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Author : C Williams  
Title : The Implications of the Woolf Reforms for Experts

### **The Implications of the Woolf Reforms for Experts**

**In issue 17 of the Trett Digest, Alex Hartman offered his opinion on the July 1996 'Access to Justice' final report by Lord Woolf. He suggested that the intention behind the implementation of the Woolf reforms would be to reduce cost and delay whilst returning the expert's role to that of independent, impartial adviser to the Court.**

On the 26<sup>th</sup> April 1999 Lord Woolf's civil justice reforms, the Civil Procedure Rules (CPR), came into force, proclaimed as the most fundamental change to the civil justice system for more than a century.

Part 1 states that the overriding objective of the reforms is to enable the court to deal with cases justly. This is to be achieved by –

- promoting the settlement of disputes and cases,
- reducing the delay in cases,
- making the costs more proportionate to the sums in dispute,
- giving the courts the overall responsibility for case management, and
- simplifying the language of litigation with the focus now being the use of plain English

Existing cases will not escape the reforms as the Civil Procedure Rules will be applied to these cases when they are next considered by the court.

As suggested by Alex, the reforms will now force both litigants and their experts to adopt a different approach to the consideration of and the use of expert evidence. The main issues which must be considered with regard to experts are:-

1. Expert evidence must be restricted at all times to that which is reasonably required to resolve the proceedings. (CPR 35.1)
2. It is the duty of an expert to help the court on all matters within his expertise. This duty overrides any obligation to the person from whom instructions were received or who has the obligation of payment. (CPR 35.3)
3. No party may call an expert without the courts permission. When permission is applied for the party must identify:-

the field in which he wishes to rely on expert evidence; or

the particular named expert.

If the permission is granted then it will only apply to the identified field or the particular named expert. (CPR 35.4)

4. The court has the power to limit the amount of the experts fees and expenses. (CPR 35.4(4))
5. Where two or more parties wish to submit expert evidence on a particular issue then the court may direct that the evidence is to be given by one single joint expert. (CPR 35.7)

6. Where the parties cannot agree who should be the expert then the court may:-  
select the expert from a list prepared by the instructing parties; or  
direct that the expert be selected in such a manner as the court thinks fit.

N.B. Experts should check that relevant bodies have up to date details of their practices and specialisms and ensure that they are listed as registered experts.

7. Where a single joint expert is to be used, each instructing party may give that expert instructions. However, whenever instructions are given by one party, a copy of the instructions must be sent to each party. (CPR 35.8)

The court may give directions regarding:-

payment of the experts fees and expenses,

inspection, examination or experiments which the expert wishes to carry out.

8. The court may, at any stage, exercise its right to direct a discussion between experts in order to:-

identify the issues in the proceedings,

where possible, reach an agreement on the issues. (CPR 35.12)

The court may specify the issues which the experts must discuss. Also, the court may direct that, following such a discussion, the experts prepare a statement which establishes:-

those issues which are agreed; and

those issues on which the experts disagree and their reasons for disagreeing.

N.B. The content of any such discussion shall not be referred to at the trial unless the parties agree. Also, any agreement reached between the parties shall not bind them unless this is expressly agreed.

9. All expert reports must comply with CPR Part 35 Practice Direction which states that an expert report must:-

give details of the experts qualifications,

give details of any literature relied on,

give details of any test or experiments carried out,

where a range of opinions is encountered –

summarise the range of opinion, and

give reasons for his own opinion,

contain a summary of the conclusions reached,

contain a statement that the expert understands his duty to the court,

contain a statement setting out the substance of all material instructions.

In addition the expert's report must be verified by a statement of truth. Proceedings for contempt of court may be brought against any expert who has made a false statement if he did not have an honest belief in its truth.

10. Both sides have one opportunity to ask for written clarification of the expert's report. However, this request must be made within 28 days of the service of the report. There is an obligation on the expert to answer these questions. The answers will be treated as part of the expert report. (CPR 35.6)

If a party has put forward a written question which the expert does not answer the court has the power to order that either:-

the party may not rely on the evidence of that expert; or

the party may not recover the fees and expenses of that expert from any other party.

