

Issue No : 11
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Author : Roger Trett
Title : Introduction - ADR. Is It The Route to Go?

Introduction : ADR. IS IT THE ROUTE TO GO?

We are often asked whether ADR is the route to follow in resolving disputes and what experiences do we have in such matters.

I believe that ADR does have a lot to offer, although I hear much scepticism from a number of the legal profession. They suggest that the Solicitor, if he does his job correctly, will be looking at methods of resolving the dispute well before the legal procedures are completed.

I accept this argument and some of those leading Construction Solicitors that I have worked with and who have gone into print saying that ADR is unnecessary, have indeed sought to settle matters prior to hearings. I am also aware of a number of Lawyers who externally support ADR but have been quite resistant to putting it into practice in their particular cases

I have now experienced two Mediations arising from construction disputes, both of which resulted in the disputes being settled.

The first Mediation took two days and saved the cost of an eight week hearing. In the second, an Arbitration hearing had just commenced but was adjourned for the parties to mediate and again, was settled in two days, thus removing the need for a further six week hearing.

The strength of both Mediations, however, was not that the parties arrived at a settlement but that they settled having listened to the issues being debated, both openly and in private with the Mediator. This is something which neither party gets the opportunity to do in Arbitration or Litigation. The fact that the Principals can hear the issues first hand and be party to the conclusion, removes the risk inherent in Arbitration and Litigation.

However, even in a Mediation, one has to prepare. Mediation is not a short cut to avoid preparation. The only reason that we were successful was the fact that the investigation and the preparation had been undertaken properly and fully. Without such preparation, ADR could be a shortcut to disaster.

There are two other factors in regard to ADR that I feel are worthwhile mentioning.

The first was the benefit derived from the involvement of a 'team'. In both bases, the Mediator was an experienced Quantity Surveyor ie, experienced in commercial matters, and on each occasion was accompanied by a Pupil. The first was a Barrister and on the second, a litigation partner of a large City practice and who specialises in Construction Law. This combination was ideal since it allowed the Mediator to consider legal aspects of the dispute with an independent legally qualified person. The result was that the Mediator more positively asserted the likely legal problems the parties faced but, I have to add, without being led into lengthy legal arguments.

Bearing in mind the limited time period for a Mediation, the opportunity to discuss matters with someone independent of the parties should assist in achieving a settlement. An Arbitrator, of course, has the opportunity to consider and take advice on legal aspects during the course of the Arbitration and during the period in which he considers and writes the Award.

Having experienced this 'team' approach, I am of the opinion that it will provide a better forum for the parties to reach a settlement.

The second factor and one that concerns me, was brought to my attention by a practicing Mediator. He commented that he has seen a trend developing for Barristers acting as advocate for a party in a Mediation to do all the talking. As a result, the other members, even when in caucus, have not been allowed to contribute. I have not personally experienced this but if it is allowed to persist, Mediation will be hijacked and allowed to develop in too formal a fashion, as has been the case with Arbitration.

To conclude my views, ADR has a lot to offer, but:-

- not without proper preparation;
- will be enhanced by the correct mix of Mediator/Pupil team;
- will fail if hijacked.

Issue No : 11
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Article No : 2
Author : T Fletcher
Title : Construction Management Feature - Improved Management of Safety

Construction Management Feature - Improved Management of Safety

Tony Fletcher considers the EEC's proposals for improved health and safety standards for building design, construction and maintenance.

INTRODUCTION

In order to comply with European Council Directive 92/57/EEC of 24th June 1992, which concerns the implementation of minimum health and safety requirements at temporary or mobile construction sites, the Regulations (**Condam Regulations**) have to come into force no later than 1st January 1994.

However, the UK's Health and Safety Executive (HSE) has recently requested a six month delay to the issue of its internal report due to confusion in the industry. The Construction Industry Council has likewise requested a nine month delay to the introduction of the Regulations.

There is no doubt that confusion exists throughout the industry as to the proposed roles for the various parties involved in construction and there is a distinct lack of guidance, particularly to the designers and clients bodies who are to be endowed with substantial responsibility for health and safety in construction.

It is significant that the UK is the only EEC country struggling to meet the implementation date of 1st January 1994.

The main difficulty perceived by construction clients and professional teams is the HSE's attempt to clarify civil liability arising from administrative or judgemental decisions. There is a real concern that there could be multi-party actions if one member of the team breaches the regulations.

