of completing carpeting works, the dispute referred to adjudication, was easily identified from a new liquidated damages claim.

The carpeting claim stayed in but the liquidated damages claim came out. The adjudicator's award was reduced from £53,363 to £19,763. Is this again not an 'opening up, review and revision of an adjudicator's decision to reach an enforceable decision'? Clearly in both Working Environments and Beck Interiors the judge thought not.

Finally we come to Lidl. Here Mr Justice Edwards-Stuart concluded that, in the same way that Akenhead J had concluded that two items were not part of or within the confines of the dispute, the two items of liquidated damages in Lidl that totalled £125,000 were clearly not part of or within the confines of the Lidl dispute even though they had been referred.

He concluded that the rest of the decision could be severed from those two items so that it remained enforceable.

What was different in Lidl was that the claimant agreed all along that the adjudicator had exceeded his jurisdiction and issued for only part of the sum 'decided'.

So has the bar for severing decisions been lowered because the judge had severed 'part of the essential dispute referred'? Well it is certainly the first time that severance has involved a part of a 'referred dispute' and where the actual request for enforcement was in respect of only part of a decision. In that respect perhaps the bar has been lowered in that severance is now not only available to the enforcing judge but also to an enforcing party if it so wishes. □

1 Lidl UK GmbH v R G Carter Colchester Ltd [2012] EWHC 3138 (TCC)

2 Griffin and Another v Midas Homes Ltd [2000] 78 Con LR 152: KNS Industrial Services (Birmingham) Ltd v Sindall Ltd [2001] 75 Con LR 71: Shimizu Europe Ltd v Auto Major Ltd [2002] BLR 113: RSL (South West) Ltd v Stansell Ltd [2003] EWHC 1390 (TCC) and Amec Capital Projects Ltd v Whitefriars City Estates Ltd [2005] BLR 1.

3 Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC)

4 Quartzelec Ltd v Honeywell Control Systems Ltd [2008] EWHC 3315 (TCC); [2009] BLR 328

5 At paragraph 42 of the judgement

6 Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture [2012] EWHC 1076 (TCC); [2010] BLR 415

7 At paragraph 120 of the judgement

8 Bovis Lend Lease Ltd v The Trustees of The London Clinic [2009] EWHC 64 (TCC); [2009] 123 Con LR 15

9 At paragraph 69 of the judgement

10 Pilon Ltd v Breyer Group PLC [2010] EWCH 837 (TCC); [2010] BLR 452

11 At paragraph 39

12 Working Environments Ltd v Greencoat Construction Ltd [2012] EWHC 1039 (TCC)

Audit of Time

CLIVE HOLLOWAY – DELAY EXPERT, DRIVER TRETT ASIA PACIFIC COMPARES THE METHODOLOGIES AND APPLICATION OF DELAY ANALYSIS AND THE ADVANTAGES OF AN AUDIT OF TIME APPROACH.

Introduction to the Audit of Time approach

With respect to the analysis of programme delay, it is widely recognised that there is no one best way in which to analyse a project; and so an equitable view of delay can only be established via an 'audit of time'; by applying a combination of the methods available; comparing any scientific calculated analysis of delay based on planned programmes, and their inherent deficiencies, with a pragmatic common sense review of the facts, to form a rational view and reach a balanced opinion.

This so called 'audit of time' approach is sound, reliable, and can withstand robust interrogation; although a thorough understanding of the mechanics of the project and the dynamics of the plan (i.e. dependences, sequences, processes, methods, systems, etc) and the key issues, and the causal factors is fundamental.

A comprehensive audit of where the time was spent, and elapsed on a project, and with respect to all activities; will realise, identify, and distinguish entitlements and compensations for time and money.

The audit of time method is an open system that provides a basic philosophy for an approach to delay analysis, whilst allowing individualistic styles. It is common knowledge nowadays which methodologies, techniques, and principles are low risk, really useful, accepted by tribunals, and most of all are credible.

Comparison with other Methodologies

Fig.1 compares the common delay analysis methodologies with the audit of time approach and provides an assessment of the benefits of each method with respect to the various considerations.