11. The expert must advise the instructing solicitor as early as possible as to which documents and classes of documents he needs to see.
12. If one party has access to information which is not available to the other party the court may order that the party who has access to the information:-

prepares and files a document recording the information; or

serves a copy of the document on the other party. (CPR 35.9)

13. Where a party has disclosed an expert's report, any party may use that expert's report as evidence at trial. However, a party who has not disclosed an expert's report may not use the report at the trial or call the expert to give evidence orally without the permission of the court. (CPR 35.11)
14. The expert may send a written request to the court for directions to assist him in carrying out his functions. However, the expert does not have to give notice of this request to any party. (CPR 35.14)
15. It is essential that the expert advises the instructing solicitors as to when he is available, to avoid being caught by the time limits. The availability of extensions has been greatly reduced as far as it may change the date of the case management review, pre-trial review or trial. Variations which do not alter these key dates, however, may be agreed between the parties.
16. Experts should ensure that they obtain specific instructions and provide costs and time estimates for work which is to be undertaken. This is essential if the experts are to comply with the cost and proportionality restraints.
17. Experts should be aware of the possibility of being appointed the lead expert in cases which involve several experts. The lead expert is responsible for the preparation of the general part of the report and for annexing or incorporating the contents of any other expert reports.

In conclusion I would offer the opinion that the new regime should be welcomed as a method of reducing the delay, cost and complexity in civil proceedings. However, in reality the system will only work if the court enforces the case management function properly. Complaints have already been raised that judges simply do not have enough time to read cases in advance of the case management meeting. In such a situation the parties resort to the pre-Woolf system and so completely defeat the whole object of the reforms.

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Author : M Hopkins  
Title : Interest on Late Payments - Do You Need to Consider Your Position

## **INTEREST ON LATE PAYMENTS -Do You Need To Consider Your Position**

***The Late Payment of Commercial Debts (Interest) Act 1998 came into force on 1 November 1998. How will it be implemented? What will its ramifications be? Should contracting parties amend their standard conditions to take the Act into account?***

This article considers the implementation of the Act, looks at the potential ramifications of implementation, and assesses whether or not contracting parties should amend the standard conditions upon which they contract.

The Act came into force on 1 November 1998. It introduced a right to be paid interest on unpaid debts arising in many business transactions. The Act applies to contracts for the sale of goods/supply of services where both parties are acting in the scope of their business, however, its implementation will be phased, and at this stage the right to statutory interest is confined to small businesses only. Therefore, only debts owed by a large business purchaser or a public authority to a small business supplier attract statutory interest. Debts owed by a large business to another large business are not affected, and neither are those owed by small businesses to anyone. However, in November 2000 the right will probably be extended so small businesses can claim from each other and by November 2002 it is likely that all businesses will be able to claim against each other and against public bodies.

Four separate Orders have been introduced as follows:

- The Late Payment of Commercial Debts (Rate of Interest) (No.2) Order 1998 - this Order revokes and replaces the original Rate of Interest Order. This was due to a defect in the first Order, in that the consent of the Treasury had not been obtained.
- The Order sets out the rate of Statutory Interest which can be claimed. The applicable rate is a simple rate of 8% above the Official Dealing Rate of the Bank of England, more familiarly known as the 'base rate'. The official dealing rate presently stands at 5¼%. Therefore debts that are presently outstanding to which the Act applies are currently accruing interest at 13¼% in aggregate.
- The Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No.1) Order 1998 - this Order brings the Act into force for the purposes of the first phase and addresses the phased introduction of the Act. The respective definitions of a "small business" a "public sector body" and a "large business" are dealt with in Schedules I-III of the Order.
- The Late Payment of Commercial Debts (Interest) Act 1998 (Transitional Provisions) Regulations 1998 - this instrument addresses the evidential burden relating to the size of a business i.e. whether it is a "small business" or a "large business".
- The Late Payment of Commercial Debts (Interest) (Legal Aid Exceptions) Order 1998 - this order provides for certain contracts made by the Legal Aid Board to be excepted from application. The contracts concerned are those where the charges and fees are not negotiated but rather are determined in accordance with the relevant regulations under the Legal Aid Act, 1988. Payments made under such contracts by the Legal Aid Board will therefore not carry statutory interest under the Act.

The Act works by providing that the contract giving rise to the debt has an implied term giving the right to interest. Interest entitlement is therefore a term of the contract. Interest runs from the date the parties agree payment is due or, if no date is agreed, from the later of the date of performance of the obligations to which payment relates or the date the debt is notified to the paying party. There are special rules for advance payment.

