

# Recovering Entitlement to Time

## Background

Project execution is challenging. The joy of having been awarded a contract very quickly translates into the practicalities of managing the array of associated risks, such as reliance on third-parties, coordination and interface challenges, manning and equipment logistics, as well as the ever-present need to manage change. It is no wonder then that the balance between keeping the customer happy and making a reasonable margin is finely poised.

Given the significant potential to disturb project equilibrium, there would appear to be little capacity for the time and effort needed to prepare, administer and conclude claims for entitlement to delay, disruption and additional costs. Unfortunately, this very often becomes a necessity borne out tensions between contractual interpretation, commercial pressures and the levels of risk assumed when planning a project. Add to this that project teams are necessarily focused on an array of daily challenges aligned to the successful conclusion of their assigned work-packages, and not to the administration of data needed to support and substantiate claims, and it becomes clear why positions often become entrenched and relationships taught.

Given these project realities, it is important to establish a practical appreciation of the steps needed to maximise the chances of recovering entitlement to time.

## Some Significant Challenges

Change management in a complex project environment represents a dynamic challenge that needs to involve multiple stakeholders, whilst also needing to establish practical and systemic practices. Of these, though seemingly obvious, the establishment of an accurate 'footprint' of actual work execution will be central to any claim, with a very keen focus on periods when work didn't occur. Compiling this 'as-built' schedule isn't however nearly as easy as it sounds. There are typically several sources of data for any given area of work, and each has the capacity to conflict with one-another. For example, the dates recorded in the project schedule regarding the start and finish of work may well be different to labour allocation records, which may be different to photos or the narrative available in periodic progress reports. Each of these will almost certainly fail to record accurately those periods when work was stopped, or when productivity was low, the latter being a particular focus for those losses attributed to disruption.

## Recovering Entitlement to Time

David Tyerman

June 2019

With an accurate as-built plan in hand, and assuming that this reveals periods of critical delay for which responsibility can be attributed to the claim recipient, the specific terms and obligations of the contract represent the next challenge, which needs to be considered in relation to the challenges of contract administration when delivering a project under chaotic conditions. Claims can however become particularly problematic if conditions precedent have not been met (notification of events that may constitute the basis of claim, etc...), and at the very least may serve as an easy 'win' for the claim recipient. Even if this obstacle has been successfully navigated, there will be explicit contract provisions in relation to the procedure to be followed for claims to be submitted and entitlement recovered. Read each clause very carefully as the devil, they say, is in the detail.

## Contemporary Change Management

In Clarke Construction Group<sup>1</sup> it was said that:

“[t]he after-the-fact, conclusory assessments of the [Contract Administrator] or that of its experts are not sufficient substitutes for [Contractor's] underlying obligation to contemporaneously document the severe adverse impact on labour efficiency it now claims resulted from the changes and RFIs.”

The point made is very clear, that there is no substitute for contemporary facts that are aligned with the matters being relied upon. Any analysis conducted much later for the purposes of asserting entitlement will be met with suspicion, and especially if derived by an expert! But the task of identifying change contemporaneously is a difficult one indeed. There are typically thousands of records on a project, so where to focus attention and which records to prioritise is a matter that needs some forethought and control. It must also be recognised that there often exists multiple layers of contracting parties and interfaces to navigate. But the task is not insurmountable and will benefit from a range of mechanisms that are usually already in place on a project. These include the focused use of the project schedule, specifically designed project controls and prioritisation of engagement from the project team. The latter is undoubtedly a rich source of data from those with the most knowledge of change events, but ironically also a key risk given that such individuals may have departed the project when the time comes to apply that knowledge.

Contemporary change management therefore needs a strategic focus towards the development of an integrated and inter-departmental process, that is sponsored by senior levels in an organisation. The list below represents just some of the questions that may need to be addressed:

- Contractual Basis of Claims & Entitlement
  - How does the contract prescribe how entitlement is to be administered, and what condition precedent does it establish – which individuals need to coordinate their attention?
  - Causation - Cause and effect – who is to conduct a preliminary assessment of how a given change event has had an impact on time and/or costs

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<sup>1</sup> Clark Construction Group Inc (2000) VABCA No.5674

## Recovering Entitlement to Time

David Tyerman

June 2019

- Who is responsible for the accuracy of the project critical path – what about subcontractor schedules and critical areas of work?
- Can concurrent / parallel areas of delay be identified (much easier to do so contemporaneously)
- With the above in hand, who is tasked with compilation of associated factual evidence
- The Supply-chain
  - Collation of achieved progress / lack of progress, performance, resource allocation and productivity data
  - Corroboration of as-built data and identification of any key data that may be missing
- Contemporary Variance Analysis
  - How is this to be done and administered – what methodologies will work?
- Contemporary Administration
  - Establishment of change management meetings
  - Formalising and administration of entitlement (agreeing protocols)
  - Departmental interfaces agreed and specific responsibilities assigned
  - Periodic (impartial) audits of capacity to recovery entitlement

