A Slice of Luck? Not Likely

Construction Delay Analysis in the High Court of Hong Kong

by **Scott Adams**

Disputes concerning delay, disruption and extensions of time (EOT) are, sadly, part and parcel of the construction business. This may continue to be so for some time; the problem is that certain fundamental issues continue to polarise opinion, causing schisms of a seemingly intractable nature.

One such EOT dispute has recently reached the High Court of Hong Kong. The decision by Reyes J in **Leighton Contractors (Asia) v Stelux Holdings Ltd. (HCCT 29/2004)** will be of great interest to those who are tasked with either preparing or defending an EOT claim. The case involved a request to the court by Leighton to seek to appeal an arbitrator's award against it.

The decision is potentially significant because it involves a judicial interpretation of Clause 23 of the Standard Form of Building Contract, Private Edition — Without Quantities, 1st RICS Edition. The judgment makes no reference to any amendments to the clause, or any special conditions (for reasons which are not germane here, it is unlikely that Leighton would have launched an appeal at all if the clause was non-standard).

Space does not permit a complete recital of Clause 23. The material words of the clause (as quoted in the judgment, but with my emphasis supplied), for the purposes of this article, are:

*"(1) Upon it becoming reasonably apparent that the progress of the Works **is delayed, or is likely to be** delayed, the Main Contractor shall forthwith give written notice to the Architect..."*

*"(2) If, in the opinion of the Architect, upon receipt of any notice... given by the Main Contractor under sub-clause (1) of this Condition, the completion of the Works **is likely to be or has been** delayed beyond the Date for Completion [by]:"*

(The reasons are then set out.)

"... then the Architect shall, as soon as he is able to... make in writing a fair and reasonable extension of time for the Works."

The emphasis has been added to show that the clause contemplates two types of delay: 'actual' delay, and 'likely' delay. The small, disjunctive word 'or' denotes that they are different beasts. Naturally, a 'likely' delay can only occur in the future, although it follows that, in order to submit the EOT notice, something must have happened in the present to trigger the likelihood.

Leighton's claims were that: (1) the Arbitrator misapplied Clause 23 because it was held that it only operated when there was an actual delay to the construction work; and (2) the Arbitrator failed to consider whether certain activities were "likely to cause delay". In effect, as the judge noted, these are just two sides of the same coin. In short, it was being claimed that the Arbitrator had effectively ignored the words "likely to be", as underlined above.

What makes the judgment even more of interest is that, apparently, both Leighton and Stelux pleaded their respective cases on delay using a "time-slice" method. Arguably, this is the best method to use when faced with an EOT clause like Clause 23, since the method can model both types of delay. However, the approach of Stelux's expert in applying the method was crucially different. The judge gives us a snippet from the Arbitrator's award:

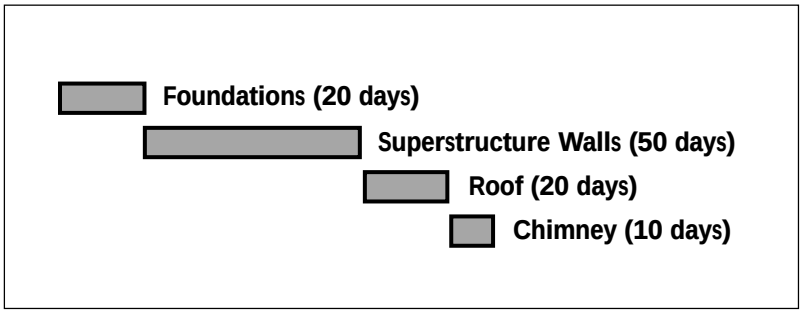
"[Stelux's Expert] does not consider off-site delays until they affect 'on-site' activities and then only to the extent that they do. In my view, such an approach is entirely consistent with Clause 23(2)... and is correct."

We are also told that the Arbitrator rejected the approach of Leighton's expert, who "focussed on the prospect of a delay resulting from an event at a given time, regardless of whether in retrospect the event had actually caused delay."

The judge held that he could not see how the Arbitrator's approach could be faulted. Leave to appeal was denied. Leighton's application thus failed.

But, hang on a minute, does not the quote from the Arbitrator's award actually demonstrate the validity of the claim? If consideration of 'on-site' delays are only analysed 'when they are affected', is this not considering just 'actual' delay, and ignoring totally the 'likely' variety? Are there not two types of delay in play in Clause 23? And surely, Leighton's expert was right (at least in principle) to examine prospective delay. If a 'likely' delay must cause an 'actual' delay to generate an entitlement to EOT, are there not too many words in Clause 23?