THE PROPOSALS

The initiative to involve all parties to a construction project in the development of a health and safety policy for the life of a building is to be welcomed. All construction information should be filed for use throughout its building, repair, extension and maintenance. It is, therefore, important that the suggested roles of the designers and clients are seriously considered along with that of the contractors actually constructing the projects.

It is difficult to define where liability falls between a designer and a contractor and there is concern that composite regulations may actually dilute the contractor's responsibility on site.

The new function of the **Planning Supervisor** was intended to be undertaken by the lead designer (the architect or engineer, for instance, on building or civil engineering works respectively) and it was the regulations applicable to his responsibilities that generated major concern.

It was originally proposed that the design was to ensure that those building, maintaining or repairing the structure were not to be exposed to risk to their health and safety. The current proposal is that the design is to include all reasonable measures to eliminate foreseeable risk, or to reduce it as much as is reasonably possible.

This would clearly include not just the design itself, but the materials and methods proposed and would require the issue of sufficient information such that the contractors and operatives were aware of any potential hazards.

This would tend to separate the responsibilities between designer and contractor and so avoid the risk of dilution of each party's responsibility.

Another major concern was the original requirement for every client to ensure that adequate financial provision is made and adequate time allowed in construction tenders to enable everyone working on the project to comply with his duties under the relevant statutory provisions relating to the project.

This would be outside most clients knowledge and expertise and the new proposals suggest that clients should ensure that sufficient resources are devoted to health and safety. Tender documentation should identify particular and known hazards, for both the site itself and where the design or construction method is known to be hazardous. It is possible that any additional varied hazards may represent variations under a contract, but the various contract authorities (JCT, ICE) cannot deal with this until the final regulations are published.

The proposals suggest that the client advises the HSE of the project and it is likely that this becomes part of the Planning Supervisors role. I would also advise a continuing requirement for contractors to notify the HSE (say) within six weeks of commencement as with the existing F10 form. This would help to ensure that contractors maintain their co-ordination role within the health and safety plan and to promote the necessary contact with the HSE. It should also be a requirement to provide information on other contractors operating on the site.

The original regulations required the Planning Supervisor to ensure that before construction starts, a health and safety plan is prepared, setting out arrangements for management of construction, monitoring of compliance by all persons and taking account of any risk to the health and safety of those involved in the project.

While this duty appears to remain intact, its impact on small contractors or on those schemes not notifiable to the HSE has been reduced or totally removed and the need to prepare a safety plan is extinguished.

The duty itself, however, has been transferred to the client from the Planning Supervisor who is now to check that the various parties have a 'sufficiently developed' plan when construction starts and that they comply with it as necessary during the work.

The currently proposed regulations, therefore, appear to have removed little overall responsibility from clients to be involved in the management of safety on their projects. While both designers and contractors have their own responsibilities, the Planning Supervisor, acting for the client, would now seem to be a different individual from the original proposal, when it was to be a lead designer.

In reality, the criteria for the selection of the person to fulfil such a role must be drawn from his capability to:-

- Advise on health and safety matters;
- Produce a health and safety plan;
- Prepare a health and safety file;
- Monitor compliance with the safety plan

The regulations need to clarify legal responsibility for safety because the Planning Supervisor, client and designers should be concerned with the overall safety strategy for the whole scheme, while the contractor remains responsible for the day-to-day safety on site.

The proposed regulations also consider the timing of the transfer of responsibility for maintaining the health and safety plan from the Planning Supervisor to the principal contractor. I consider that the Planning Supervisor should continue his activities until at least the conclusion of the contractor's involvement. The degree of activity would diminish during construction, but should not be extinguished. In this way, the health and safety plan can be maintained consistently to the benefit of the client, the builder, the maintainer and repairer.

Such involvement would not remove any responsibility from the contractor for the operations on site, but would enhance the awareness of all parties to the project to the health and safety plan.

CONCLUSIONS

The proposed regulations are to be welcomed as they will create further awareness of and consideration for the health and safety of all associated with a buildings construction, maintenance, repair and extension.

The role of the proposed **Planning Supervisor** is vital to the new proposal and the person must be drawn most likely from a construction management discipline.