The provisions of the Act cannot be contracted out of except by providing an alternative 'substantial remedy' for late payment under the contract. It is not precisely clear what will qualify as a 'substantial remedy', although S.9(1) of the Act states that a remedy will be deemed to be substantial if:

- it is sufficient to compensate the supplier for the cost of late payment or for deterring late payment; and
- it would not be fair and reasonable in the circumstances for the statutory right to interest to oust or vary the contractual remedy.

The Minister of State for the Department of Trade and Industry, Lord Clinton-Davies sought to explain the reason for setting the interest rate at 8% above base on the basis that the DTI had been advised by the Bank of England that this is the rate at which the weakest businesses may obtain agreed overdrafts or term loans. If this is the case, for the parties to agree a contractual rate of interest beneath the 8% figure may lead to such contractual remedies being held to be insufficient "for the purposes of compensating the supplier for late payment..." under Section 9 (1) (a) of the Act and treated as void.

It remains to be seen whether the courts will consider the level at which the supplier has actually been able to obtain bank finance as a telling factor in determining whether or not the contractual interest rate of less than 8% above base is or is not a substantial remedy. However the scope for argument is certainly there. Not unsurprisingly the Minister responsible for the Bill's passage through the Commons and Standing Committee would not be drawn on what would constitute a 'substantial remedy'.

The Order which deals with the phased implementation of the Act, initially providing a right to statutory interest to small businesses only, defines a small business as a business that had 50 or less full time employees for the period 1 April to 31 March immediately preceding the date that the contract in respect of which statutory interest is claimed was formed. The schedule to the Order which defines the meaning of the 'small business' is a fairly lengthy and arduous section. There are complicated arrangements for defining which employees are taken into account in totalling up the 50. Parttime employees are treated as fractions of full-time employees and employees of associated businesses are taken into account (an associated business is one controlled by the same individual or a business which controls, or is controlled by, the business claiming payment). Meal breaks and rest periods are all fed into the equation, and where the numbers fluctuate there are ways of working out the average over the relevant period.

However well it is drafted the definition will unfortunately lead to anomalies in practice. Businesses continually expand and contract and there is every prospect, especially since the definition looks to the year prior to the date the contract was entered into, (which could be a number of years prior to the commencement of a period of statutory interest for which the small business is claiming) that the supplier who is seeking to claim statutory interest is either as big if not bigger than the business the supplier is seeking to claim statutory interest against. This however is the inevitable consequence of legislating ostensibly to protect particular sectors of commerce and industry.

The legislature oversaw these problems when debating the application of the Unfair Contract Terms Act 1977 between two enterprises contracting in a business relationship and therefore chose not to go down the road of partial or phased implementation. The Housing Grants Construction and Regeneration Act 1996 on one view could be seen as moving towards particular sectors of the construction industry but its provisions apply equally to all contracts

that fall within that particular Act's definition. This Act takes the protection of specific sectors of commerce and industry still further.

It remains to be seen whether claiming parties, especially small businesses keen to obtain future work from their present customers, will actually enforce claims for interest or challenge any lesser contractual rate as not constituting a 'substantial remedy'. To enforce the right to interest a creditor has to take some form of legal proceedings and it is thought that few sub-contractors, for example, will want to jeopardise their working relationship with main contractors by insisting on payment of statutory interest. In the majority of cases any entitlement to interest, even at the full statutory rate, will not be for such a significant sum that would make it cost effective to have recourse to the courts or arbitration purely to enforce a right under the Act or challenge a lower rate set in the contract.

Finally, it is also worth considering just how extensively the Act will apply in the construction industry. As stated previously, the definition of 'small business' regards as one business all employees working for an associated employer such as a parent or sister company. It is quite likely therefore that a vast number of subcontractors will actually be too large to fall within the definition and therefore avail itself of the right to statutory interest. A more likely application of the Act will be the next layer down, namely the sub-subcontract/sub-sub-supplier level. It is not therefore inconceivable that subcontractors who have in the past been guilty of late payment will feel the commercial implications of the Act more than their main contractor counterparts.