The Basics of the Audit of Time approach

The basic principle of an audit of time is to fully analyse the facts, the contemporaneous site records, the available information and data; to determine what happened and why it happened; and how the time was spent and elapsed in terms of delay, disruption, prolongation, acceleration, etc.

Typically the key contract provisions, with respect to time generally, require timely action re delay events as they occur; need to account for the likely and actual delay effect; impose mitigation obligations; look to preserve the date for completion; accept the need to maintain an achievable target for completion; require the establishment of a reasonable prospective time entitlement due to any relevant delay events; and to extend the programme and date for completion to accord with any extension of time (EOT) awards.

However, what happens in reality is that many contracts are not administered and operated as they should; there are problems with baseline programme feasibility, approvals, updates, etc; delay analysis is exaggerated, inappropriate and not likely; non-critical delay is ignored; EOT awards are either not granted or late, and given for obscure reasons. This results in a morass of unresolved and undistinguished claims that are no more than a list of global complaints of general issues.

The added problem is that prospective EOT entitlement techniques, like critical path as-planned impact, are often used and applied retrospectively, even though the facts of what actually happened and the as-built data is available. This may lead to an alleged entitlement greater than what is needed, for example; a theoretical entitlement of 300 days EOT might be claimed, even though actual completion is only 200 days late, and yet the contractor claims 100 days acceleration [often not credible].

FIG.1 METHODOLOGY COMPARISON

CONSIDERATIONS	METHODOLOGIES				
	As-Plan Impact	Time Impact Analysis	Audit of Time	Window Analysis	As-Built But for
EOT (Entitlement)	Y	Y	Y	N	N
EOT (Actual Delay)	N	N	Y	Y	Y
Disruption/Production	N	N	Y	?	Y
Mitigate/Accelerate	N	Y	Y	Y	?
Prolongation Costs	N	N	Y	?	Y
Loss and Expense	N	N	Y	?	Y
Information Available	L	M	M	H	H
Witnesses Available	L	L	M	H	H
Time to do Analysis	L	H	M	H	H
Cost of the Analysis	L	H	M	H	H
Control of Outcome	H	M	M	M	L
Negotiation	Y	Y	Y	Y	Y
Adjudication	Y	Y	Y	N	N

TABLE LEGEND KEY; Y = Yes, N = No, H = High, M = Medium, L = Low

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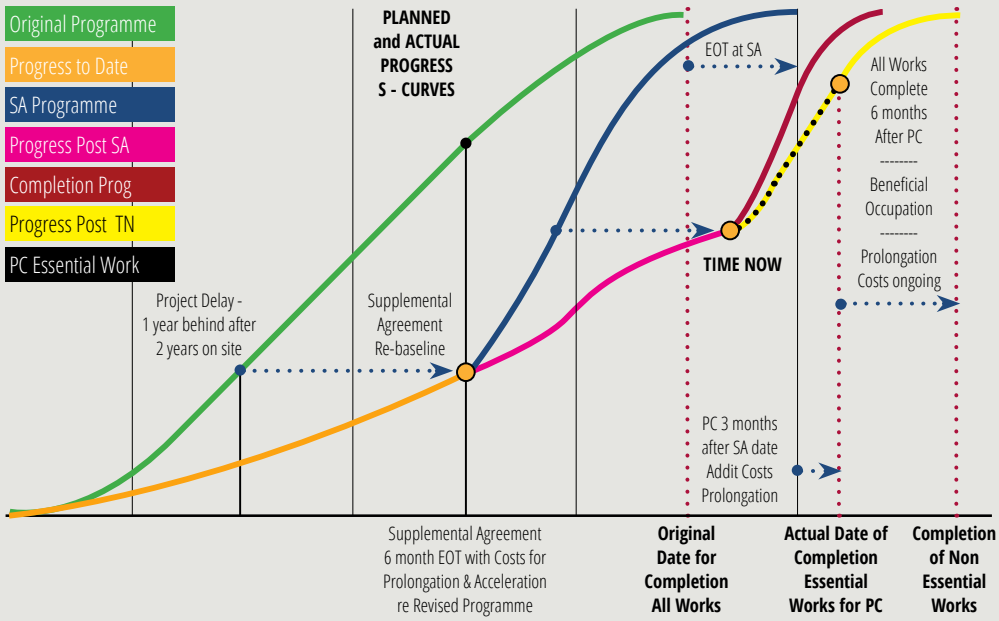
The Process of the Audit of Time approach

