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Quantum leap

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QUANTEX CONSULTING'S BRAND NEW NEWSLETTER

London Calling...

Quantex Consulting is pleased to announce the opening of its new London Office in New North Street, Holborn, WC1...

Having become well established in the English Midlands and having set down permanent roots in the Republic of Ireland with an office in Cork, Quantex Consulting is pleased to announce that its newest office has just opened in the UK's capital city.

With the planning almost over and construction under way for London's 2012 Olympics and all of the associated developments, clearly it's a good time to be part of the London scene. In truth, however, the establishment of a London base has been on the cards for some time. Quantex has had an almost constant presence in the city for the last 6 years, working for a number of prominent clients on projects around the capital, either on site or as temporary residents in their offices.

The London Office is run by Regional Director Jason Tudor, who said that finding the right London location had been a major consideration.

"We did not want a "London Office" which was, in reality, outside the M25. Bloomsbury or Holborn was our preferred choice - ideal for the Central Line and access to the East and West of the city, close to many of our existing clients and the various solicitors' practices with whom we have already worked, yet still accessible for colleagues travelling in to Euston from the Midlands. It means we can be more proactive and offer our clients an enhanced level of service, and importantly we now have the ability



to offer the same high Quantex standards to others too."

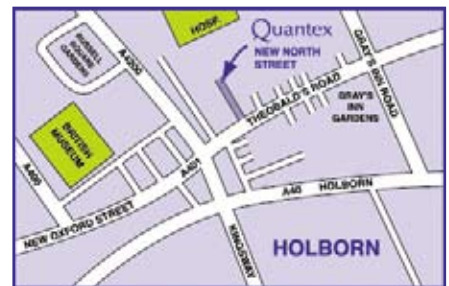
Quantex Consulting's Managing Director Tony Brayford accepts that the establishment of a permanent base in London was inevitable. "Absolutely... in recent years we have had numerous teams of our consultants working here, with most travelling down from the Midlands. It has worked very well, but obviously there are advantages in having a base both for us and our clients. It offers an alternative location for meetings, a more controlled working environment rather than making do with spare facilities elsewhere, and an opportunity for us to establish a dedicated and local team - more efficient for us and our clients."

Quantex offers its full range of services from the London Office, including commercial support, contractual advice and claims management, adjudication and other ADR services, expert witness appointments, planning

and forensic delay analysis.

The London Office is in New North Street, just off Theobald's Road in Holborn, WC1 and the doors opened for business on 1 September 2008.

For further details please contact:
jtudor@quantexconsulting.com
Mobile: 07814 033047



MIND THE GAP... in your claim

Senior Consultant Richard Giles reviews the position on global claims...

Can the rumour be true? Have global claims now been accepted by the courts? Someone told me that the judges have changed their mind after some case involving the tube last year...

Twelve months on from **London Underground Ltd v Citylink Telecommunications Ltd** and the lessons on global claims are still not being heeded. Are you able to fully particularise your claim? If not, don't be surprised if all you manage to win is "a somewhat rough and ready result" as far as the courts are concerned.

Global claims within the construction industry

are usually advanced to cover losses resulting from two or more events in circumstances where establishing the causal link between the individual events and the individual loss is either very difficult or impossible, i.e. the total loss is said to be caused by a mixture of different causes. In the past global claims have been treated by the courts with suspicion for this lack of clear "cause and effect" and because of the overriding presumption that the defendant must have been responsible for all causes of loss without any culpability on the part of the claimant.

The 2004 Scottish case of **John Doyle Construction Ltd v Laing Management (Scotland) Ltd** represented a slight softening in the judicial approach, deciding that while the global claim might generally fail, it did not necessarily follow that some part of the claim could not succeed, providing sufficient evidence existed to make apportionment of part of the global claim, hence the "rough and ready" analogy.

This Scottish ruling, whilst persuasive, is not binding in England, but the Citylink case resulted in a degree of judicial approval of the principle. Here, the contract was for the replacement of London's complicated underground network of communication systems. Citylink claimed for a...

