

# Delay In Construction Projects



RIDGEMONT

Ridgemont is an established, boutique law firm with offices in central London and Bristol that specialises in construction and real estate law.

We represent exciting clients that have the same enterprising ethos as we do.

Overview of important elements of delay claims under

**JCT 2016 SFC & DBC**



## Tim Seal

Head of Construction

Tim has spent nearly 20 years advising all parts of the construction supply chain. Tim has worked for some of the largest commercial law firms in the UK, before becoming a consultant. He joined the Ridgemont team in December 2020 and full time Head of Construction since February 2022 adding huge experience and know-how.

Tim focuses on dispute resolution and has advised clients on all of the different contract forms that you find in the construction industry. Tim also carries out a lot of advisory work. He has an excellent knowledge of all suites of standard form domestic and international contracts. Tim has advised both public and private sector clients.

Tim has published articles in specialist media, sat on legal know how boards and presented numerous talks and seminars.



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# Introduction

Delay in completing construction works is extremely common, not least because it is difficult to ensure in advance, that all the moving parts of a construction project are going to function seamlessly. Therefore when drafting the contracts, providing for what happens when there is delay, is an important part of that task. However the consequences of delay are often complex and so contract clauses, even in standard form contracts, rarely deal comprehensively with them.

- Overview of 3 important elements of delay claims under JCT 2016: **(i)** contractor's notification of delay **(ii)** global claims and **(iii)** concurrent delay.
- Delay in this webinar means specifically delay to the contractually agreed date for completion of the contractor's works, ie "critical" delay.
- A useful document is the Society for Construction Law's (SCL) 2017 Delay & Disruption Protocol which provides "practical and principled guidance on proportionate measures for dealing with delay and disruption issues" ("the Protocol"). See <https://www.scl.org.uk/resources/delay-disruption-protocol>



## JCT 2016

- We are using the latest JCT suite of contracts for this webinar, ie 2016, specifically the standard form building contract (SBC) and the design and build contract (D&B). Any quotes from the contract herein are from the SBC.
- The delay clauses in these 2 contracts are identical for our purposes.
- A new JCT suite dealing with eg the Building Safety Act 2022 will be published in due course.

Check out [Ridgemont's LinkedIn](#) page where you will find engaging video content explaining how the Building Safety Act 2022 will affect you.



# Purpose of delay provisions in construction contracts

Purpose is to relieve the contractor or punish it from/for the consequences of delay depending on fault. Namely by extending time for completion of the works or refusing to, and by allowing a contractor to recover its associated loss & expense or sanctioning it with damages.

## Notice of Delay by Contractor

### Clause 2.27 JCT (Notice by Contractor of delay to progress)

*"If and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith give notice to the Architect/Contract Administrator of the material circumstances, including the cause or causes of the delay, and shall identify in the notice any event which is in his opinion is a Relevant Event.*

*In respect of each event identified in the notice the Contractor shall, if practicable in such notice or otherwise in writing as soon as possible thereafter, give particulars of its expected effects, including an estimate of any expected delay in the completion of the Works or any Section beyond the relevant Completion Date.*

*The Contractor shall forthwith notify the Architect/Contract Administrator of any material change in the estimated delay or in any other particulars and supply such further information as the Architect/Contract Administrator may at any time reasonably require."*

### 3 Elements to notification of delay by the contractor, which simplistically are:

1. when delay becomes apparent, serve the notice
2. together with or soon after that notice, provide certain information and
3. promptly inform of any subsequent change in the predicted delay.

### 1st stage - the Notice:

- a. timing: when it becomes reasonably apparent that the progress of the works is being or is likely to be delayed the contractor shall forthwith give notice
- b. contents: the material circumstances of the delay, including the cause(s) and any Relevant Events

### 2nd stage - the supporting info:

- a. timing: in the notice or asap afterwards
- b. contents: expected effects of each event identified in the notice, including delay estimate
- c. amount of detail: simply says give particulars

### 3rd stage - informing of subsequent change:

- a. timing: says forthwith
- b. contents: any material change in estimated delay or in any other particulars PLUS such further information as is reasonably required of contractor.