Issue No : 11
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Article No : 3
Author : Jon Prudhoe
Title : International Experience 1 - The Dutch Way

International Experience 1 - The Dutch Way

When I mentioned to one of my friends that I was relocating to The Netherlands, I received the response "Oh, that's somewhere in Holland, isn't it?" Although widely used to mean the whole country, Holland actually only refers to two of The Netherlands' twelve provinces - North and South Holland. These two provinces are encompassed by a grouping of cities (including Amsterdam, The Hague and Rotterdam), collectively known as the Randstad (literally 'rim town'). This area is home to almost half of the country's population.

With a total number of inhabitants of just over 15 million in an area the size of Wales, The Netherlands is the most densely populated country in Europe and ranks third in the world density league. Little wonder that the Dutch have mastered the art of utilising land, both above and below sea level.

Inevitably, this wanting of terrain has effected The Netherlands' lifestyle, especially in the Randstad. A typical Dutch home, be it house, apartment or houseboat (of which there are about 2,500 in Amsterdam alone) is definitely what would, in estate agents terms, be classified as cosy. The problem also extends to the streets. Finding a parking space can present major difficulties, even in the smaller towns. The collection of fines for parking offences is a very serious business. When you see the driver of a car being interrogated by the police on arrival at Europort, don't automatically assume he's a drug dealer. He probably just failed to pay his parking ticket on a previous visit - five years ago!

Despite the compactness of the country, The Netherlands has long been considered favourably as a base in the European community. Indeed, a substantial number of foreign companies, including over 400 British companies, are already based there. But what is it like doing business with the Dutch? Anyone who has had experience of working overseas will tell you that every nation has its own preferences of peculiarities in its business approach. The Netherlands is no exception to this and there are a lot more miles between it and the UK in the business sense, than there are geographically.

The Dutch are most direct, preferring to get straight down to business without engaging in long, drawn out, round-table discussions, which they often accuse their British counterparts of doing.

Also, the consensus of Dutch opinion is that the British are too aggressive in their contractual approach, particularly in the construction and engineering industries. Although many UK companies will also say that they like to sort out problems amicably as they arise and do not believe in using a contract as a weapon, the Dutch appear to be more virtuous in their actions. But why is it the Dutch can adhere more closely to this ideal?

In the construction and engineering fields, Dutch contractors are amongst the world leaders (particularly in dredging, flood and sea defence and the offshore sector), but they are relatively few in number. Having less players in the national arena, coupled with the fact that The Netherlands has not suffered a recessionary period as deep as any in the UK, results in less fierce competition. Being able to obtain work in the home market at 'comfortable' prices leaves room for flexibility when it comes to resolving commercial difficulties (No doubt this was also helped, until recently, by certain tender pricing practices that were condemned in 1992 by the European Court!).

Another influencing factor is that both contractors and sub-contractors will work for fewer clients than would comparable UK companies. It is not unheard of for their source of work to

be confined to only a couple of clients. Long standing relationships will also exist at management level - they probably even graduated from the same university. As a result, this gives rise to a reluctance to 'rock the boat' and, with future contracts in mind, in a dispute situation they tend to be more conciliatory and are sometimes prepared to swallow very bitter pills to reach a speedy agreement. This obvious high regard by the Dutch for their client gives rise to a more open style relationship which is conducive to proactive problem-solving.

These principles and attitudes that have been founded in the home market are almost instinctively carried over into their international dealings. Of course, not everyone else wants to play the same ball game and their domestic approach clearly will not help to resolve some contractual problems. In such situations, the Dutch too are not averse to calling on outside assistance to help deal with a dispute.

There is a definite tendency by the Dutch to take action at an earlier stage, which is, of course, a major step towards preventing potential problems from developing into protracted disputes. Also, on large, complex projects, there is more willingness to seek professional pre-contract advice, expert assistance with planning and even to appoint an outside commercial consultant to administer (with sensitivity) the contract on a daily basis.

Of course, the more subtle cross-cultural differences cannot be understood and interpreted properly overnight. It is only after living and working in The Netherlands for more than two years that I can comfortably say I am accustomed to doing business 'the Dutch way'. Unfortunately, the national pastime of gulping down whole raw herrings is going to take a little longer to get used to!

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Article No : 4
Author : Anthony Farrow
Title : International Experience 2 - A QS in Japan

International Experience 2 - A QS In Japan

My first day at the Tokyo offices of my Japanese employer, a major engineering concern, brought home the realisation that there were major communication difficulties lying ahead. I had asked my departmental Secretary for a rubber, but when she replied "I'm not that sort of girl" I knew that I would have to take care in my choice of words! I also wonder where I might have been today had she been the sort of girl to have a rubber!!