The basic process of an audit of time is the production of; graphical progress 'S' curves which measure time against effort derived from planned programmes, and as-built site records for all key activities and operations; establish flowcharts for sequences, procedures, cycle times, etc., to understand the process; identify the variance, analyse the delay and disruption; associate and allocate the causes and events; which can then be logged into a form of Scott schedule or delay table; ultimately facilitating a quantified assessment of costs, financial loss and expense, and compensation.

The 'S' curve chart in Fig.2 provides a typical and indicative life cycle of a project comparing the planned expectation with what actually occurred in terms of productivity.

FIG.2 S CURVE – TYPICAL LIFE CYCLE OF A CONSTRUCTION PROJECT



Advantages of the Audit of Time approach

The main advantage of an audit of time is that it is an iterative process whereby initial work may be at a high level, and can then be refined as more detail becomes available. Other advantages of this process are that it provides focus in key areas, it allows a continuous and transparent appraisal, it requires full engagement of the team and the parties, it can be used in different dispute resolution processes, it is flexible and adaptable (can integrate measured mile and earned value analysis), and can quantify actual delay, disruption, and prolongation in terms of the associated actual costs that flow.

Differentiation between Time and Money

An implied link between an extension of time and prolongation costs might seem reasonable to many, but the two are generally dealt with differently in contracts, which often allow for time entitlement based on prospective 'likely' delays, but require costs and losses to be calculated from actual delay. Often a contractor would appear to have a valid case for EOT due to employer relevant delay events; however his own contractor default delay events seem to negate this, and so arguments re concurrency, pacing, first in line, mitigation, time at

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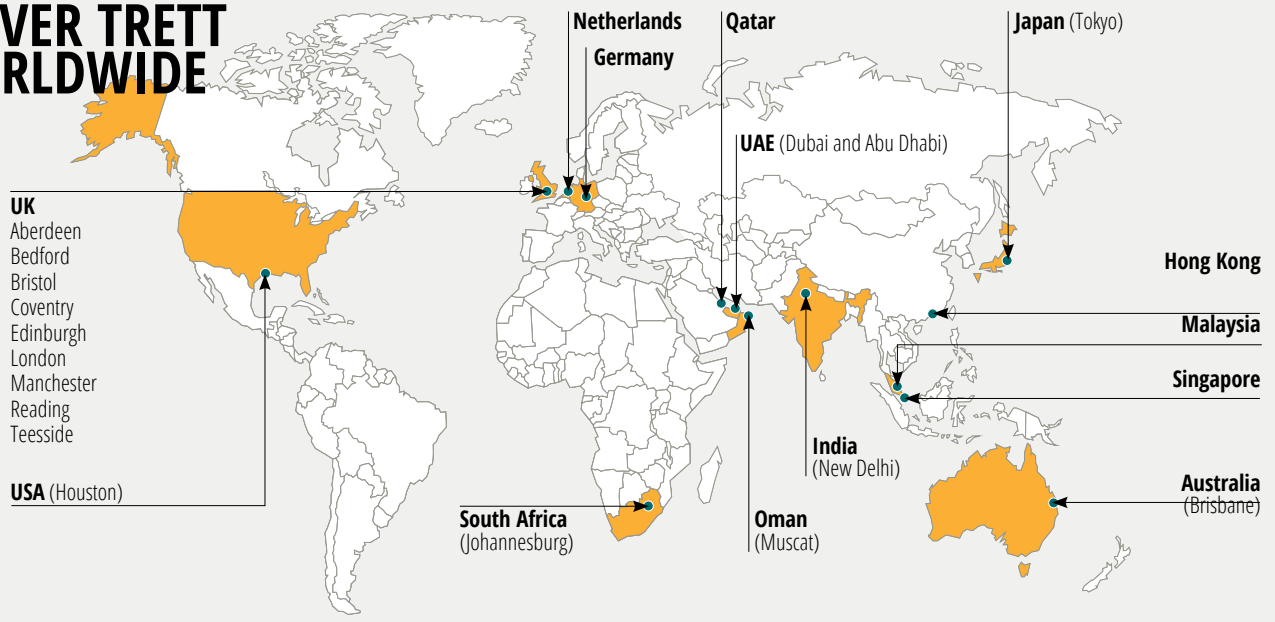
DRIVER TRETT WORLDWIDE