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New Recruits...

John Wood
Regional Director
jwood@quantexconsulting.com

We are delighted to announce that John Wood has joined us from Hill International, taking up the post of Regional Director. John's is a very well known face in the Midlands, having first established a presence and then developed a business as Executive Director for James R Knowles. A past treasurer to the Midlands Branch of the Chartered Institute of Arbitrators, John has some 40 years of experience in construction as a quantity surveyor, in commercial and contractual claims, in dispute resolution and in litigation support.

Based in our office in Halesowen, John brings a wealth of knowledge and experience to supplement our professional team. After almost 30 years continuous service with Knowles / Hill, we are very pleased that John has been suitably impressed with the quality of our service range and has chosen to move across the Midlands to join Quantex Consulting.



Richard Giles
Senior Consultant
rgiles@quantexconsulting.com

Richard joined the company in March 2008 and was immediately plunged into a major commission providing assistance in claims management and an associated mediation in Ireland, supplementing our existing Cork Office team. However, his regular base is at Halesowen supplying both commercial and contractual services based upon his experience in quantity surveying in both building and civil engineering disciplines.

Having initially trained with a well established PQS practice, Richard also has considerable experience in the rail sector, having worked on the West Coast mainline both as consultant and as an integral part of a major contractor's project team.

Finbarr Downey
Senior Consultant
fdowney@quantexconsulting.com

With extensive commercial and contractual knowledge and having led a team of QSs on one of Ireland's largest infrastructure projects, we were very pleased that Finbarr decided to join the Quantex Cork Office in June 2008.

Having worked for two of the major Irish contracting organisations, predominantly in connection with civil engineering projects, he brings a wealth of practical expertise and experience to the team in terms of pre and post contractual commercial management and in pursuing contractual claims through formal methods of dispute resolution.

Left: Tony Brayford, Managing Director, welcomes new Regional Director John Wood to Halesowen.

Mark Reeves
Consultant
mreeves@quantexconsulting.com

Mark joined our Commercial Services division in March 2008 and is based in the Halesowen Office. With over ten years experience in all aspects of modern quantity surveying, Mark has worked both for a contractor and a professional QS practice, managing numerous design and build projects.

Since joining us, Mark has continued to deliver sound commercial and contractual input to maintain and protect our client's interests, and has assisted in the representation of clients in adjudication proceedings.

Laura Adams
Administrator
ladams@quantexconsulting.com

Another new addition to the team in March 2008, Laura has risen to the challenge of becoming our administrator.

Based in Halesowen but with a remit to administer our systems and procedures throughout the UK, particularly in respect of credit control, Laura is invariably our client's first point of contact when they call the office.

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MIND THE GAP... in your claim

(continued from front page)

...substantial extension of time based on a number of alleged breaches of contract by London Underground Limited (LUL) which were said to have caused the delay. The case went first to adjudication, then arbitration, before finally ending up at the TCC where Mr Justice Ramsey (in referring to the Doyle case) decided that there was enough evidence to apportion part of the global claim to an individual event, sufficient to award a substantial extension of time. So while the global claim was rejected, a portion of it survived.

In reaching this conclusion, Ramsey J looked at the expressed contractual provision that any assessment of an extension of time should be on a "fair and reasonable" basis (see also "Common Sense is not Common Place" on page 3). He agreed with the arbitrator that as this was a subjective test, a critical path analysis was not suited to finally determining liability, and if an apportionment could be made on the basis of factual and expert evidence, then this should be considered further.

It is tempting to believe, therefore, that this case casts a more favourable view on the global claim and that it increases the likelihood of such a claim succeeding, at least in part. But wait! In reality, it does just the opposite...

Any surviving claim must be examined thoroughly in order to determine the causes and their effects, and it is still the claimant's responsibility to make the claim - this cannot and will not be done by the arbitrator or the court.