Is notice a Condition Precedent (CP) to an extension of time award here? Note the words “the contractor shall...” repeated throughout para 2.27 JCT. Answer is not straightforward, but probably no. A member of the JCT 2016 Drafting Committee once blogged that there was no intention to create a CP here. Therefore amendments are often made to this para 2.27 JCT to add in clearer time bars and consequences etc.

But remember that generally you don't need to use the words “Condition Precedent” for there to be a CP. There are no such words in the JCT. Courts are less likely to construe requirements as to the form and content of a notice as a CP, than requirements as to timing. Courts are not keen to construe as a CP absent clear language to that effect.

There is **House of Lords authority** that a notice provision will be considered to be a condition precedent and binding, only if:

- (i) the clause states the precise time within which the notice is to be served; and
- (ii) it makes plain that unless the notice is served within that time, the party making the claim will lose its rights under the clause.

So failure to comply with para 2.27 JCT may well just sound in damages and not be a bar to an extension of time.

If the contractor fails to serve a compliant notice and it is a CP, has the contractor **missed the boat entirely**? No, under para 2.28.5 JCT, the architect/CA must review the situation following practical completion and can bring the completion date forward or push it back.

#### Clause 2.28.5 JCT (Fixing Completion Date)

*“After the Completion Date for the Works or for a Section, if this occurs before the date of practical completion, the Architect/Contract Administrator may, and not later than the expiry of 12 weeks after the date of practical completion shall, by notice to the Contractor, giving the details referred to in clause 2.28.3:*

1. *fix a Completion Date for the Works or for the Section later than that previously fixed if in his opinion that is fair and reasonable having regard to any Relevant Events, whether on reviewing a previous decision or otherwise and whether or not the Relevant Event has been specifically notified by the Contractor under clause 2.27.1; or*
2. *subject to clauses 2.28.6.3 and 2.28.6.4, fix a Completion Date earlier than that previously fixed if in his opinion that is fair and reasonable having regard to any instructions for Relevant Omissions issued after the last occasion on which a new Completion Date was fixed for the Works or Section; or*
3. *confirm the Completion Date previously fixed.”*

Any contractor's **loss and expense** caused by the delay, is a similar but separate regime for claim (see paras 4.20/21 JCT). Note the notice provisions in para 4.21 JCT and the reference to relevant matters now, as opposed to relevant events when seeking an extension of time.



#### Clause 4.20 JCT (Matters materially affecting regular progress)

1. *“If in the execution of this Contract the Contractor incurs or is likely to incur any direct loss and/or expense as a result of any deferment of giving possession of the site or part of it under clause 2.5 or because regular progress of the Works or any part of them has been or is likely to be materially affected by any Relevant Matter, he shall, subject to clause 4.20.2 and compliance with the provisions of clause 4.21 be entitled to reimbursement of that loss and/or expense.*
2. *No such entitlement arises where these Conditions provide that there shall be no addition to the Contract Sum or otherwise exclude the operation of this clause 4.20 or to the extent that the Contractor is reimbursed for such loss and/or expense under another provision of these”*

#### 4.21 JCT (Notification and ascertainment)

1. *“The Contractor shall notify the Architect/Contract Administrator as soon as the likely effect of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from a deferment of possession becomes (or should have become) reasonably apparent to him.*
2. *That notification shall be accompanied by or, as soon as reasonably practicable, followed by the Contractor's initial assessment of the loss and/or expense incurred and any further amounts likely to be incurred, together with such information as is reasonably necessary to enable the Architect/Contract Administrator or Quantity Surveyor to ascertain the loss and/or expense incurred.*

3. *The Contractor shall thereafter, in such form and manner as the Architect/Contract Administrator may reasonably require, update that assessment and information at monthly intervals until all information reasonably necessary to allow ascertainment of the total amount of such loss and expense has been supplied.*
4. *Within 28 days of receipt of the initial assessment and information and 14 days of each subsequent update of them the Architect/Contract Administrator or Quantity Surveyor shall notify the Contractor of the ascertained amount of the loss and/or expense incurred, each ascertainment being made by reference to the information supplied by the Contractor and in sufficient detail to enable the Contractor to identify differences between it and the Contractor's assessment.”*



# Global Claims

- A Global Claim in the context of a delay dispute is where a Contractor in making a delay claim, does not establish the causal link between alleged Employer Risk Events and the delay/loss that it alleges they have caused. Instead it puts forward a collection of events and a total amount of loss and argues that the collection of events has in combination caused the loss.