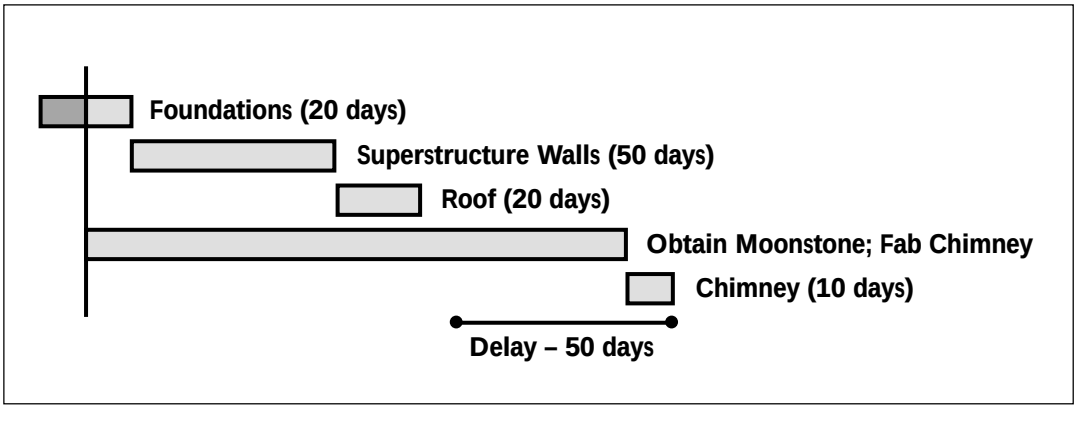
In order to examine the issues at stake here, it is best to make a digression by means of a simple example. Let us say that we are a main contractor. We have contracted to build a house; the time for completion is 100 days. Our programme for the works is shown in Time-Slice 1.



Time-Slice 1: Initial 100-day Programme for House

We commence the foundations as planned. Things are going swimmingly, when on Day 10 the Architect issues an instruction concerning the chimney. For architectural reasons, he wants it made of pure moonstone (this is a frivolous example, but it will suffice to illustrate the principles). We, the contractor, will now have to wait for the next manned mission to the moon before we can get our hands on the material for the chimney. This is commonly known in the trade as a "procurement problem". We get in touch with NASA, and make all the requisite enquiries of the European Space Agency. The earliest time by which the materials can be retrieved, fashioned into a chimney, and erected on the house is by Day 150. Thus we produce an updated programme, and submit it with a Clause 23(1) notice (Time-Slice 2).

Thus the variation produces a prospective delay of 50 days. We shall assume — for this discussion — that the chimney is vital to completion of the house, and cannot be taken out of the programme as "outstanding works". On seeing this programme, of course, the Architect might consult with the Employer to see if he really wants the moonstone feature; he can also consult with us (or possibly even ask questions to NASA) as to the validity of the programme. But if he is satisfied that the procurement programme is valid, and the Employer really wants that moonstone chimney,



Time-Slice 2: Programme after Chimney Variation

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then he surely must award an EOT to us. This is so not only because it is good project management, and not only because Clause 23 imparts a sense of urgency (note the language above: "…forthwith", "…as soon as"), but because it is fair and reasonable. We cannot possibly finish before Day 150 now, can we? If the Architect is asked, at this juncture: is the moonstone chimney likely to cause delay, how can he say it is not? Is it not a purpose of Clause 23 to account for delays such as this one? Otherwise, why bother with the words "is likely to"?

The delay in Time-Slice 2 above is an 'off-site' delay. Heavens, if we must get stone from the moon, it is an 'off-the-face-of-the-earth' delay. But now consider that, after the variation on Day 10, we totally mess up the superstructure walls. Our workmanship is poor; our sub-contractor goes bankrupt; the material supplier fouls up his order for the bricks; our replacement sub-contractor is under-resourced.

While this 'wall-to-wall' catastrophe unfolds, man goes to the moon, brings back the booty; the manufacturer then makes the chimney and delivers it to site. But we are not ready for it. The messed-up walls are (say) only 60% complete.

The roof is thus still to be constructed because the (unfinished) walls have proved to be such a nightmare. Therefore we have a programme time-slice such as below (Time-Slice 3).

Now what? Well, on the 'Stelux view', the moonstone variation has caused no delay because the 'on-site' chimney activity was not delayed by it; the variation made no difference. The chimney was actually delayed by our wall problems. Does this mean that the 50-day entitlement has been 'extinguished'? Well, once an EOT has been awarded, it cannot be rescinded. The corollary is that if Stelux (and hence the Arbitrator, and Reyes J) are correct, any decision on an EOT claim for prospective (likely) delay must be held in abeyance to see if there is any actual delay. Whilst this conclusion is seemingly in the teeth of clause 23, contractors may, on this view, have to wait a long, long time to see if 'likely' delays become 'actual' delays. The decision could have far-reaching ramifications for contract administration in Hong Kong.

Of course, arbitrations are private, and the programmes used in the case (quite properly) do not form part of the judgment. We do not even know if the judge was presented with any programmes to peruse by the parties. Nor do we know the (de)merit(s) of the individual delays claimed. Nonetheless, on principle, if one of the two permissible species of delay was ignored, or was 'demoted' somehow, then surely something has gone awry.

This writer has always been of the opinion that critical delays should be treated on a 'first-in-line' approach. In the simple example above, the contractor would thus be entitled to 50 days EOT due to the variation, because when it happened it was likely to cause that delay; the remainder of the delay, an actual delay — due to the walls — would be treated separately and consecutively.

It appears that, by having likely delays only considered in their time-slices if they later caused actual delay, Leighton has perhaps had a slice of bad luck.

Time-Slice 3: Chimney Delivered; Walls Incomplete