Communications is a major factor when working or conducting business in Japan. It is an advanced industrial and commercial nation whose economy is greatly dependent upon trade with the outside world. Where external trade is concerned, Japanese are well trained in the most commonly spoken languages, particularly English. However, on the domestic front, whilst Japanese are well educated in the English language, they do not have the opportunity to practice the spoken language. Therefore, foreigners in Japan usually find communications their first difficulty.

The written language is a further special problem to western foreigners since road signs, train and underground stations, public notices, street names, shops etc are often shown in Kanji (ie, chinese characters), not in our simple roman alphabet. I was once given a Tokyo underground map (see next page) and told to go to 'Ginza'.... Any ideas?

Japan is made up of four main islands, Honsushu being by far the largest and most populated, together with many smaller islands, particularly to the South.

Japan has four clear weather seasons that follow Western Europe's except that its summers are much warmer and the winters chillier.

With a population of 124 million, Japan has a large workforce whose business and working methods are based on cultural and historical practices. For example, an employee will join his company after graduation and will retire 40 years later, still employed by that same company. This life-long employment commitment has far reaching implications for Japanese industrial and business practice and in sociological behaviour. For example, knowing that you have an individual in your employ for 30-40 years allows companies to invest considerably in each individual's training and development, in the confident knowledge that the return on that investment is to be reaped over many years.

With this commitment to its employees, companies will expect of its staff and it is not unusual for individuals to be moved from department to department, sister company to sister company, from town to town, city to city and country to country.

An employee's loyalty to the company has been compared to that given to feudal Lords in times gone by. Whilst there are company labour unions or staff associations, the life-long relationship between employer and employee create a very different relationship in annual pay bargaining. Both parties (though they maintain their is only one - the Company) look towards achieving improvement in their joint status in say the next 5 - 10 years, instead of maximising on returns in the present pay bargaining round

This life-long employment policy is well known about but its implications have a major impact upon business and working practice. For example, with less turnover of staff, Japanese organisations are better team players. The life-long system has created larger organisations and businesses employ greater numbers of managerial, technical and administrative

personnel than their western counterparts. As a result, business plans or strategies or problems tend to be considered and investigated by larger teams, with a broad base of expertise. For example, when I was part of bid proposal teams, it was usual to travel to the project country with over 12 members; project management, sales department, planning, procurement, civils, construction, mechanical and electrical and finance departments would be represented in such tender survey work. By comparison, British engineering companies would often send only one or two individuals to the project country for equivalent tender survey work.

The long-term approach is also evident in the domestic business community. For example, the norm is for contractor X to build most of, let us say, Nissan's factories and contractor Y to do most of Toyota's. Similarly, sub-contractor A will be closely linked to contractor X and sub-contractor B to contractor Y. It is possible to trace these relationships back over many, many years. Consequently, whilst there is a formal legal system for resolving commercial disputes, it is rarely used, (except where there is some foreign element!). The approach by contractors and sub-contractors is usually one of subordination, in the knowledge that it is the long term that is important, not achieving an immediate recompense.

Engineering companies have rather formal organisation structures; there is a very clear pyramid-type chain of command. However, at any level within the pyramid, an individual's role will not be restricted by a clear and precise job specification. Individuals have a broad based role and are often allowed to work on those matters at which they particularly excel. For example, my own role was to develop tendering procedures and sub-contract procedures for civil, mechanical and electrical packages of up to £50 million in value. However, a chance conversation with a project manager of an ammonia plant in Indonesia highlighted my interest in contractual claims. Shortly afterwards, my remit was expanded and I became actively involved in claims management on that project.

Decision making in Japanese companies is most certainly bottom-up. Policy making and strategy is originated at the more junior levels of management and as it is worked out and formulated, more senior managers become involved and ultimately executives, in the final decision making. This is a very different approach to that taken by western companies, where policy and strategy decisions are established by a few executives or a single executive and then imposed downwards on the rest of the organisation.

As with most capital cities, Tokyo is an extremely expensive place and the cost of living is higher than that of most western countries. However, as a place to work and conduct business, it is very enriching.

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Article No : 5
Author : G Bergin
Title : Law 1 : Frustration

Frustration

Following a letter from a reader in issue number 9, Jed Bergin of our Manchester office provides his interpretation of this very "frustrating" legal doctrine.