- Such claims are contrary to para 2.27 JCT and the need to show cause and effect:

2.27.1 refers to identifying the “cause or causes” and any relevant events

2.27.2 refers to identifying the “expected effects”

- But such claims are not uncommon and especially when the works are not of high value and the contracting parties not sophisticated in delay analysis.

- The approach taken by the courts and by the Protocol towards global claims:

*Para 17 of the Protocol states: “the not uncommon practice of contractors making .....global claims [is] discouraged by the Protocol, despite an apparent trend for the courts to take a more lenient approach when considering global claims”*

- Why are global claims unattractive? For example:

1. They reverse the burden of proving the delay, ie it reverts back to the employer, who faced with a global claim has to either unpick it and show the causality, or concede the claim; and

2. They avoid the spotlight being turned on other possible causes of the delay for which the contractor is culpable: eg labour shortages, poor supervision and too low a tender price

- Are such claims indicative of a contractor that has not been paying attention to what has been going on during a project? The Protocol states: “If the Contractor has made and maintained accurate and complete records proportionate to the project, in most cases the Contractor should be able to establish the causal link between the Employer Risk Event and the resultant costs and/or loss, without the need to make a global claim.” (para 17.1).



- If a contractor legitimately says that it has no option but to bring a global claim and has otherwise complied with the contract on serving notice etc, it should: “proceed in 2 stages: (a) quantify those items of the claim for which the causal link can be established between the Employer Risk Event and the resultant delay and loss; and (b) claim compensation for the remainder as a composite whole” (para 17.2 Protocol).

- Broadly the following seem to be the elements that a Court will want satisfying by a contractor before permitting a global claim:

- (i) meet the contractual requirements for such a claim (ie other than showing cause and effect): eg the notice requirement

- (ii) prove the factual side of the claim: eg that the

risk events occurred and they resulted in delay

- (iii) prove that the loss/delay would not have happened in any event: eg because the tender was too low and job under-resourced

- (iv) isolate the contractor risk events

- (v) show the causal links for those parts of the claim where they can be; and

- (vi) provide evidence that the losses have been incurred.

## Concurrent Delay

- Concurrent delay is the occurrence of 2 or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, the effects of which are felt at the same time, and they both affect the critical path.

- The Protocol says that true concurrent delay will be a rare occurrence (para 10.3) (emphasis is on the word true).

- Concurrent delay is a complexity in delay claims because it is a difficult concept and people often mean slightly different things when they refer to the term.

- Complex for at least 2 reasons:

- (i) You need 3 things to align: (a) an Employer Risk Event and a Contractor Risk Event occurring at the same time (b) their effects being felt at the same time and (c) they both affect the critical path and

- (ii) Analysing that situation is then complicated.

- A particularly difficult situation is where an employer’s risk event starts after a contractor’s risk event, but they then continue in parallel. It is likely that only the contractor’s risk event will be deemed relevant, because completion was always going to be delayed during this period by that event.

- The Contractor’s part of any true concurrent delay should not reduce any extension of time award to it. The logic behind that approach probably boils down to the “prevention principle”, ie the principle that no party may require the other to comply with a contractual obligation, in circumstances where that party has itself prevented such compliance. In the concurrent delay arena, that refers to the Employer’s risk event.

- How does the JCT deal with concurrent delay? It is not dealt with in the major standard forms of contract used in the UK (such as JCT and NEC4), which leaves the parties not knowing how to act when it occurs. Sometimes the parties fill that gap with amendments.