In essence, the LUL v CTL case strengthens the argument for fully particularising your claim, thus allowing the judge to look at everything and not just the bit that can be "apportioned" out. The Society of Construction Law's protocol guidance helpfully states;

"if the contractor has made and maintained accurate and complete records, the contractor should be able to establish the causal link between the Employer Risk Event and the resultant loss and/or expense suffered, without the need to make a global claim"



This is all well and good, however, in today's modern high-tech commercial world, ensuring that up to date and accurate site records are created and maintained is not all that easy and, let's be honest, is not often a priority. Yet time and time again, my colleagues and I are asked to review contractual entitlement, we identify a claim strategy, then we struggle to particularise it for a lack of records.

Cost and resource capturing, progress reporting and the service of early and effective warnings and notices as to potential delays are a vital part of any successful claim. So take heed and "mind the gap" in yours.

rgiles@quantexconsulting.com

Common Sense is not Common Place!

Tony Brayford hopes for a return to old fashioned values...

Granny always placed a great deal of store in using "common sense". In these days of political correctness gone mad, administrative overburden and a "nanny state", the use of "common sense" appears to be diminishing, which is why I greatly enjoyed reading again the 2007 judgement in **City Inn Ltd v Shepherd Construction Ltd**.

This dispute has been well documented and dates back to 1999. In short, City Inn wanted a new hotel in Bristol, and Shepherd won the contract based on an amended JCT 80. The project was delivered late and Shepherd sought an extension of time of 11 weeks. The basis for the EOT was a series of late instructions from the architect, albeit some were concurrent with each other. For their part, City Inn argued that the instructions did not cause any delay and anyway, strict notice provisions had not been followed so tough luck. However, even if there was delay caused by the instructions it was concurrent with Shepherd's own delays.

Several bouts were hard fought in the court, leading to the 2007 judgement of Lord Drummond Young. The court had several key issues to consider: how to determine the extent of the EOT; how to assess the effects of concurrent delays; the extent (if any) of prolongation costs; whether the service of notice(s) was a "condition precedent" to the entitlement to an EOT.

Both parties relied on their planning experts' opinions. Neither had access to an electronic version of the contract programme and they adopted different methods of analysis. City Inn's expert attempted to replicate the original programme and then carried out a full critical

path analysis. The judge was careful to note that "*such an approach has serious dangers of its own*". Shepherd's expert relied on witness evidence and a practical knowledge of the construction process to compare "planned" with "actual".

The Judge set out a useful overview of the principles that should be applied in determining the extension of time, and recognised the "*inherent uncertainties*" involved. Such uncertainties, he decided, were envisaged by the terms of the contract because the EOT clause (Clause 25) made clear that the architect's assessment should be "fair and reasonable". His Lordship concluded that "*...Judgment is involved. It is probably fair to state that the architect exercises discretion, provided that it is recognised that the architect's decision must be based on the evidence that is available and must be reasonable in all the circumstances of the case...*"

His Lordship decided that this "fair and reasonable" obligation must also be applied to the issue of concurrent delays, depending upon the exact circumstances. The significance of each of the factors causing the delay must be assessed as should the degree of culpability behind each cause, but again this should be a judgment call for the architect.

In respect of prolongation costs and on these particular facts, His Lordship considered it inappropriate to apply "*a rigidly logical application of the principles of causation*" and decided that "apportionment" (see the "Mind the Gap" article on Page 1 of this edition of Quantum Leap)

should be applied.

Finally, His Lordship held that the condition precedent notice requirement (Clause 13.8) only applied to those instructions which caused delay in themselves. A lately issued City Inn instruction which caused a delay just by being issued late could not be subject to the same notice requirement.

Preferring not to follow the "*coldly logical approach*" argued by City Inn, the Judge settled on a 9 week EOT award to Shepherd with prolongation costs for the same period. All of these points, when viewed as a whole, champion the application of good old common sense. Lord Drummond Young has, by inference, confirmed that there is no single best method for demonstrating delay, rather the issue should instead be determined based upon the facts and the records available, coupled with practical knowledge and understanding.