In the final analysis this is a matter for the contracting parties themselves. However there appears to be a limited scope within which a contracting party can amend its standard terms and conditions, by the introduction of an express right to interest in consequence of late payment. As mentioned above any reduction in the rate set out in the Order of 8% above base will run the risk of not constituting a substantial remedy. Similar risks will apply to any attempt to extend substantially the date when interest would otherwise run. However the consequences of a contractual right to interest which seeks to displace the statutory right of interest being held to be void for not constituting a substantial remedy are simply that the supplier will become entitled to statutory interest (most likely higher interest for a greater period of time) as if the express contractual position had not been included in the first place. To have reached this stage, however, the 'small business' pursuing the claim for statutory interest will have had to litigated the entire matter before the Court at the trial. It see Im; therefore that the only penalty for removing the supplier's right to statutory interest by a remedy held not to be substantial will be to return to the application of statutory interest.

One of the contract drafting bodies which has introduced amendments thus far that touch upon the subject matter of the Act is the JCT. Clause 30.8.5 of the JCT Standard Form (1998 Edition), for example, provides for simple interest at 5% above base. Whether or not it is actually a substantial remedy may not matter certainly for the next 4 years until such time as the Act extends to large businesses which is projected to take place in the year 2002. It may however have more significance in relation to similar amendments to be found in the JCT family of subcontracts.

Over the next 4 years it may be the preferred option of contracting parties not to include any express provision entitling interest on late payment at all since unless it is obvious that they are contracting with a "small business" they will be providing an express entitlement to interest for late payment to their supplier in circumstances where the supplier in question would not otherwise have such a right. The author understands that Employers are quite often deleting the contractual right of interest in the main contracts and further their requirement for the main contractor to include a similar provision in its subcontracts. Are we to see an additional enquiry being raised in the tender documents for the tenderer to state the number it employs working for its organisation for the year 1 April to 31 March prior to the invitation to tender?

In the final analysis deciding whether to amend is down to the contracting party. There is no obvious right or wrong answer. Shrewd contracting parties however would be well advised to

consider the material provisions of the Act, assess their effects on their business, and consider whether or not they should amend the contract provisions upon which they regularly contract, if they have not already done so.

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Author : R Palmer  
Title : Notifying Your Insurers - Theory and Practice

### **Notifying Your Insurers - THEORY AND PRACTICE**

Every year professionals throughout the construction industry spend substantial sums of money on indemnity insurance, yet time after time insurers refuse to provide cover on particular claims. This often results from very basic features of the terms of the insurance policy. In many cases, the withdrawal of cover could have been prevented by the insured taking certain simple steps and/or adopting basic procedures when dealing with potential claims. *The writer, Richard Palmer of Watson Burton, is a Partner with Watson Burton solicitors, specialising in defending and pursuing claims in professional negligence against architects, engineers, surveyors and accountants.*

#### **LEGAL OBLIGATIONS OF INSURED TO INSURERS**

The first hurdle for an insured is the proposal form. This will form a part of the contract. 'Every single word of the insured's answers to the queries on the form must be weighed very carefully'. It will form part of the contract and if incorrect the insurers may reject liability.

One of the most common reasons for withdrawal of cover by insurers is that they are not notified of claims early enough. By way of reminder, an insured is under a duty to notify any **circumstances** which are likely to **lead** to a claim; it is not enough to wait and see whether court proceedings are issued against you. But what amounts to a notifiable circumstance? The only safe approach to take is to notify any criticisms of your work that are made in writing; verbal complaints can be made in the heat of the moment but if someone feels strongly enough to record their concerns, it is conceivable that they may eventually resort to litigation.

The above considerations are also relevant when seeking to enter into a new or to renew an existing policy of insurance. You will be asked whether, at the time of completion of the Proposal form, you are aware **after enquiry** of any circumstances or **material facts** which might lead to a claim. Following the land mark case of **Pan Atlantic v Pine Top** [1994] 3 All ER 581, the court held that for an insurer to be entitled to avoid a policy for misrepresentation or non disclosure, the circumstance not disclosed would have to have had an effect on the mind of a prudent insurer in weighing up the risk (**materiality**) and in addition, the insurer must have been induced into the making of the policy on the relevant terms (**inducement**). Accordingly, an underwriter who is **not** induced by the misrepresentation of a material fact to make the contract can not rely on the misrepresentation or non disclosure to avoid the contract.

In the later case of **St Paul Fire & Marine v McConnell Dowell** [1995] LI Rep 116, the Defendant sought construction works insurance on a government building and the insurance submission and its accompanying documents described the buildings as being constructed on piled foundations. The nature of the foundations of that building were subsequently changed involving the use of spread foundations, a fact which was not disclosed in the Proposal Form and the court held that non disclosure of this point was non disclosure of a material fact.

