

Causation and Common Sense

Thomas Barnes & Sons PLC (in Administration) v Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC)

A recent case in the TCC has provided comment on the perennial issues of delay analysis methodologies, causation and concurrent delay.

Thomas Barnes & Sons (“**Barnes**”) was appointed by Blackburn with Darwen Borough Council (“**Blackburn**”) in 2014 under an amended JCT SBC 2011 with Quantities, to construct Blackburn bus station to an innovative design, comprising a “Hub” area for offices at ground and mezzanine levels and a “concourse” providing a waiting area and access to buses.

The appointment of Barnes was terminated on 04 June 2015, who then brought an action for unfair termination, an extension of time and prolongation costs for a period of 209 days over and above EOT of 84 days awarded during the Works.

Delay Analysis Methodologies

Delay experts appointed by both parties referred to methodologies identified in the SCL Protocol, with the Barnes expert referencing the “as-planned versus as-built” methodology and the Blackburn expert, referencing a hybrid time slice and time impact analysis.

In cross-examination, it was contended that the Barnes expert had not followed the as-planned v as-built method and that the Blackburn expert, had relied on a methodology that was more relevant to a prospective rather than a retrospective method of analysis.

HHJ Stephen Davies commented:

*“Both arguments had some force. However, in my judgement it would be wrong to attach too much importance to a close analysis of whether each had properly chosen or loyally followed the particular method selected. **The SCL Protocol itself discourages such an approach.**”* [para. 109 – emphasis added]

“Thus it would be wrong to proceed on the basis that, because the SCL Protocol identifies six commonly used methods of delay analysis, an expert is only allowed to chose one such method and any deviation from the stated approach renders

their opinion fundamentally unreliable However, I do accept that if an expert selects a method which is manifestly inappropriate for the particular case, or deviates materially from the method which he has said he is following, without providing any, or any proper, explanation, that can be a material consideration in deciding how much weight to place on the opinions expressed by the expert.” [para. 110 – emphasis added]

He went on to reference four observations made by Akenhead J in *Walter Lilly & Company Ltd v McKay* [2012] EWHC 1773 (TCC):

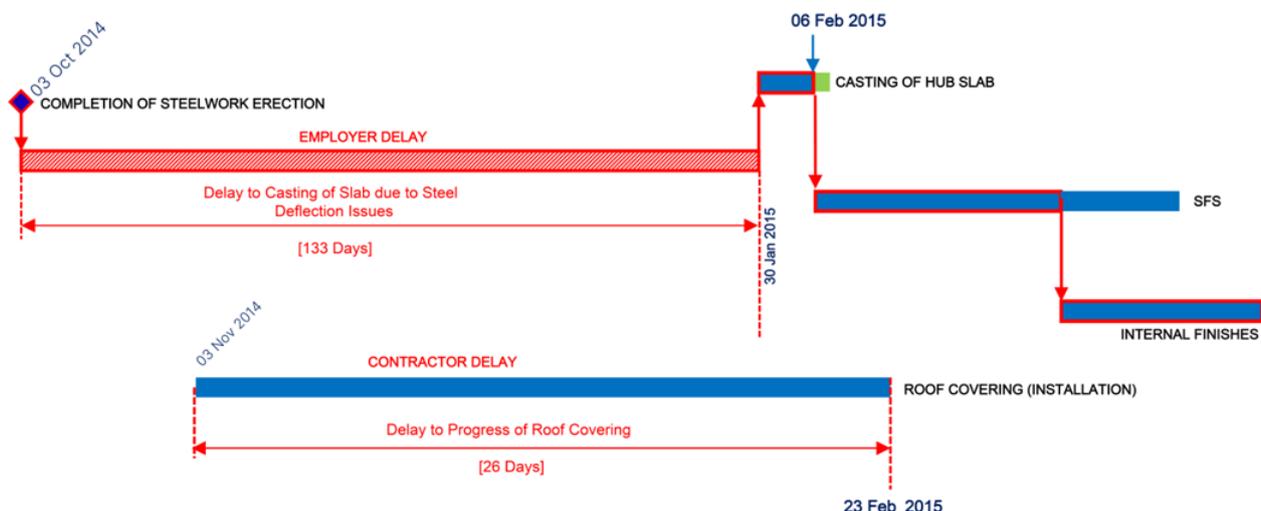
- The court does not have to choose either analysis. It is a matter for the court to decide if, how, and to what extent the works were delayed.
- In determining what is causing delay at a given time “...one should generally have regard to the item of work with the longest sequence” [para. 113]
- “...it is not necessarily the last item of work which causes delay” [para. 114] or in other words, effect should not be confused with cause.
- “...a complaint is irrelevant to a delay analysis if it was never agreed upon, established or implemented” [para. 115] or in other words, cause and effect turn on fact.

