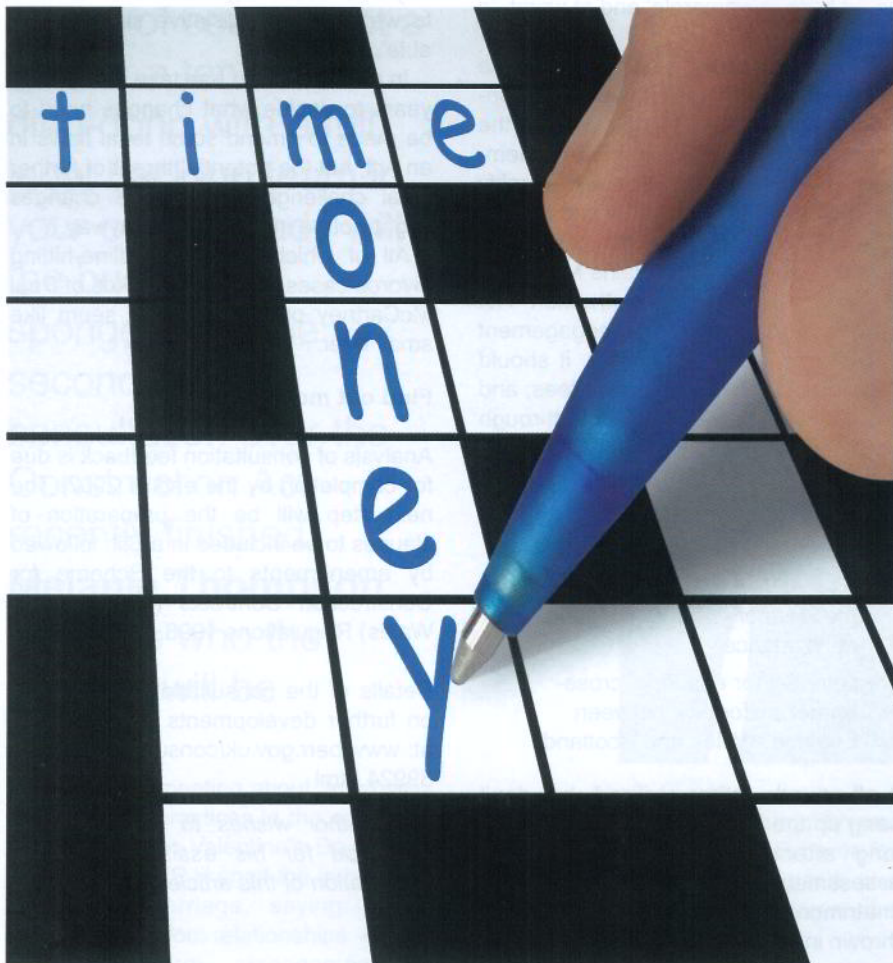


# Contract killers III

**Andrew McLeod** of solicitors Robin Simon LLP looks at how to deal with contractors' claims for extension of time, in the third in an occasional series on contract administration.



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In previous editions of *Architectural Technology*, Paul Greenwood MCIAT and I have thrown the spotlight on problem areas in building contracts for contract administrators.

We have looked at adjudication and the subject of contractor's non-performance and how you, as the contract administrator, might address those issues.

On this occasion, I wish to look at the way in which the law views the duties of contract administrators in the context of contractor's claims for extensions of time under the building contract.

The starting point is that any contract administrator should take care in acceding to contractor's claims for extra pay-

ment and extensions of time. Any extensions granted and payments awarded should be reasonable and justified according to the terms of the building contract. That in itself requires contract administrators to be familiar with the relevant terms governing these issues in the particular form of building contract being used.

The mechanism adopted in successive versions of the JCT Standard Form of Building Contract in recent times requires the contract administrator, upon receipt of written notice from the contractor, to consider:

1. Whether any event stated by the contractor to be the cause of delay amount

to a 'Relevant Event' (a Relevant Event is defined within the contract as one of several types of events ranging from compliance with Architect's Instructions to exceptionally adverse weather conditions); and

2. Whether the completion of the works is likely to be delayed beyond the completion date by reason of that Relevant Event.

If the event causing the delay is a Relevant Event and if it will delay completion of the works beyond the completion date, the contract administrator is required to give the contractor an extension of time by fixing such revised completion date as he considers to be 'fair and reasonable'.

The courts readily impose a duty upon the contractor administrator to act lawfully in reaching his or her decision. The law also imposes a duty upon the contract administrator to carry out the analysis of the appropriate extension of time using the skill and care to be expected of a reasonably competent contract administrator.