The extent of the duty upon a proposer was then further clarified in the case of **Ontario Metal Products** when it found that a material fact may include a fact or circumstance about which an insurer does not necessarily request details in the insured's proposal form but which, if known to the insurer, would result in that insurer refusing cover to the proposer or the seeking of a higher premium from the insured.

It is worth remembering that you are under a duty of utmost good faith when answering this question and a failure to disclose a material fact (which will usually come to light when a claim is made on your policy) will entitle your insurers to either repudiate your policy of insurance in full or alternatively, to allow cover to continue under the policy but to withdraw indemnity for that particular claim. Accordingly, although a proposer may be quoted a higher premium by bringing to the attention of his prospective insurers details of an anticipated claim, this is surely a small price to pay for peace of mind when any such potential claim becomes a reality.

### **HOW CAN YOU ENSURE THAT ALL MATERIAL FACTS ARE DISCLOSED TO YOUR INSURERS ?**

Many professional firms or companies within the construction industry retain large numbers of staff with delegation taking place of appropriate tasks to members of that organisation. This inevitably leads to communication problems and often a problem will remain undiscovered because the relevant member of staff feels uneasy about accepting and/or reporting criticisms levelled against them. They may also persuade themselves that the problem will go away or that it can be resolved by further discussions. It is therefore extremely important that all staff who have dealings with clients are:-

- A. educated in claims management,
- B. encouraged to report to brokers or insurers on any criticisms that are levelled against themselves, their fellow staff or the organisation as a whole, and
- C. trained staff to deal properly with complaints from clients.

#### **A. EDUCATION**

- i. If staff are made aware of the effects of a non disclosure upon the organisation as a whole, they are more likely to take such matters seriously and consult with the appropriate person about the problem.
- ii. Those staff who are responsible for appointing other professionals on a sub contract basis should also be aware of the need to ensure that, prior to any appointment, the professional indemnity insurance held by the sub contractor is adequate.

#### **B. NOTIFICATION**

- i. Professionals never like to be criticised; we all pride ourselves in providing the best quality advice at all times (although to keep things in perspective, one must also remember that the person who never made a mistake never made anything !). All staff must be encouraged to report complaints at an early stage without fear of reprisals and often if discovered and dealt with at that stage, a complaint can usually be resolved. It may be helpful to arrange a regular meeting with your broker shortly after partners meetings or board meetings have taken place so that all potential claims can be monitored on a regular basis.

#### **C. DEALING WITH COMPLAINTS**

- i. It is an obvious, but often forgotten point that liability should never be admitted in respect of a criticism, complaint or claim without first consulting your insurance brokers. An admission will prejudice your insurers' position and will amount to a breach of your policy.

- ii. In addition, one should never confirm that insurers are dealing with a particular claim; any Claimant's solicitor worth their salt will seek to establish at an early stage whether a Defendant is worth suing. If they know that indemnity in respect of that claim is being provided by the professional's insurers, they will be aware that a potential 'pot of gold' awaits them should a judgment be obtained. This may well induce them to issue proceedings which would not otherwise have been commenced against an uninsured Defendant. By giving this information to a potential Claimant, therefore you could once again be in breach of your policy terms. Many insureds are surprised when advised not to reveal this information due to the fact that when they are appointed by the client, they usually have to provide details of their insurance in any event and argue that a client will know that they are insured. My response is always to the effect that, for the reasons set out above, although a professional will almost always carry insurance, if a professional breaches their policy terms, an insurer will not always carry that professional.

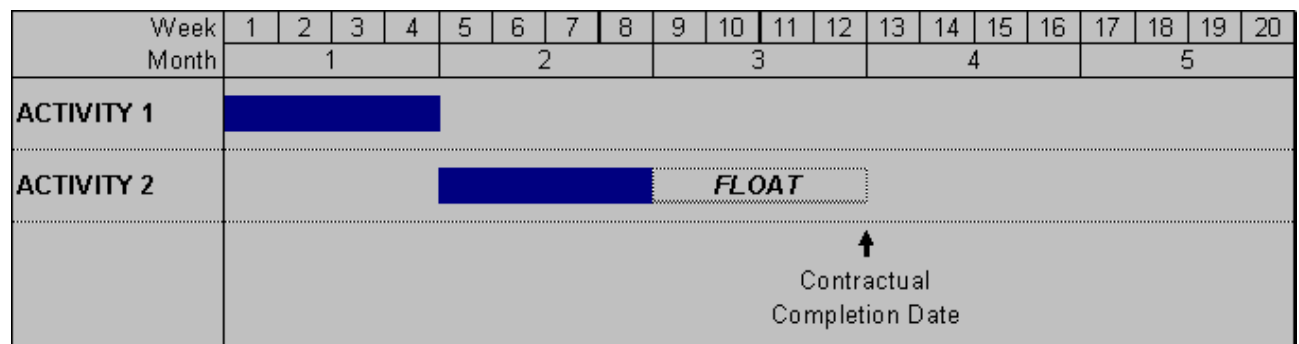
***Richard 1. Falmer LLB Partner, Professional Indemnity Unit, Watson Burton***