How these observations became relevant to the dispute is a reminder that common sense and facts, can have greater cogency than the arithmetic of activity durations, logic linking and float values in determining the critical path(s).

Critical Paths, Causation and Delay

A significant part of the dispute arose from the criticality of the roof coverings, as opined by Blackburn’s expert, and in the same period, the criticality of the hub steelwork deflection issue, as opined by Barnes’s expert.

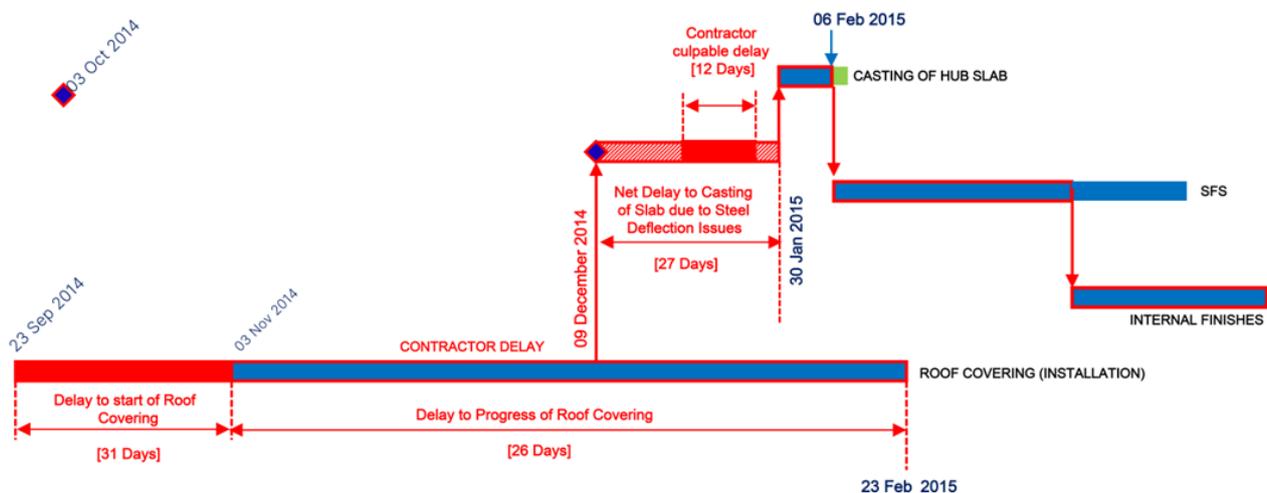
Specifically, Barnes’s expert opined that critical progress was dependent on the resolution of the steel deflection issue, which would have allowed the casting of the first-floor slab to the hub, to allow the SFS installation to progress, to form the external envelope which, in turn, would allow hub finishes to progress.





Conversely, the roof coverings started on 03 November 2014, delayed from the planned start of 23 September 2014, and, following the delayed start, subsequent progress was further delayed, such that the roof coverings were completed on or around 23 February 2015, that in turn allowed the hub finishes to progress.

Blackburn's expert opined that because of the roof covering delay, the critical path did not switch to the steelwork deflection remedial works until 09 December 2014, resulting in a delay of 39 days to 30 January 2015. This reduced the Employer culpable delay to 27 days after an allowance of 12 days due to Barnes' failure to act on an email from the structural engineer in January 2015.



The roof covering delay was a Contractor culpable event and the steelwork deflection issue an Employer culpable delay event.

Why did the experts have opposite opinions on the route of the critical path in the same period?