Despite the project being in Bristol, the case was heard in Scotland and as such, the judgment is only persuasive in English law. Nevertheless I will certainly be raising a glass to Lord Drummond Young (any excuse!). Don't get me wrong, detailed delay analysis has its place and uses, but surely it is not the be-all and end-all. The ability to "demonstrate" some theoretical entitlement does not make it correct, no matter what your computer says. Garbage in equals garbage out. The more opinion based logic that you apply, the greater the risk that the logic is flawed or differs from original intent, the harder it becomes to find and correct the inaccuracy. Experts can become embroiled in giving their opinion on differing baselines as a result, rather than concentrating on the material and evidential facts of the case. And where Granny, is the common sense in that?

abrayford@quantexconsulting.com

Ireland Beware! The Devil's in the Detail...

Finbarr Downey comments on the dangers of bespoke forms of contract...

Gone are the days when either the Institution of Engineers of Ireland (IEI) or the Royal Institute of the Architects of Ireland (RIAI) forms of contract were the standard forms of contract between contracting parties in Ireland. As the year 2008 progresses it is becoming more evident that all sorts of bespoke forms of contract are being invented by all parties involved in the industry.

Now the government's new Public Sector Contracts have introduced the Irish construction industry to another suite of terms and conditions from which contracting parties are happily cherry-picking their favourite clauses.

There has been an increasing trend amongst contracting parties (be they Client, Consultant, Contractor, Sub-Contractor, Specialist Contractor or whoever) to modify the traditional forms from the IEI or RIAI with clauses from the Public Sector Contracts. But do all these ingredients mix well enough together to deliver the perfect set of terms and conditions? I would suggest not.

Contract drafting is a painstaking business and a skilled art. Attempting to shortcut the process by mixing different "standard" clauses

can leave plenty of loopholes, which some may exploit and others may find it difficult to extricate themselves from. These loopholes may be accidental, but there is also a significant



possibility that they could exist deliberately, designed by the drafting party to make the contract extremely onerous on the other.

Given the extremely competitive nature of tendering in Ireland, it is becoming increasingly evident that contractors of all shapes and sizes are submitting tenders and entering into contracts without fully reviewing the conditions, leaving themselves wide open to such contractual pitfalls. This is being exacerbated by the current economic slowdown hitting the industry, as contractors become desperate to maintain their turnover of work.

With the rise in popularity of these bespoke forms of contract, any tendering party must take the time to review the offered conditions thoroughly and even take professional advice if necessary. The relatively small cost in checking the contract at this stage could not only help the project run more smoothly (thus promoting the chances of achieving positive cash-flow), but could also significantly reduce the chances of major expenditure on legal costs at completion of the works.

fdowney@quantexconsulting.com

A London Olympics 2012 Claim, Written in 1296 AD...?

Jason Tudor ponders historic parallels between constructing Edward I's 13th Century castles, and London 2012...

As the government counts the rising costs associated with London's 2012 Olympics programme should we, the tax-paying public, ask if lessons have been learned from previous experiences? Wembley Stadium? The Millennium Dome? Or how about a little further back in time?

Visit Beaumaris Castle on the isle of Anglesey, North Wales, purchase a guidebook and take a look at a 712 year old construction claim which might bear a remarkable similarity to some that could soon be in production around East London. It reproduces a letter from 27 February 1296, co-written by James of St George - Master of the King's Works in Wales and a medieval architectural genius, also responsible for the design of castles at Harlech and Conwy (amongst others) for Edward I - and his clerk of works, Walter of Winchester. The letter beseeches the Employer (the very same "treasurer and barons of the exchequer" at Westminster) for additional funding.

After felicitations, expressions of greeting and due reverence (a text-book opening to any claim submission), James set out his progress report on the construction of the castle, opening rather directly with "the work we are doing is very costly and we need a great deal of money". This is followed by a familiar tale of low productivity,

winter working, labour costs, labour shortages, and a lack of positive cash-flow with which to pay the work force (400 masons, 200 quarrymen, 2000 labourers, 30 smiths, carpenters, etc.). There is also a loss and expense claim arising from the spiralling cost of insuring the works, albeit via the slightly less common practice these days of maintaining a mounted garrison, cross-bow men and 100 infantry.