Everyone involved with the construction industry considers that (s)he appreciates the meaning of frustration - has any excuse not yet been put forward as explanation for something not to have happened? It's the architect's fault... no it isn't, it's the builder's fault... no it isn't, it's the engineer's fault... However, there's another type of frustration - that which the law considers is capable of discharging contractual obligations.

The doctrine of frustration operates in situations where it is established that due to a subsequent change in circumstances, the contract is rendered impossible to perform. For example, destruction of the subject matter; or the contract has become deprived of its commercial purpose by an event not due to the act or default of either party, such as the cancellation of a procession.

Whether or not a particular event is sufficiently capable of frustrating a contract involves mixed questions of fact and law. A suggested distinction between the issues is -events capable of frustrating a contract is a matter of law, and whether a particular event did frustrate the contract under consideration is a matter of fact. As a result of this, if an arbitrator correctly directs himself on the issues of law, an appellate court will generally not interfere with his decision on the facts, unless he has reached a decision which no reasonable arbitrator would reach: *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema [1982]*. Quite often, a party seeking to discharge its obligations through frustration will claim that a series of events has rendered its performance impossible. However, the doctrine of frustration is applied within very narrow limits. In *Pioneer Shipping* it was said that the doctrine of frustration was "**not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains**". The significance of this in our own industry is to remind us that the courts will not mend a badly worded or ill-conceived contract.

In *Davis Contractors Ltd v Fareham UDC [1956]* the plaintiff contractor sought to advance the argument that, as there has been such a radical change in its obligation to construct 78 houses, the contract should be considered frustrated and the work be paid for on a quantum meruit basis. Their Lordships advocated a three-tiered test:-

- to construe the contractual terms in the light of the contract and surrounding circumstances at the time of its creation;
- to examine the new circumstances and decide what would happen if the existing terms are applied to it; and
- to compare the two contractual obligations and see if there is a radical or fundamental change.

Accordingly, it is the nature of the obligation that must have changed and not just the circumstances. Thus, in *Davis* the builder claimed that the weather and labour shortages, which were unforeseen had frustrated the contract, and that it was entitled to recover £17,000, by way of quantum meruit. Unfortunately for the builder, the court held that despite the fact that unforeseen events made a contract more onerous than was anticipated, they did not frustrate it.

Frustration discharges the contract automatically; there is no question of election by one of the parties to continue with the contract.

Prior to the *Law Reform (Frustrated Contract) Act 1943* the common law was perceived to be harsh towards a party which had rendered only partial performance -in effect, losses lay where they fell. The Statute, which is very flexible, remedies the defects of the common law. In essence, any monies paid are recoverable subject to the proviso that expenditure upto the time of the frustrating event may be recoverable while any money payable thereafter ceases to be so. Also, if one party has gained a *valuable benefit* before discharge of the contract, then it is obliged to pay over an amount as the court sees fit; in short, the court attempts to balance the hardship between the parties on a fair and reasonable basis.

Frustration is a vexed area of law, the concept is readily understood, however, its application is not always predictable. One thing is certain - it is very much an issue for the lawyers to advise upon if you find yourself faced with what appears to be a *frustrating* event.

Issue No : 11
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Article No : 6
Author : J Jones
Title : law 2 : The Law of Evidence in Civil Proceedings

The Law Of Evidence in Civil Proceedings

In preparing Expert Reports, members of Trett are often required to consider what reliance can be placed upon the available evidence. John Jones of our Manchester Office summarises the basic rules of the Law of Evidence which regulate the admissibility of evidence in Civil Proceedings.

What is evidence? Evidence can be said to be the information relied upon to establish a disputed fact. Whether such information can be presented to a Court and if so, in what way, is determined by the Law of Evidence.

At the risk of over simplifying the law, all evidence **relevant** to the facts in dispute is admissible, subject to exceptions. Prior to summarising these, it is important to bear in mind that the burden of proof rests with the alleging party (he who asserts must prove) and in civil cases, the standard of proof required to be achieved being the **balance of probabilities**.