HHJ Stephen Davies summarised the opinion of Blackburn's expert:

"...the GRP roof cladding could not progress until the roof coverings had begun, and because the roof coverings needed to be progressed before a start could be made on the internal finishes and services to the hub and concourse areas and the concourse glazing. It is obvious, I agree, that the GRP roof cladding and the concourse glazing cannot be progressed in an area until the roof coverings are in place in that area and also that the majority of internal finishes and services cannot be progressed until the roof coverings are in place so as to give protection from the elements." [para. 132 – emphasis added]

Barnes's expert was broadly in agreement with the Blackburn expert in that he opined that the internal works could not progress until the roof coverings and SFS to external walls were complete such that the working area was watertight and weathertight but with the fundamental exception that the critical path ran through the SFS, which was driven by the steelwork deflection issue and not the roof coverings. This was because the SFS was completed after the roof coverings and therefore, the SFS and not the roof coverings were critical to the progression of internal finishes. Consequently, he did not consider the roof coverings to be a cause of critical delay.



*“His view was that since the delay due to the **hub steel deflection issue continued throughout and beyond any delay due to the roof coverings issue**, the latter was not a relevant cause of delay to completion.” [Para.116 – Emphasis added]*

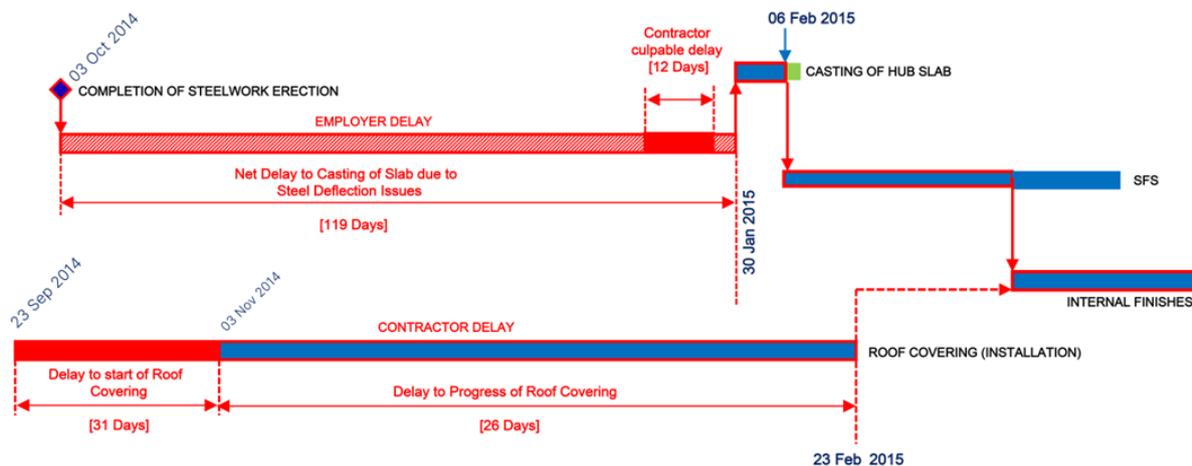
Blackburn’s expert opined that the Barnes as-planned programme demonstrated that concrete topping and subsequent hub SFS installation were planned prior to the roof coverings and that on this basis, the structural steelwork remedial works demonstrated float and therefore, were non-critical until 09 December 2014.

HHJ Stephen Davies concluded:

“Whilst I am prepared to accept this evidence from a theoretical delay analysis viewpoint, comparing the as-planned programme with the position at various points in time, it does not seem to me to be a sufficient answer to the point on causation, which is that on the evidence the fact is that the delay to the remedial works to the hub structural steelwork and the delay to the roof coverings were both causes of delay over the period identified by Mr x [Blackburn’s expert] where the roof coverings were delayed. Even if there had been no delay to the roof coverings the hub finishes, which it is agreed were on the critical path, could not have started earlier because of the delay to the remedial works to the hub structural steelwork.” [para. 143 – emphases added]

“I am also satisfied that the converse is also true. The claimant cannot simply say that because there was a problem with the hub structural steelwork identified in October 2014, which was not finally resolved until January 2015, all of the delay between those points in time was only caused by this cause. It ignores the fact that for a very considerable period of time there was also a problem caused by the delay to the roof coverings which was itself a cause of delay to the critical path...” [para. 144 – emphasis added]