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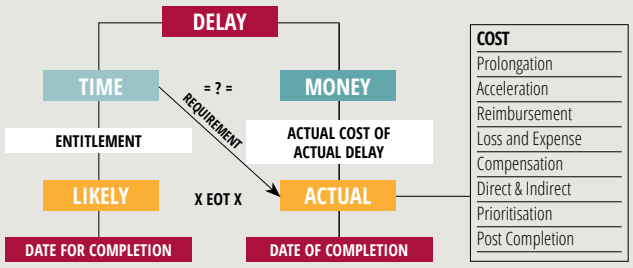
large, apportionment, etc., are often rife in this situation. The dominant cause theory might suggest that the Contractor is wholly culpable and so no EOT is due; but then the Contractor would be liable to pay what are in effect 'windfall damages' even though the Contractor otherwise could not have completed on time, due to the so deemed less dominant 'just in time' Employer relevant delay events, asserting the 'but for' position.

FIG.3 DELAY FLOW CHART



There is a need to consider the project as a whole, in general terms, so as to put problems and issues into perspective.

The Practical Answer

The practical answer is to separate the project completion date into the 'Date for Completion' (affected by entitlement and prospective arguments) and the 'Date of Completion' (shown by actual and retrospective arguments). A prospective method of analysis, only deals with the planned Date for Completion, and it seems relatively easy to make claims on a theoretical basis while obfuscating the delay to the actual Date of Completion. It is common (but wrong) to go on to allocate actual prolongation costs to what are effectively theoretical periods of likely delay.

However, a retrospective factual analysis is not a wholly satisfactory alternative given that work generally expands (or works are paced) to fill the extra time created by float periods. So both types of analysis might be required to address both definitions of the completion date, and if programmers and analysts make this distinction in their analysis of delay, then quantity surveyors and commercial managers can focus on the real cost of actual delay.

An audit of time addresses this mismatch, and looks at the as-built facts to determine actual delay on all programme fronts in order to assess financial loss across the board, not just the critical activities. Fig.3 provides an indicative overview of the typical options process in choosing which delay analysis method to adopt depending on the time and/or money requirements / expectations.

Entitlement versus Reality

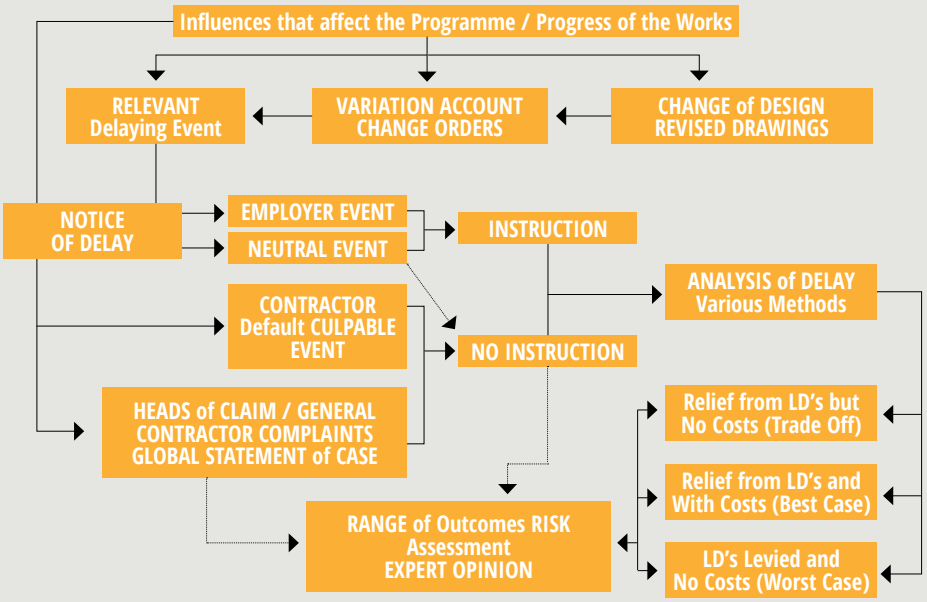
A delay analyst might look at the problem in terms of entitlement, but his work will not be complete until he understands the real causes of delay, and how the project was actually built. Many seem to believe that the prospective model represents how things actually were, when clearly they were not. The key is in understanding how the science of delay analysis and the realities of the project work.