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NB

*This e/paper is a summary of the issues only and does not constitute legal advice and no reliance is intended nor should be placed upon it. Please consult a lawyer at Ridgemont for specific legal advice.*



# Contractors and Delay



## James Burgoyne LLB ACII

Divisional Director - Claims & Technical Advice Group

James joined Brunel in 2009 and heads the Technical and Claims Department to ensure all our clients receive outstanding risk management and claims servicing.



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## Boundaries of professional indemnity insurance cover for delay

James Burgoyne of Brunel Professions discusses the risks delay poses for contractors and limitations placed on professional indemnity insurance cover.

Delay is a primary concern of parties to a construction project and as a result a contractor will often see stringent contract terms relating to breach of the project programme and failure to deliver a project by the demanded deadline. The developers' commitments are such that they are unsympathetic to unforeseen difficulties during the course of the project, where changes are needed and adjustments made.

This represents a significant area of risk to contractors, and conscious consideration of this area is all the more important as risk transfer via professional indemnity (PI) insurance is not complete.

An inspection of PI insurance policy wordings themselves will not necessarily identify the boundaries of cover for delay. A keyword search for the word "delay" would be unlikely to produce results as most policies contain no explicit exclusions or conditions relating to delay.

However there are two market standard exclusions which can operate to circumscribe the cover.

The first is a very longstanding exclusion of onerous liability accepted in contract. This is because the insurance market does not provide a blank cheque for any form of contractual liability, given the freedom of contracting parties to alter the usual legal position. The exclusion comes with an important caveat however, which is that it does not apply to liability which would have existed in the absence of the contract term in question. The acid test for "onerous" is therefore the law of negligence, with contractual liabilities which go above the legal standard of negligence being excluded, but otherwise negligence claims intended to be covered, subject to any other relevant policy terms and conditions.

This is very relevant to the issue of delay where it is not uncommon to see strict contractual commitments being given regarding project programme, or even warranties and contractual penalties.

Many contractors are not necessarily aware of this restriction on their cover. A non-specialist broker might approach the contractor's insurer regarding cover for a particular project, and the market standard response of an insurer is "covered subject to policy terms and conditions". This is not as reassuring as it might appear at first glance, as it means what is covered is still covered, but what is excluded remains excluded. Without a more specialist knowledge of the PI policy's terms, the boundaries of cover may not be obvious.

In simple terms, a PI policy will cover negligent delay, but stricter contractual terms relating to an arbitrary date will not be supported by the policy. The insurers do have a discretion regarding claim payment, but longstanding experience in this area is that the insurers will often look closely at a delay claim and whether the claim rests substantially on the contractual terms accepted. The result is that such claims can be denied or only part paid.

It should be noted that the contractors faced with such claims might well have been said to have created the situation for themselves given that they accepted the contractual terms which created the liability. However, the contractors might justifiably point to the tender exercise which they underwent, and that the acceptance of the onerous contractual position was forced on them or they would not have won the project. This places contractors between the proverbial rock and a hard place. They cannot win the project without taking on a risk which they cannot insure and where unforeseen problems which they cannot control can cause issues.

The second restriction of delay cover relates to an exclusion which has only recently arisen. The insurance market has undertaken a review of liabilities which arise from cyber issues, and particularly where external cyber attacks or wider telecommunications infrastructure issues are involved. The review was prompted by the growth of a new type of insurance policy referred to as “*cyber-liability*” cover. As this new class of insurance became more prominent, there was concern regarding the potential overlap between PI and cyber-liability policies.

The review therefore asked insurers to consider to what extent this overlap existed, and for PI insurers to be explicit regarding the cover being given under their PI policy. The market reaction has generally been to exclude these risks from PI policies going forward, on the basis that firms wanting this cover can now obtain it from a cyber-liability insurance.

The relevance to delay is ransom-ware and the disruption that this malware can cause. There is insurance market experience of construction professionals being infected with ransom-ware and being locked out of their systems. If this happens at the wrong moment, the affected party cannot supply the plans or information that are required on time, which will have knock on effects on the project programme.

The length of the delay varies depending on the circumstances of the project, the availability of back up information, the use of common data environments and the availability of cyber-liability insurance response to the incident (often payment of the ransom).