“In his report Mr Y [Barnes’s expert] made only passing reference to the other potential causes of delay to the hub building...If by this he meant to suggest that the roof coverings could have been progressed but they were non-critical and could have been performed in a more leisurely manner as a result, this seems to me to ignore the fundamental fact that throughout the crucial period from October 2014 through to January 2015 the claimant could not have known how long the remedial works to the hub steelworks would take and could not therefore reasonably have proceeded on the basis that there was no need to worry about the roof coverings until the hub steel deflection issue was completely resolved.” [para. 133 – emphasis added]





“In my judgement this is a case where these causes were concurrent over the period of delay caused by the roof coverings. That is because completion of the remedial works to the hub structural steelwork was essential to allow the concrete topping to be poured and the hub SFS to be installed, without which the hub finishes could not be meaningfully started, **but completion of the roof coverings was also essential for the hub finishes to be meaningfully started as well.** It is not enough for the claimant to say that the works to the roof coverings were irrelevant from a delay perspective because the ... the remedial works to the hub structural steelwork were continuing both before and after that period of delay. Conversely, it is not enough for the defendant to say that the remedial works to the hub structural steelwork were irrelevant from a delay perspective because the roof coverings were on the critical path. **The plain fact is that both of the works items were on the critical path as regards the hub finishes and both were causing delay over the same period.**” [para. 140 – emphases added]

“It follows on an application of established principles as noted above that the claimant is entitled to an EOT for this period of time.” [para. 145 – emphasis added]

HHJ Stephen Davies went on to conclude that amended clause 2.29A did not alter this conclusion because the critical delay to the hub remedial works “...was not a circumstance arising by reason of any error, omission, negligence or default of the claimant or its subcontractors” [para. 146] and therefore, the clause did not negate or reduce EOT entitlement in the circumstance of concurrent delay but reinforced that the Claimant was not entitled to recover loss and expense for the concurrent period of delay:

“It follows in my judgment that the claimant is entitled to an EOT of 119 days... However, it also follows that the claimant is only entitled to recover for prolongation **for the lesser period of 27 days net of the concurrent delay due to the steel frame deflection.**” [para. 148]

It is unclear where the 27 days of loss and or expense falls, but it would be reasonable to conclude that it arises in a period when there was no concurrent Contractor culpable delay.

As a final point, whilst the steel deflection remedial works represented an Employer delay event, the right of the Contractor to an EOT was subject to a duty to use “best endeavours” to prevent delay.

HHJ Stephen Davies accepted that the steelwork remedial works could have been undertaken after the casting of the first-floor slab, allowing the slab to be cast earlier, provided it was cast in 2 parts, but acknowledged what he considered to be a reasonable position taken by Barnes’s expert that unless instructed, he would not have expected a contractor to incur additional costs by casting the slab in 2 parts and, there was no reliable evidence of the time, if any, that would have been saved had this been undertaken.

The judgment maintains the established principle for concurrent delay under English Law, of entitlement to an EOT, but not entitlement to loss and expense, and, whilst the facts vary between disputes, provides useful guidance on how the courts continue to take a common-sense approach to delay.

- The credibility of a methodology turns on whether it is appropriate in the circumstances, supported by a coherent explanation and based on the facts.

*“...irrespective of which method of delay analysis is deployed, there is an overriding objective of ensuring that the conclusions derived from that analysis **are sound from a common-sense perspective.**” [para 11.2 SCL Protocol – emphasis added]*

- Deviation from the SCL Protocol does not automatically render an analysis methodology unreliable because the objective of the Protocol is to provide useful guidance consistent with good practice rather than a benchmark for good practice.
- The SCL Protocol is not prescriptive and therefore provides the opportunity for variance, within the rationale of each methodology.
- The duty of a delay Expert is to assist the court but ultimately, the court will decide the critical path and cause and effect of delay events based on the facts.
- The position on concurrent delay, EOT and entitlement to loss and expense under Scottish law, other common law jurisdictions and civil law jurisdictions is different

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