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 Author : V Ramsey QC  
 Title : Who Owns the Float? RESOLVED

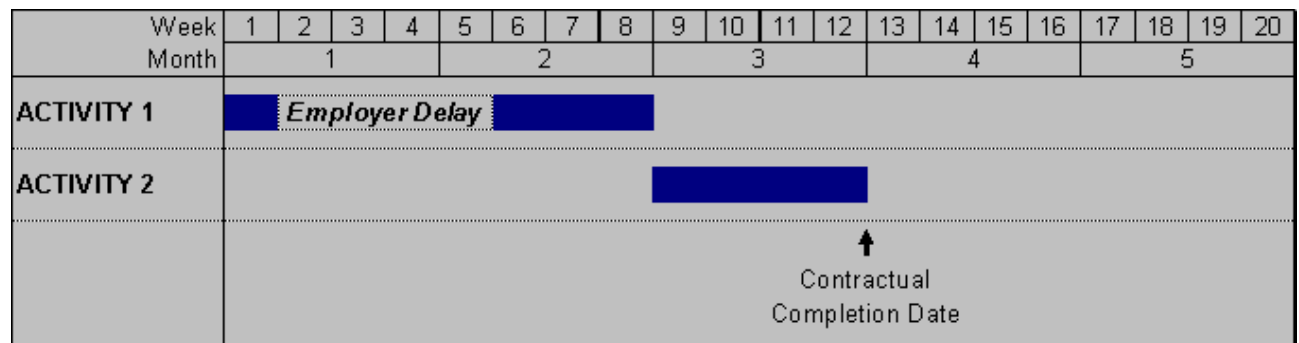
**Who owns the float?.....Resolved!**

In issue 20 of the Trett Digest, Tony Farrow presented the following set of facts to illustrate a view with regard to the ownership of programme 'float':-

There is a simple project involving 2 sequential activities, each taking a month and the contract allowing 3 months to complete the work. The Contractor submits the following programme:-



During Activity 1, the Employer delays the works by one month (eg by failure to deliver necessary free-issue materials). The adjusted programme becomes:-



During Activity 2, the Contractor delays the works by one month (eg because he has to replace some defective work). The final *as-built* programme is:-

Week	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
Month	1				2				3				4				5			
<b>ACTIVITY 1</b>	Employer Delay																			
<b>ACTIVITY 2</b>									Contractor Delay											
													↑ Contractual Completion Date				↑ Actual Completion Date			

On the basis of the above facts, it was concluded that the Contractor is obliged to pay the Employer 4 weeks liquidated damages in month 4 and the Employer is obliged to pay the Contractor 4 weeks loss and expense during months 1 and 2 (weeks 2 to 5). The reason for reaching this conclusion is that the Employer 'got to the float' first and at the end of his delay, the Contractor was still in a position to complete the works by the completion date. From the end of month 2, the only reason the project was late was due to the Contractor's delay.

Several interesting and challenging responses were received by readers of the Trett Digest (see issue 21). These responses highlighted the numerous problems associated with the ownership of 'float' and its interpretation. In an attempt to resolve this complicated issue a definitive opinion has been sought...

**Mr Vivian Ramsey QC of Keating Chambers offers this view on the matter:**

The simple answer is that, generally, the Contractor owns the float. However Tony Farrow's example and the reader's contributions demonstrate that this general answer needs some qualification. Obviously the precise position will depend on any particular terms of the contract, but the following view deals with the general position in the absence of such terms.