Given the strict contractual position around programme faced by contractors and the uninsured risk that this represents to the contractor, they will obviously wish to avoid delays occurring, and will be keenly interested in delay mitigation. Key questions are therefore what data dependencies exist for a particular project, and the ability of the participants to respond to disruption.

The contractor may well want to add cyber-liability to the insurances it requires from other participants, along with the existing list of public liability, employers liability and PI insurance.



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## Mike Feasey

Relationship Director

Mike joined Secure Trust Bank as a Relationship Director in March 2022 from Handelsbanken where he held various roles, latterly a senior corporate manager.

He works as part of the Reading-based team supporting investors and developers across the Thames Valley, Midlands, South and West and has experience across a range of asset classes and client types.

Mike joined Secure Trust Bank as he was keen to join a growing and ambitious bank. He enjoys working with real estate investors, structuring deals to support them with their goals. When not in work, Mike spends his time playing golf, in the gym, watching football or walking his dog.



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# How to approach a lender in the event of delay

Delay within the construction industry has been more commonplace in recent years. **COVID, BREXIT** and the **War in Ukraine** are just some of the unforeseen events that have recently caused widespread delays.

The construction materials shortage hampered the industry throughout 2021 with significant supply chain issues seen by the majority. Whilst early this year the issues appeared to be easing, soaring energy price rises, which came into effect in April, and the ongoing war in Ukraine have started to reverse this progress.

The FMB State of Trade Survey for Q1 2022 found 73% of SME builders have delayed jobs because of a lack of material whilst 55% have delayed jobs due to a lack of skilled tradespeople (\*1).

It is therefore in the interests of all parties to ensure that the risk of delays and shortages are appropriately managed. For employers, the main risks are delays to completion and the solvency of the contractors. For contractors, the risks include exposure to rising prices and liability under LADs as a result of delays. Lenders must assess all of these risks with delay being the most likely outcome in each scenario.

Delay is nothing new to Lenders, we understand that sometimes things can go wrong and a lot of the time it is things out of your control. Therefore, delay is a common risk factor considered by lenders when assessing construction loans. A common practice of keeping a contingency fund for construction delay is also undertaken by banks when assessing the construction loan – be it due to bad weather, staffing issues, or even poor management. Getting the right level of contingency is paramount and for that reason Secure Trust Bank generally looks to a 10% contingency (against core build cost) in the current market.

## 1. Length of delay

Be clear about whether this is a relevant / significant event in the first instance. There is a difference between a modest delay in programme compared to a relevant event. Has the CA/Architect put something in writing to confirm, setting out a *'fair and reasonable'* request for an extension of time? Is the extension of time required and deliverable?

## 2. Engage with the lender at the earliest opportunity

You should engage with the lender as soon as possible especially if a relevant or significant event is identified. Tell them as soon as an issue is apparent rather than trying to hide it until you have all the answers. A simple telephone call in the first instance can go a long way.

The lender will require time to think of a solution, often with bank IMS and legal advisors' opinion required, so an early approach is always welcome. Early engagement with the lender's monitoring surveyor is also important.





### 3. Be open and honest

Be open with the lender – tell them all the facts rather than drip feeding them / hiding things you think they may not want to hear. It is better that the lender has all the facts so that they can make the appropriate decision.

### 4. Be prepared

Whilst you may not have it as part of the initial call, be prepared to provide a detailed and revised timeline / cash flow in due course and let the lender know that this is in hand.

Consider the solution to the problem?  
Who / what can help to mitigate the risk?  
Is an increase or an extension to the facility required? What is the best

anticipated result for all parties? What is the risk if the bank cannot/will not assist if required? It is always good to go to the lender with a solution to / good understanding of the issue faced.

When applicable it is important to be able to demonstrate to the lender that the project is still viable, providing evidence of why you believe that and formulating a Plan B that you can both believe in.