An early practical analysis of delay to examine the project before formal claims progress too far is recommended. As most contested disputes have more to do with delay arising from disruption than event based prolongation, resulting in global claims and complaints that become general heads of claim. There is a need to look at them in practical ways - examine the feasibility of the planned programme and then look at the inner workings of the construction project in terms of productivity.

There is always a need for practical and empirical views given the differences between entitlement and actual arguments, and the uncertainty that affects scientific analysis.

Fig.4 provides an overview of the typical process cycle in dealing with events and change that occur on a project, which ends up forming the basis for a claim.

FIG.4 PROGRAMME DELAY ANALYSIS PROCESS CYCLE



In Summary

The audit of time approach is a thorough contemporaneous analysis of where time was spent on the project. It considers the effect of delay events, and the range and risk of possible outcomes; identifies the cause; it looks at what was likely at the time, and what actually transpired; what might have occurred 'but for' certain events; it focuses on certain windows of time; and on all activity strings and on all competing programme fronts. Therefore, it is important to have people (a claims team) that are competent enough to understand and cope with all of these issues, and be capable of producing simple and reasoned claim submissions that relate to reality, that assist rather than confuse. □

Introducing our latest DIALES expert – Stephen Lowsley

DIALES ARE DELIGHTED TO WELCOME A RECENT ADDITION TO THE TEAM, HIGHLY EXPERIENCED AND RESPECTED DELAY EXPERT STEPHEN LOWSLEY.

I am very much looking forward to be joining the DIALES expert witness team in mid-April. I have been employed in the construction industry for just over 40 years and have specialised in delay analysis and time related dispute work for the last 15 years or so, having been appointed as expert on numerous occasions. The field of delay analysis and expert witness work is a relatively small one and I already know some of the Driver Trett team, having worked with some of them in a 'past life' (some have occasionally also represented the opposing party!). I am really looking forward to catching up with old colleagues and friends, as well as making many more; and of course undertaking some interesting assignments.
See you all in April, very best regards
Stephen Lowsley. □

What is a DIALES expert?

Our experts are proven and respected in their fields. Delivering high quality support and success ensures their reputations and integrity as expert witnesses. DIALES experts:

- Have been cross examined before a tribunal, or completed an accredited training programme.
- Understand their duties to the court and their clients.
- Have proven track records in delivering concise, detailed reports, on time, and often against challenging deadlines.
- Have access to highly skilled support teams to ensure rapid evidence processing, regardless of volume.

If you are looking for an Expert Witness in Quantum, Delay Analysis, or a Technical discipline; the DIALES team will provide the right candidate, with an excellent reputation, track record, and supporting expert profile or CV.

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UK Spring Breakfast Seminar series on NEC3 – Limited Options

DRIVER TRETT ARE PLEASED TO ANNOUNCE THE 2013 SPRING BREAKFAST SEMINAR SERIES TITLED: NEC3 – LIMITED OPTIONS?

The seminar will review several key topics, and compare and contrast how the issues raised vary in their outcome, depending on which Main Contract Option has been selected. The course will also consider the effect of other relevant forms of contract, such as IChemE and FIDIC, as a comparison.

