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# Sorry, we are not giving you the native programme files!

As we all know, a large proportion of construction disputes revolve around delay. A fundamental part of dealing with these disputes is getting to grips with the construction programmes. It is beyond dispute that that the critical path activities must ultimately be affected by an excusable event to result in an extension of time. Consequently, access to the native electronic programme files, although not imperative, is of considerable assistance in determining more reliably where the critical path sits.

The importance of a reliable critical path has been highlighted in a number of cases before the courts. In complex projects it is often near impossible to determine this without native programme files. The problem was addressed in Mirant Asia Pacific Construction (Hong Kong) Ltd v Ove Arup and Partners International Ltd [2007] EWHC 918 (TCC) where His Honour Judge Toulmin CMG,QC said:

*"In the helpful work, Delay and Disruption Contracts by Keith Pickavance (LLP 2005), the author makes the point that the Critical Path Method requires detailed and sophisticated analysis and that in complex projects it is unlikely that a critical path can be identified inductively, i.e. by assertion. "It can only reliably be deduced from the mathematical sum of the durations on the contractor's programme to be completed in sequence before the completion date can be achieved."* ***This is an important cautionary word in this case where a number of witnesses were convinced, without the benefit of any such analysis, that they knew where the critical path lay."***

...

*"Without such analysis those controlling the Project may think they know what activities are on the critical path but it may well appear after a critical path analysis that they were mistaken. [emphasis added]"*

Typically, when delay arises, the contractor makes the running by preparing a claim supported by some form of delay analysis reliant upon various versions of the programme. The contract administrator or employer reviews the claim, and if they do not already have them, may ask for native versions of the programmes which the contractor has used.

I have been involved in preparing and reviewing claims where the contractor has flatly refused to give native files to the other side and I have often thought about whether this prejudices his position. My instincts always tell me that in any dispute you need to occupy the "moral high ground". Withholding native programme files suggests you are deliberately hiding something.

Sometimes contractors feel that their programmes are somewhat less than perfect, and any imperfections may be exposed if native files are provided. All programmes are imperfect: that is the nature of the beast.

Occupying the moral high ground is all very well, but it is a rather abstract convention. Is there a more compelling reason to provide native programme files to the other side in a dispute?

This particular matter was considered in Eurocom Limited v Siemens PLC [2014] EWHC 3710 (TCC) although it was somewhat of a subsidiary issue. Siemens was defending a delay claim from Eurocom. The dispute resulted in an adverse adjudicator's award, and in challenging the adjudicator's decision, Siemens argued that the adjudicator breached the rules of natural justice when

he, amongst other things: *'… failed to order Eurocom to produce native versions of the programmes on which it had based its delay case so that Siemens could properly respond."*

This of course raises the issue of what are the rules of natural justice? At their highest level they have been formulated as follows:

- nemo judex in suo causa – the judge/arbitrator/adjudicator should be impartial with no interest in the outcome (Dimes v Grand Canal (1852) 3 HLC 759); and
- audi alteram partem – a decision should not be taken without all parties being heard (Ridge v Baldwin 1964 AC40).

The law reports are littered with judgements whereby arbitrators or adjudicators have been said to have breached the rules of natural justice. The cases are particularly fact sensitive covering a wide range of problems such as excluding evidence, timing of hearings, conflicts of interest, etc.

Returning to the Eurocom case, the Honourable Mr Justice Ramsey only briefly considered the matter of native programme files, saying (at paragraph 125):

*'I do not consider that the absence of programmes in native format can found a basis for breach of natural justice."*

Regrettably the judge did not expressly give his reasoning, but what can be distilled from other parts of the judgment is that he seemed to be of the view that Siemens had adequate documentation and time to deal with the issues raised by Eurocom without the need for native programme files.

*'The time periods were short and, in particular the need to work over the Christmas/New Year period put pressure on Siemens. However, having considered the responses and submissions which Siemens put in, it can be seen that they were able properly to respond to matters raised by Eurocom."*

Of course, as with other natural justice claims, this turns upon its particular facts, so laying down hard and fast rules about refusing to provide native versions of programme files requires careful consideration. If there is a demonstrable refusal to provide native files an adverse inference may be drawn by the tribunal.

Regardless of all these considerations, the first port of call is always the contract since that may well stipulate which programmes must be provided and in which format, both throughout the progress of the works and in support of any claims.

One final and perhaps overriding thought: the burden of proof rests with the contractor and he must prove his case on the balance of probabilities. Does the absence of native programme files lessen the chances of the contractor discharging that burden? It is often a fine balancing act, but the issue is not an absence of programmes, but an absence of native programme files. It is the contractor's prerogative to decide the scope of evidence upon which he will rely to support his claim and, in many instances, (particularly for less complex projects) the hard copies of programmes are often sufficient.

If you require any further information, please contact David Gainsbury at davidgainsbury@hka.com.

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