First, when the Employer causes a delay then, under most standard forms of contract this leads to the consideration of whether or not an extension of time should be given. It does not generally lead to an automatic extension of time. There is often a further consideration which is expressed in terms such as whether the completion of the Works is likely to be delayed beyond the Completion Date or whether the delay fairly entitles the Contractor to an extension of time. Only if that question is answered affirmatively is there a consideration of the extent of the extension of time. Both the answer to whether there is an entitlement and as to the extent of the entitlement can vary depending on when the matter is considered.

Secondly, the entitlement to money is a wholly separate, though related, question to the entitlement to extension of time. There will be cases where the Employer causes a delay and the Contractor is entitled to money but no extension of time. Equally there may be cases where there is entitlement to extension of time but no money.

With those observations in mind, we can approach Tony Farrow's example. The *Glenlion* case established that a programme submitted does not generally alter the obligation of the Contractor to complete the works "on or before" the Completion Date or "within" the period for completion. It is a management tool which is often relied on to establish entitlement to extension of time and, increasingly in many contracts, complex obligations are attached to its production. Thus, in the example, the programme shows that the Contractor intends to complete the Works in two months, which he is entitled to do but the contractual obligation remains for the Contractor to achieve completion in three months and, this leads to the corollary, that the Contractor is to be allowed that period of time by the Employer to complete the Works: see *Wells v Army & Navy*.

in the example, the Employer causes a delay of one month because he fails to deliver necessary free issue materials. As an Employer's delay, it will generally be a ground that can lead to an extension of time. The Contractor will, I assume, give the relevant contractual notice when the delay occurs and will then, after the end of the period of delay, apply for an extension of time of one month. In my view, it is difficult at, say, the end of month 2 to accept that the Works are likely to be delayed beyond the end of month 3 (the Completion Date) by the Employers' delay. It is however possible to argue that the Contractor is "fairly entitled" to an extension of time of one month: he had two months in which to carry out the remainder of the Works and has been deprived of one month and should fairly have that additional month restored. Equally, it is possible to argue that the Contractor is not "fairly entitled" to an extension of time because at the end of month 2 there is no reason to believe that the Contractor will not complete by the end of month 3.

If the Contractor were not granted an extension of time and if it had then gone on to complete the Works by the end of month 3, there would then have been no need to reconsider the position. However, at the end of week 10 the Contractor had to commence the work to remedy the defective work for which he is responsible. At the end of week 14 the Contractor realised that it would now complete one month late. This then requires the Contractor's entitlement to extensions of time to be reconsidered at that stage. The Contractor was originally entitled to have three months in which to complete the Works, including any necessary remedial work. The Contractor was prevented by the Employer from having that full three month period in which to complete the Works. The fact that the Contractor planned to complete the Works in two months did not change the contractual obligations in relation to that period for completion. The Contractor was entitled to have three months in which to complete the Works. In fact, the Contractor would only have taken three months to complete had it not been for the Employer's default. In those circumstances, at the end of week 14 it is evident that the Works are likely to be delayed beyond the end of the month 3 Completion Date which the Contractor was entitled to use for the Works by the one month delay caused by the Employer. Equally, the one month delay by the Employer would fairly entitle the Contractor to a one month extension of time. This is consistent with the "net" method of calculating extension of time as set out in the ***Chestermount*** case. If the Employer were to have the "benefit" of the float then the timing of the delay would be important and this "gross" method was rejected in that case.

So far as entitlement to payment is concerned, the one month delay to Works caused by the Employer's failure to deliver materials may cause costs to the Contractor, for instance, the Contractor may incur additional labour costs which cannot be mitigated. Those costs could be recovered as damages for breach of contract even if there was no entitlement to extension of time. In addition, the Contractor could also recover the cost of one month's prolongation on the basis that one month's prolongation costs were incurred which would not have been incurred but for the Employer's breach. That recovery would, of course, be subject to the limitations which might apply if there were contract terms similar to those in the ***Glenlion*** case.

The recovery of costs would not depend on the extension of time being granted. Rather, it depends on the breach of contract and the general principles of the recovery of damages for breach of contract. The Contractor would be left to bear site overheads and other running costs for the original two month period and also the prolongation costs for the period of remedial work.

It follows that, in my view, the answer to Tony Farrow's example would be that:

1. The Contractor would be entitled to a one month extension of time because of the delay caused by the Employer.
2. The Contractor would be entitled to damages for one month prolongation caused by the Employer's breach of contract.

***Vivian Ramsey can be contacted at Keating Chambers on 0171 240 6981.***