### 5. Other considerations

- Is there a lending covenant breach risk?
- Reps and Warranties – Doing nothing is not an option. Possible risk of triggering an event of Default/Material Adverse Effect? Is there Cure Right in place?
- Engage with your broker: if the lender is unable to assist your broker may be able to find alternative funding options.
- In the event of delay are there sufficient funds to pay for cost overruns customarily associated with delays?
- Impact of an increase in loan costs due to; longer loan period, higher loan amount, increasing interest rate environment

**In summary, the most important thing to do is to engage with your lender at the earliest moment possible and to be as open and honest as possible.**



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## Stewart Owen

### Director, Head of Business Development

Stewart Owen MBA MCR is a highly experienced, General Management focused, Pre-Construction, Sales, Marketing and Business Development Director with extensive success in delivering revenue growth.

Stewart has a strong ability to identify and access major opportunity through analysing and researching the market and by utilising effective networking skills to create, build and maintain strong client and consultant relationships. He has outstanding Project Management skills in building and leadership of a variety of high performing, cross functional teams, ensuring delivery of world class, work winning strategies.

Stewart has successfully won a large number of project tenders through effective leadership of bidding and presentation process and by planning and negotiating with high value clients.



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# Delay a commercial perspective

Delay – a Commercial Perspective- a Game of Three Thirds

Whilst we return to some sort of normality post Covid (assuming no significant resurgence) there is a sense the construction sector weathered the storm of pandemic related effects reasonably well.

In reality, many projects were seriously delayed, but contracting parties seem to have reached commercial settlements by 'trading off' contractor side Extensions of Time (EoTs) against Client Employer side Liquidated and Ascertained Damages (LADs) each having decided that pursuing these was more trouble than it was worth and these were unprecedented times

But is this 'fair'?




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a d a i r



The Dispute Resolution team at Adair, led by Expert Witness Justin Sullivan, deals with many claims arising from conflict in construction projects, and we have a strong and informed perspective built on forensic analysis of the causes of conflict.

We see many claims arising from disputes about costs, but the prime causes of these disagreements are often related to performance against the programme. Understandably; after all Time is Money. For developers, this is literally true – additional borrowing to cover the delay in getting the ‘product’ to market is generally at higher rates and is harder to find. For contractors, in addition to increased prelims, delay can be detrimental to cashflow, which is frequently a major stressor to the business.

So, what is wrong with reaching a commercial settlement based along the lines of meeting halfway (or at the mid-point)?

When a dispute emerges, each side tends to believe the other side is entirely at fault. Our experience shows something different.

But first, why do projects that start so optimistically and positively seem to evolve into something more adversarial?

We often see the indicators that a project is going awry become evident, often about 1/3rd of the way into the construction phase, signalled by the programme being clearly ‘behind schedule’ The obvious thing would be to intervene and address this at this point; except this rarely happens. Why?

We see the contractor, having made provision by building in ‘float’ will continue to provide reassurance, often based on optimism bias (knowing there’s float secreted up the contractor’s sleeve), that they can recover during the second 1/3rd of the programme and all will be well in the close out phase of the final 1/3rd.

Many disputes arise once this ‘optimism bias’ is seen to be unfounded. However it may not be apparent the situation is irreconcilable until towards the end of the second 1/3rd of the programme, when it is too late and positions have become entrenched and there is insufficient time to achieve a recovery.

Our view is, at the first 1/3rd stage, if things look off track, it is critical to have a strong review, tough examination of the programme, rigorous interrogation of the recovery programme and clear actions – if delay has arisen as a result of client change or lack of information, this needs addressing and urgently; if it’s because the contractor is underperforming, then draw out the causes and address them.

At the same time set the tone for how the job is to reach PC on target, and allow the client to explore funding options – most lenders find early engagement far more reassuring than ‘late panic’ – experienced lenders understand and are far happier to consider less onerous options at this point

One thing that became apparent during, and subsequent to Covid, is that there was a great deal of naivety about the contractual position relating to delay. The term ‘Force Majeur’ must have been the most commonly misused phrase referred to by parties and the industry – plenty of law firms were offering webinars on this theme. It was proven to be not the panacea, if it can be considered such, it was thought to be.