Topics to be covered will include:

- Disallowed costs
- Defects
- Omitting work
- Cashflow – Payment provisions
- Termination

Demand for these events is always high and places are offered by invitation only. Even by invitation many dates are often over-subscribed, so please book early to ensure your space. Further details can be found at http://www.drivertrett.com/knowledge/seminars.shtml, or contact your local office (see page 13 for details). Locations and dates are also listed in the table opposite.

LOCATION	VENUE	DAY	DATE
Cardiff	Village Hotel	Thursday	18/04/2013
Exeter	Exeter Rugby Club	Tuesday	23/04/2013
Bristol	Bristol Golf Club	Tuesday	30/04/2013
Leeds	Armouries	Tuesday	14/05/2013
Derby	Hilton East Midlands Airport Hotel	Thursday	16/05/2013
Newcastle	Wynyard Rooms	Thursday	16/05/2013
Manchester	Lancashire County Cricket Club	Tuesday	21/05/2013
Coventry	Windmill Village Hotel	Tuesday	21/05/2013
Hemel Hempstead	Holiday Inn	Thursday	23/05/2013
Glasgow	Glasgow Hilton	Thursday	23/05/2013
Chelmsford	Essex County Cricket Club	Wednesday	05/06/2013
London	The Grange Hotel, Holborn	Wednesday	12/06/2013

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ANALYSIS ACTION RESOLUTION

THE DIGEST NEWSLETTER
BYTES

Introducing Digest Bytes

The Driver Trett and DIALES teams are frequently called upon to write articles for a number of respected publications across our areas of expertise around the world. The introduction of Bytes, will ensure that Digest readers have access to download these pre-published pieces throughout our website. Each Digest issue will provide a brief synopsis and web link to a number of Digest Bytes for our readers to download. Please let us know if there are any articles you would like to see featured as Bytes in our coming issues. Our first Bytes include the original article of the FIDIC Rainbow Suite series written by Paul Battrick and Phil Duggan, and an entertaining comparison of wedding and construction planners by David Waddle. **Click on each Byte title to download full article from our website** http://www.drivertrett.com/knowledge/digest/bytes.shtml

BYTE 1: FIDIC Rainbow Suite – 1

The International Federation of Consulting Engineers, or FIDIC as they are better known, have been drafting standard forms of contract for many years. These forms have been widely adopted by employers on a global basis, in respect of many types of construction project.

With the FIDIC 1999 Suite of Contracts, they did not revise previous editions but compiled a new suite of contracts for major construction works known as the Red, Yellow and Silver Books. This article considers the fundamental nature of these contracts and the manner in which FIDIC has sought to define their usage.

BYTE 2: The Wedding Planner

This article takes a look at how even some diverse professions use detailed planning to help projects run smoothly and compares this to the construction industry where such benefits are not always appreciated.

On any construction project one will find at least one 'JCB' which will arrive on day one to help set up the site facilities and will still be there on the very last day clearing away the final bucket of debris to leave a pristine project.

The author suggests that the programme is as important to the project as the 'JCB' and should be treated as such rather than simply 'wall art'.

What's new with Driver Trett?

KEEP UP TO DATE WITH OUR LATEST NEWS AND EVENTS.

For more details of the services and solutions that Driver Trett, and the wider Driver Group can deliver, please visit our website **www.drivertrett.com**.

Regular news and event updates are made to the website, so be sure to visit, or follow us on LinkedIn to keep up to date with our latest seminars and news.

In the next issue

The next issue of the Driver Trett Digest will have an Asia Pacific focus, with the Middle East region taking its turn later in the year. Although each issue has a regional theme, we work hard to ensure that there is a little something for everyone within the digest pages, wherever they are in the world and whatever industry they may be from.

The Digest will always aim to be topical, and respond to requests and questions from our readers through the articles and briefings we publish.

If you would like to submit a question or article request to the Digest team please email info@drivertrett.com with DIGEST in the email subject line.

We are always pleased to receive feedback from our readers, and welcome the opportunity to develop the Driver Trett Digest into a valuable read for those involved in the global engineering and construction industry.