## Create Your Own Footprint

The establishment of compelling contemporary records of fact is an opportunity that by its very definition cannot be retrospectively replicated. Effective change management administration should ensure that change notice submissions and other such contractual obligations are married to a strong, positive claims, in a manner that ensures the presentation of a favourable 'story'. However, it is essential that this story is supported by contemporary, factually aligned evidence in order to underpin all assertions made in a claim, this being especially important when under any third-party dispute resolution scrutiny.

In contrast, if in a position when a claim needs to be rebutted, the same advice is as equally applicable. For example, should a claimant suggest that work has been accelerated, it would have been wise to disabuse them of that opinion, on record, as soon as the accusation was raised (which is typically in periodic progress reports). Like most matters under dispute, that is not to say that the vagaries of 'acceleration' cannot be dealt with post-contract completion, but it is far more compelling to point towards evidence of having considered (and rejected) the notion at the point in time it was raised during the currency of work execution. Make your claim positive and clear, anything less will be exploited by the recipient.

## Recovering Entitlement to Time

David Tyerman

June 2019

### Delay Analysis

There are many different forms of delay analysis, as well as many opinions regarding their effectiveness or standing in dispute proceedings. Advice and protocols too are in abundance, with reference often being made to the Society of Construction Law's Delay and Disruption Protocol<sup>2</sup> and the ACEI's Recommended Practices<sup>3</sup>. Though there is possibly a distinction to the type of analysis that should be afforded when submitting a claim, it is suggested that the following is kept in mind:

- Keep the analyses as simple and clear as is possible
- Keep the recipient in mind - can they easily associate the analysis with the matters being claimed and are they able to express your analysis and opinion to their peers?
- Keep the analysis aligned to facts (as opposed to being theoretically representative of the situation), as far as possible

The blend of delay analysis adopted for a claim may consider the following:

- **Descriptive analysis** – Inform the reader about WHAT happened in the past. Taken from contemporary project data, this will be a statement about what happened with descriptive statistics. Typical forms of analysis could include use of an As-Built Plan, Time Slice Windows Analysis and Retrospective Longest Path Analysis.
- **Diagnostic analysis** - Informs the reader about WHY something happened in the past. Involves deeper investigation in order to build hypothesis, collect more data, and to identify reasons behind patterns found in descriptive stage - a Time Slice Windows Analysis may be used to assist with this stage.
- **Predictive analysis** - Informs the reader about what will happen in the future based on past data and possible future factors that have be used to predict the future outcome – this type of analysis therefore assumes a position of being 'in the moment', with the information available at that time and its effect on forecasting dates – a Time Impact Analysis (adjusted to reflect achieved performance, as compared with as-built performance) may be appropriate, also Impacted As-Planned Analysis, Earned Value Analysis, or Earned Schedule Analysis.
- **Prescriptive analysis** - Informs the reader about what should / could have be done in order to achieve desired future outcomes. This requires a study of the cause & effect relationships between independent & dependent variables and helps to identify and evaluate the scale of mitigation measures applied to a period or set of circumstances – may use a Collapsed as-built analysis or Measured Mile Study.

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<sup>2</sup> Society of Construction Law, Delay and Disruption Protocol, 2<sup>nd</sup> Edition, February 2017

<sup>3</sup> AACE International Recommended Practice No. 29R-03, Forensic Schedule Analysis TCM Framework: 6.6 – Forensic Performance Assessment