The JCT Standard Form of Contract requires the contract administrator to reach his or her decision, in normal circumstances, within 12 weeks of receipt of a contractor's notice and particulars of the effects of the delay. In all other respects, the courts are likely to require a contract administrator to reach a decision within 'a reasonable time'. Simply deferring a decision is unlikely to be an option.

One of the key cases that has come before the courts where guidance has been provided for contract administrators was the case of *John Barker Construction Limited v London Portman Hotel Limited* (1996). The High Court made it clear that a contract administrator is obliged to act 'fairly, lawfully, rationally and logically' in considering an extension of time. In that case, the Court made a finding that the contract administrator had failed to meet that standard. *Continued on page 28.*

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The High Court conducted a detailed analysis into the approach taken by the contract administrator to the contractor's claim. The contractor's claim was supported by expert evidence in the form of programmes together with details of the effect of variations upon those programmes.

In response to this, the contract administrator met with the contractor, the project manager and quantity surveyor. The contract administrator also met with the engineers regarding requests for architect's instructions and

**'...he made an impressionistic rather than a calculated assessment'**

delays relating to mechanical and electrical matters. The contract administrator produced his extension of time report which recorded the fact that he had considered the AI's, CVI's and relevant RFAI's and their implications for possible disruption of the contractor's works. He identified the Relevant Events and granted extensions of time.

The contract administrator's report did not give any actual indication of how the specific extension periods had been calculated. The Court looked for evidence (but did not find any) to see whether the contract administrator's analysis of the contractor's claim had been carried out in a methodical way taking into account the contractor's programme, the progress of the works at the time and the effect of the Relevant Events on the subsequent works. Although the Court concluded the contract administrator certainly believed he had made a fair assessment of the extension of time due to the contractor, the Court found that the contract administrator did not "... carry out a logical analysis in a methodical way of the impact which the relevant matters had and were likely to

have on the contractor's planned programme. He made an impressionistic rather than a calculated assessment of the time which he thought was reasonable for various items individually and overall.'

The Court pointed out further anomalies such as the misapplication of contract provisions and allowance given for relevant events which bore no logical or reasonable relation to the delay caused. Other factors that contract administrators may need to consider include:

- The effect of any causes of delay which do not amount to a Relevant Event.
- The effect of concurrent causes of delay, whether a Relevant Event or not and whether one of them is an effective, dominant cause of delay.
- The extent to which the contractor has used his best endeavours to prevent delay and has done all that might reasonably be required to proceed with the works.

There is no hiding from the fact that the analysis required in order to assess the impact of delaying events upon the contractual completion date can be very complex and the accuracy of this assessment will depend upon the quality of the information which is available to the contract administrator.

Architectural Technologists can take some comfort from the fact that in a subsequent case, *Royal Brompton Hospital NHS Trust v Hammond (No. 7) (2000)*, the High Court recognised the difficulty of making an assessment of an extension of time.

Firstly, the Court pointed out that when assessing whether a delay affected the completion of the works, it is perfectly possible for the progress of the works as a whole to be delayed by exactly the same period as a particular operation is delayed, if that operation is critical to the completion of the works.

The Court went on to point out that there are a number of established ways in which an assessment can be made as to whether a particular event has or has not affected the progress of the works as a whole.

Crucially, the contract administrator has to consider what operations are critical to the forward progress of the works as a whole. The Court acknowledged that the establishment of the critical path can be a difficult task if one does not know how the contractor planned the job and the critical path may well change during the course of the works and almost certainly will do if the

progress of the works is affected by some unforeseen event.

The expert programming evidence provided in that case conceded that the different methods of making an assessment of the impact of unforeseen occurrences upon the progress of construction works are likely to produce different results and the accuracy of any of the methods in common use critically depends upon the quality of the information upon which the assessment exercise is based.

This led the Court to conclude that the duty of a professional in these circumstances is not necessarily to be right but to be careful. The fact that a contract administrator may, ultimately, be proved to be wrong is not, of itself, evidence that he or she has been negligent. His conduct has to be judged having regard to the information available to him, or

**'...the duty of a professional in these circumstances is not necessarily to be right but to be careful.'**

which ought to have been available to him, at the time he gave his advice or made his decision.

The Court in this case seemed to accept that an 'impressionistic' (rather than a scientific) assessment formed on the basis of previous experience might be sufficient. Also, if that was correct, then in the absence of plain factual error, the Court thought it would be almost impossible to demonstrate that any particular decision by a contract administrator was made negligently.

This view is difficult to reconcile with the willingness of the Court to closely scrutinise the approach of the contract administrator in the John Barker Construction case mentioned above.

Realistically, any negligence claims against contract administrators in this area are likely to be supported by expert evidence from a programmer and a contract administrator.

So prudence suggests it remains important to be able to demonstrate a fair, lawful, methodical, rational and logical approach to the assessment of an extension of time.

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