And yet, Master James was still pleased to report that great achievements had been made "in spite of all the Welshmen", and assured his Employer that he was making every effort to mitigate such costs to the "best profit of our lord the King".

The letter closes, assuring delivery of satisfaction in everything and calling forth divine blessings upon the Employer (a superbly upbeat prayer for your statement of claim), thoughtfully adding for the avoidance of any doubt the post-script: "Sirs, for God's sake be quick with the money...".

He even added an early fore-runner of the standard adjudication "or-such-sum" alternative, pleading for "...as much as ever our Lord King wills...".

No doubt the same age-old issues that have plagued all construction sites will have a bearing on some aspect of the 2012 projects (hopefully

without revolting Welshmen), but all being well we can expect a completed Olympic stadium and village. Beaumaris Castle was never finished - the Welsh uprisings petered out and work halted in 1298 at a "final account" of some £14,000. James was dispatched to strengthen Edward's Scottish strongholds, where he died in 1308.

London 2012 will cost a King's ransom, even by modern standards, although we are led to believe that there are substantial contingency sums built into the Olympic construction budget. Edward's Welsh castles and defences cost some £80,000 in total and virtually bankrupted England. Many remain today as world heritage monuments, testament to troubled times, and well worth a visit. But with the Olympic site destined to be turned back to public use, there is unlikely to be a world heritage monument on this site in another 700 years - already you need to look hard for evidence of the 1908 games in White City, and of course the old 1948 stadium has gone too.

The hope is that the status, spectacle, facilities and regenerative "legacy" of the games will suffice in that regard, which begs the following question. Should we even attempt to reconcile the rising construction cost with perceived value?

jtudor@quantexconsulting.com

Chequered Flag

Motorsport is a passion at Quantex Consulting...

Quantex Consulting sponsored rider John McGuinness (right) claimed yet another victory in the Isle of Man Senior TT 2008. Following on from his heroics in clocking the first ever 130mph average speed lap on his way to winning the 2007 centenary event, he pushed his 1000cc Padgett's Manx Gas Racing Honda to a race average of 127.186 mph, some 51 seconds ahead of second placed Cameron Donald, to claim his 14th TT victory. John now stands alongside Mike Hailwood as joint second on the all-time TT winners list with only the legendary Joey Dunlop ahead of him. Congratulations to John from all at Quantex.

We were pleased to welcome clients to the British Touring Car Championships, the British Superbikes and the MotoGP at Donington Park during May and June. Our hospitality suite is in a new location this year - after several seasons at Goddards we are now located at the other end of the start/ finish straight at Redgate, the circuit's crucial first corner. The action has been spectacular so far, as the photos prove...



Clients who joined us for the MotoGP in June were fortunate to witness a rare event—a British win! Okay, so it wasn't James Toseland in the main event (he crashed out on the first corner), but the future is definitely looking bright after schoolboy Scott Redding won the 125cc Grand Prix becoming the first Brit to do so since 1973. And with a clutch of other young and extremely talented British riders making their way through the ranks, surely it is only a matter of time before we have a MotoGP winner again?

Quantex Consulting

3 Lyttleton Court
Birmingham Street
Halesowen
West Midlands
B63 3HN
Tel: +44 (0)121 585 5544
Fax: +44 (0)121 585 6116

2A Clogheen Business Park
Blarney Road
Cork
Ireland
Tel: +353 (0)21 439 6868
Fax: +353 (0)21 421 2371

2 Town Hall Mews
South Street
Ashby de la Zouch
Leicestershire
LE55 1BQ
Tel: +44 (0)1530 563 193
Fax: +44 (0)1530 564 274

13 New North Street
London
WC1N 3PJ
Tel: +44 (0)207 430 0939
Fax: +44 (0)207 430 0924