## A Good Delay Claim Can Be Structured Like This...

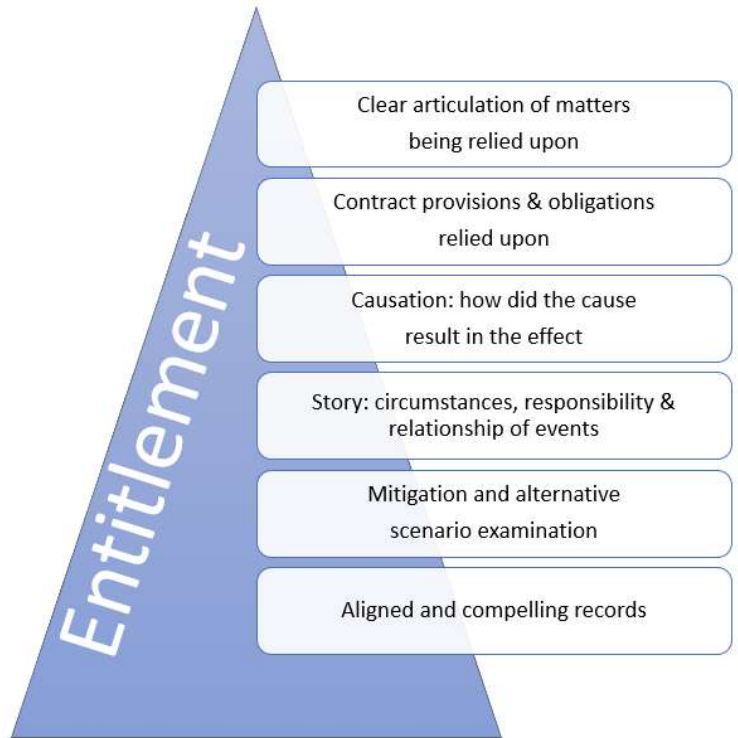
Though the level of detail and complexity of a claim will depend on the specific circumstances of the project and of the number / interrelationship of the matters being relied upon, a general structure upon which to base each claim is proposed in the diagram opposite. This of course is a loose structure that is to be adjusted to reflect any specific or mandated project obligations.

At the top of this structure is a very clear narrative that expresses the matters relied upon and the relief sought, in other words, what is the claim or dispute concerned with? This must be supported by the provisions in the contract that facilitate the relief sought.

It is necessary for references to “cause and effect” to include a clear expression of the relationship between the two; how did the cause(s) result in the effect(s). The results of this investigation should also reveal which other causes could have contributed, or conversely why they should be discounted from having contributed to the effect(s). For example, the effect of poor project management practices, or delayed information may be included within this assessment.

There is no doubt that a compelling ‘story’ will greatly assist with a favourable outcome. The claim will ultimately be presented to the party from whom relief is sought, and potentially to third parties if the matter escalates to formal dispute proceedings. If the recipient fails to be convinced by the assertions made in the claim, and indeed be unable to ‘sponsor’ those assertions through to authorising signatories in the recipients organisation, then a significant amount of time will be spent explaining how matters inter-relate with one another; how the matters were the responsibility of the recipient; and how those matters affected project completion. If on the other hand the recipient can associate with the ‘story’ and instead needs only to test the assertions made for accuracy, the claim resolution process will be much more efficient.

Though often overlooked, one of the first questions asked by the recipients of a claim is “what did you do to prevent or mitigate the impact?” Not only is this a reasonable question to ask, but it also addresses the opposite characteristic, being whether the impact claimed has been artificially exaggerated. This examination and narrative should also consider the range of alternative scenarios that may have resulted in the same effect, that is, by addressing the reasons why other causes could not have been the root



## Recovering Entitlement to Time

David Tyerman

June 2019

causes of the alleged delay, many of the recipients assertions will have been addressed, as well as the claim being better balanced.

A good claim has compelling and aligned records at its foundation. Each record should be referenced to its associated feature within the claim, as well as being recognisable as a having been available in the domain of both parties during the currency of the project. This therefore reflects the prior advice of contemporaneously administering change and records.

## Playing to Strengths

It is given that 'forensic delay analysis' is pretty much useless unless it is supported by associated contractual obligations / compliance and compelling evidence. It's also noteworthy that the analysis of delay ought to be a relatively straight forward matter - what actually occurred on the project - whereas an assortment of 'dynamic', 'static', 'prospective' and 'retrospective' analyses may only serve to confuse the claim recipient, or at the very least provide ample opportunity for an equally complicated rebuttal.

It is typical for the assembly of a delay claim (and especially a claim for disruption) to be a matter that is put to one side in the face of more pressing priorities. This is possibly on account of the lack of experience of those tasked with the responsibility to prepare a claim that is compelling whilst also consistent with best practices. As a response to these facts, it is suggested that a lot of value can be added by combining existing team members with an experienced professional, together with an appropriate knowledge transfer contract. The resultant work practices and claim assembly should result in elevations of internal competence, together with a reduction on the reliance on expensive third parties. This model also draws on the best sources of knowledge; the existing team members know organisational and project dynamics best, whereas an experienced professional should be expert in contractual, delay and claim strategy considerations.

## Summary

There is no magic formula or templated claim submission that is guaranteed to recover entitlement. There is however a direct correlation between successful claims and their basis on common-sense, contractual compliance, clear presentation of the assertions made and strong records.

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