So, to return to thoughts about responsibility and culpability.

It can be extrapolated from various industry reports that, prior to Covid, the Suez Canal problem, and consequences of Brexit, ‘only’ 60% of projects are traditionally delivered ‘on time’, ‘on budget’ and ‘on quality’ (i.e to the expected level of quality/content).

It can therefore be inferred a proportion of recent concessions, if on the basis of meeting halfway, and made during commercial settlement, were perhaps not equitable, because the party wasn’t able to draw out whether the project was going to be late/over budget or wrong anyway and how much of that is the party’s responsibility... Covid will have masked a lot of extant problems caused by other reasons.

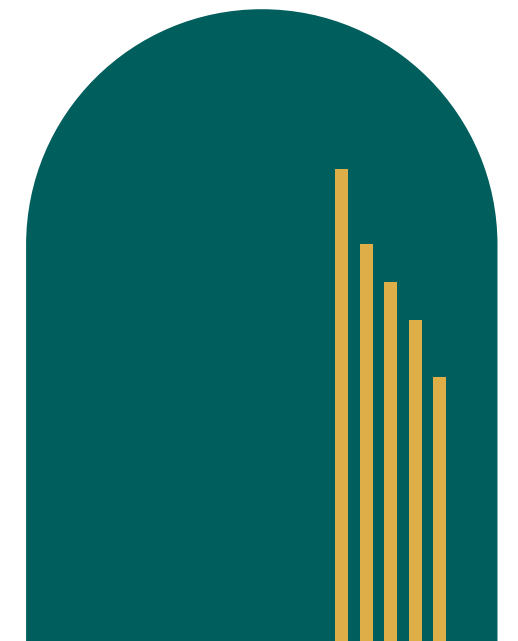
Clients tend to attribute problems to contractor underperformance and poor management; contractors tend to attribute problems to client changes and decision making and to late provision of information. Who is right?

We believe many conflicts were, and are being resolved by the parties but from an uninformed position – simply meeting ‘half way’ or by one side, believing it to be liable or in an indefensible position, conceding more ground than strictly necessary or equitable. There is clearly benefit to be gained by being better informed as to the actual position and risk/reward for that more informed approach.

As it happens, in regards to claims, our experience shows this also tends to be in thirds, rather than halves.

Irrespective of common thinking that a party often takes, that the other side is entirely responsible, most claims seem to be each party is either 1/3rd or 2/3rds responsible, and therefore either partly or mostly liable. So the commercial position in regards to settlement is the difference between the 50/50 crude ‘expectation’ and the more realistic allocation of culpability along the lines of 1/3rd v 2/3rd or 2/3rd v 1/3rd. The trick is to know, as far as possible, which side of the 2/3rds 1/3rd divide each party sits. And that requires analysis.

To us, this represents sufficient substance to make using professional advisors certainly worth considering before moving into or past the negotiation window. And this analysis can be carried forward to any adjudication if this proves unavoidable – not having the analysis is a false economy – few would make a making a business based decision without independently ascertained, robust numbers and data.



So what's the learning we can take away from this episode? Our view is firstly, ascertain the contractual position through consulting your legal counsel; this can save a lot of heartache and certainly need not be expensive, relatively speaking. Next, employ a specialist consultant (yes, Adair is one such specialist) to give at least a high level view of the extent and balance of culpability/risk of any potential difference between the contractor and employer – which side of the 'thirds' divide do you sit?.

Then make a commercial call based on the same principles the business uses when making business decisions – simply, deploy principles used when making ROI based choices. Finally, build and develop the risk profile for the claim, a strategy and understand the appetite for and consequences of the available negotiated offer versus escalation.

Perhaps Covid didn't change anything, but it did highlight something we should already be aware of – the industry tends to use crude metrics, expedient solutions in the misplaced belief this saves costs, and is at risk of not being informed enough to decide how to resolve conflicts equitably.