Once evidence is established as being relevant to the facts at issue, we need to examine the plethora of regulations to ascertain whether such evidence is excluded from admission to the hearing. These exclusions include the following:-

1. Evidence as to a persons character is not allowed (except in actions for defamation).
2. Opinion evidence is generally not admissible except from a qualified Expert recognised by the tribunal.
3. Evidence against public policy cannot be presented without the express leave of the Government Department concerned.
4. Communications or documents passed between a legal advisor and a client in a professional capacity are generally inadmissible as evidence (ie, legal and professional privilege). For a document to be classed as **privileged**, its dominant purpose must be the anticipation of litigation or disclosure will be instructed (*Waugh v British Railways Board 1980*). Such privilege can only be waived by the party for whose benefit the privilege exists.
5. Statements made **without prejudice** are not admissible as evidence provided the statement is a genuine attempt to settle. The statement 'without prejudice' within the terms of a letter, for instance, will not necessarily mean that the document is inadmissible as evidence.
6. No witness is bound to respond to questions which may expose him to criminal charges.
7. The **Estoppel Rule** prevents a party from attempting to prove allegations which are directly contrary to those which have already been proved against him. For example, a party having approved the appointment of an Arbitrator cannot subsequently have the award set aside by attempting to prove that the Arbitrator was not qualified as required by the contract (*Oakland Metal Co v Benaim 1953*).
8. When a transaction is recorded in a document, such as a written contract, extrinsic evidence (eg, evidence of pre-contract negotiations) is inadmissible as a substitute for the terms set out in that document. This is often known as the **Parol Evidence Rule** and its general effect is that the tribunal must refer only to the four corners of the contract' as representing the intent of the parties. In *Wates Construction Southern and Bredero Fleet Ltd (1993)* an award was remitted back to an Arbitrator by the Court of Appeal because he had strayed from the 'four corners of the contract' in arriving at his decision.
9. **Hearsay evidence** is an oral or written statement made by a person other than the testifying witness. The general rule at common law is that hearsay evidence is not

admissible. With regard to civil proceedings, the complex law relating to hearsay was substantially altered by the Civil Evidence Act 1968.

First-hand hearsay evidence is admissible (section 1) as are all documentary records, even if the contents of the documents contain second-hand hearsay (section 4). The 1968 Act expressly took over and preserved some common law exceptions (section 9), those not preserved being abolished.

Second-hand hearsay is inadmissible (section 2) except if contained in a document compiled by a person acting under a duty (section 4). A duty is defined by section 4 as being a trade, business, profession or other occupation in which that person is engaged for the purpose of paid or unpaid office held by him.

Computer records are inadmissible as evidence unless produced by an operational computer being operated in the regular course of its use by qualified competent staff (section 5).

Section 3 of the Act permits the presentation of previous statements made by a witness as evidence of fact to enable consistent or inconsistent statements to be put to the witness.

10. The Civil Evidence Act 1972 extended the whole of Part 1 of the 1968 Act (except section 5 - Computers) to Expert Witness Evidence and similar exclusionary rules apply.

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Article No : 7
Author : J Whitfield
Title : Staking a Claim

Staking A Claim

The real purpose of any claim is to recover a sum of money. However, to succeed the claimant needs to accomplish a number of goals. Essentially, he needs to first establish the real cause of delay or extra cost, then link the cause to the effect of such a delay or event. He also must show that real damage resulted from the cause and effect and that the damages are reasonably quantified and acceptable to a reasonable person.

To be successful in recovering our costs for a disputed item or event, the claimant must first explain what caused the event, who caused the event and who is responsible for the event. In the case of a delay, it can be shown, say, that a late drawing caused a delay to the foundation laying; that the drawing was to be provided by the Architect, according to the contract and that the client is responsible for the delay and its cost as he employs the Architect.

So often clauses are quoted or a breach of contract is claimed without the claimant stressing these simple, but essential points. If these points are made, the claimants counterpart will clearly see his case, even though he may disagree. Understanding a claim is the first step towards settling it.

If the foundations in the above example were already held up because of a labour dispute, then perhaps the late arrival of the drawing may have had no effect on progress. If there was no effect on progress then no claim can be supported. In all cases, it must clearly be demonstrated that the event, the late drawing in this example, had an effect on progress.

In the case of *McAlpine Humberoak v McDermott International*, the claimant alleged that every cause must have had an effect. The court disagreed and demanded a firm nexus or linkage. Put simply, if you have a cause but no effect, you get no money. Even if a claimant proves an effect, if he cannot link it to the cause he is unlikely to succeed.