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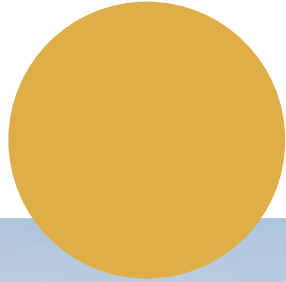
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## Francis Mainoo

### Head of Sales

With nearly 20 years' experience in financial and professional services, Francis has spent most of his career engaging with business owners, private equity houses and decision-makers to support their commercial growth. His many successes have been achieved by challenging existing sales channels and strategies, and identifying ways that businesses can enhance their marketable activities.

Francis has developed an extensive network of contacts and has a proven track record of consistently delivering value to employers and contacts. He is always happy to meet with dynamic businesses to discuss how Moore Kingston Smith can help them to reach their potential – feel free to contact him directly.

Well-respected in the City of London, Francis is regularly sought as a speaker and commentator on best practice business development.

In his spare time, Francis likes to spend as much time as possible with his wife and young son. He is also an avid motorbike fan, getting up to 150mph on the track on a good day!

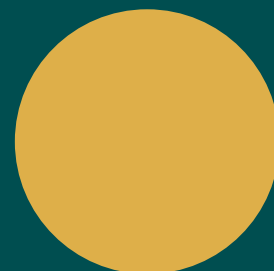
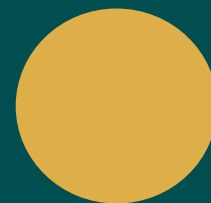


Let's Connect!

### Interaction of operational and finance managers

Given the current turbulent market conditions, delays are more likely, maybe even inevitable. Delays in construction happen for a myriad reasons. It is crucial that project managers consider the potential risks and impacts and ensure that the profitability, or lack thereof, of your contracts is reflected within your financial information on a timely basis.

Do you have a robust process to ensure reforecasts of contracts are updated within the financial information?



### Cashflow and finance headroom

There is usually a delay between historical financial results being audited, agreed and provided to funders to support the growing funding needs of a business. By ensuring that your business secures its financing and headroom when it is performing well, and is financially strong, could secure better terms and larger facilities. Delays in contract delivery can complicate and undermine this timing by delaying profits being recognised and/or earned.

Financial headroom should consider possible issues such as delays, inflation, new suppliers/contractors, remediation work and/or customers not paying. Knowing how to calculate a buffer to absorb likely eventualities is fundamental.

### Accounting

*Reforecast project profit/losses and accounting for Long-term contracts (LTC's)*

LTC accounting for construction projects is notoriously difficult. It is usually based on a percentage complete basis. As the total profitability of your project changes, so does your accounting estimates. If initial assessments of contract profitability are consistently different from actual results then the year-end financial results may vary more than the changes in contract profitability.

Understanding in detail how to budget for a construction project is the corner stone of its success. Profit and loss needs to flex during a project's various stages to accommodate cost increases caused by delay. Marrying this to the year-end accounts must allow for the cumulative position of the contract performance.

### Disputes – liabilities, costs of dispute

Disputes need to be fully understood by your finance team, along with considering potential costs of delays/disputes and costs to settle. Liabilities from a dispute may need to be accounted for sooner than assets from a dispute.

### Credit rating

It is important to understand your credit rating and consider how to manage it given the cyclical nature of the construction market. The cyclical nature of the market means that good results, and the ease of access to financing when things are going well, do not exist when the cycle has turned. You should allow room for growth in your financing structure and headroom, as well as any unforeseen events that may reduce your credit rating. If emergency funding is needed, the lender will consider other aspects, such as company or project size, state of completion and point in market cycle. It is expected, by funders, that Shareholder support will take most of the risk. Additionally, historical accounts need to be supported by robust management accounts to support financing needs when delays and extra funding are needed quickly. Do you have a strong finance team that funders believe in?

### Credit rating

Check the credit worthiness of key suppliers and customers to ensure you understand their credit risk and potential financial impact on your business if they ceased to trade. These risks should then be managed.

### Help from the construction experts

Moore Kingston Smith has been accounting for construction clients for decades. Our specialist Real Estate and Construction (REC) team knows the market intimately, and they proactively flag any sudden concerns looming on the horizon. Get in touch for further information or support.



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