Having shown that the drawing was late due to the Architect's delay and having demonstrated that this prevented progress for say 5 days, the next question is: Did it result in damage? It does not always cause damage. Perhaps the claimant could simply employ the labour, supervision and plant 5 days later than planned. If no damage is proved then all he will be entitled to is an extension of time and any prolongation costs. The cause must have had an effect that resulted in some damage or the claim fails. Of course, in engineering and construction contracts, damage is almost inevitable as site operatives and staff are waiting for the foundation completion to be able to continue with their works.

Having proven real damage, costs must now be accurately and reasonably assessed. Failure to do so will reduce the claim or see it struck out entirely. An exaggerated claim will be a burden if it is adjudicated by an arbitrator or an judge. An extortionate claim will extend the dispute duration and will result in a massive increase in costs. Realistic, reasonable claims must be submitted or the claim may fail.

Whoever prepares the claim, it should be forensically evidenced, analytically prepared and professionally presented. If the claimant does this and covers all the above points then his claim will have a far greater chance of success.

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Article No : 8
Author : M Thomas
Title : Record Keeping 3 : The Labour Allocation Sheet

Record Keeping 3 : The Labour Allocation Sheet

Our regular readers will be well aware that a constant theme in the Trett Digest over the years has been our concern over the maintenance of proper records.

Often, record keeping goes by the board, excused in our own minds by the fact that all efforts are applied to the physical completion and hand-over of the Project. We then find that we have deprived ourselves of the formal records needed to support the Final Account and as a result, recovery of the proper entitlements under the contract is diluted and becomes more difficult to pursue.

Daily **Labour Allocation Sheets** are a vital part of the overall system of records; they may be known as Daily Labour Returns or Time Sheets. Whatever they may be titled, their importance as a record is the same. They must detail what actually happens on site.

To form a useful record, Labour Allocation Sheets have to be prepared by the front-line members of the Project team. They cannot be done from Head Office or by visiting Supervisors. Remember, whilst the Project Manager may be aware of site problems and difficulties and the Supervisor may have first hand knowledge of what it took to resolve them, the Foreman-in-charge was the one who actually had to solve the problems and it is his detailed knowledge that needs to be recorded on the Labour Allocation Sheets.

Allocation Sheets are of no use at all if they merely record start and finish times of operatives on site. They are acting merely as clock cards in this instance. It is no use at all recording that Fred Bloggs, Bricklayer, spent 8 hours laying bricks!

The industry has a fundamental problem, because the person best placed to fill in the Labour Allocation Sheet to the required level of detail is normally the hands-on Foreman at the sharp end, who does not enjoy filling in forms. As a result of this natural aversion to paperwork, contractors and sub-contractors must be losing out on literally millions of pounds in unrecovered entitlements, due to the absence of proper records of events.

How can we encourage staff to fill in Labour Allocation Sheets properly? The following points are worthy of consideration and may act as a catalyst to help you consider the merits of your own system.

1. Keep the format of the Labour Allocation Sheet simple, but leave plenty of space for comments by the writer.
 2. Make submission of properly completed Allocation Sheets a matter of routine, so that it becomes a regular weekly task.
 3. Make space available on the Sheet which encourages comments and draws out important facts such as:-
 - PLANT USED
 - EXTRAS
 - DAYWORK
 - STANDING TIME
 - DELAY/DISRUPTION
1. Regular checking of Allocation Sheets by Management, including taking an active interest in ensuring that Sheets are properly filled in.

2. Make sure that those responsible for filling in Allocation Sheets are given every encouragement. Explain why it is important to the company that accurate and detailed Sheets are maintained. Any task is performed more willingly if the reasons for and importance of the task is clearly appreciated.
3. There will be a cost in terms of the time invested in preparing and maintaining proper detailed Labour Allocation Sheets. Do not shirk from this cost or try to reduce it unrealistically. The investment in compiling properly recorded Allocation Sheets will pay for itself over and over again.
4. Where a known problem is about to occur, discuss in advance with the person who writes the Sheet and request that the item is separately flagged up and recorded.
5. Make sure that your sub-contractors operate an Allocation Sheet system which conforms with your own requirements, so that their records support and compliment your own.
6. The manner in which time is recorded against job tasks ought to be set up by the Project Surveyor or Planner; this will enable a check between planned and actual labour production and provide information to produce an as-built programme.

The correct compilation of detailed Labour Allocation Sheets is vital to the commercial success of your business. Please look critically at your current systems for compiling these records to establish whether there is scope for improvement.