



FEBRUARY 2021 NEWSLETTER

THE CONTRACTS GROUP

COMMERCIAL, CONTRACTUAL AND MANAGEMENT CONSULTANTS
TO THE CONSTRUCTION INDUSTRY

KUNG HEI FAT CHOI! WE WISH YOU ALL THE BEST FOR THE YEAR OF THE OX!



A Time for Reflection for Delay Experts

A recent case in the NSW Supreme Court, Australia, seems to have gone under the radar in Hong Kong. In the case of White Constructions Pty Ltd (the Plaintiff) v PBS Holdings Pty Ltd (the Defendant) [2019] NSWSC1166, the recent judgement by Justice Hammerschlag cast doubt on the way programming experts present their case and the efficacy of the delay methodologies under the SCL Protocol.

Very briefly, the Plaintiff, a Developer, brought proceedings against its sewer designer and its water servicing coordinator for failing to create and submit an acceptable sewer design to the relevant Water Authority, thereby allegedly causing delay to the completion of the project and additional costs.

Both the Plaintiff and the Defendant engaged engineering delay experts to assess the alleged delay. Surprisingly whilst both experts were able to agree an as-built program, they were unable to agree on the appropriate delay analysis methodology to be adopted, further both experts disagreed with each other's approach. The Plaintiff's expert using an 'as planned versus as-built windows analysis' concluded there had been a critical delay of 240 calendar days, whereas the Defendants expert, 'using a collapsed as-built (or but for) analysis' concluded that the works at best could only have been completed 19 calendar days earlier than the actual date of completion, but for the alleged delay.

The Judge noted the complexity of the expert's reports, describing them as "adept at their art", and having reached profoundly differing conclusions, which were almost 'impenetrable' to understand, as a consequence the judge opted to engage a court appointed expert whose methodology and opinion he adopted, dismissing both expert's evidence and the methods they adopted, the Judge preferring to pay considerable attention to the contemporary records of the progress of the works including what those records did and did not say on the subject of the alleged delay.

As many will be aware the SCL Protocol refers to six (6) commonly used methods of assessing delay, two of which the experts had adopted, however, the Judge considered that 'the fact that a method appears in the Protocol does not give it standing and the fact that a method, which is otherwise logical or rational, but does not appear in the Protocol does not deny its standing'.

In essence the Judge considered the only appropriate method was to determine the matter by paying attention to the facts and assessing whether the Plaintiff has proved, on the probabilities, that the alleged delay did in fact delay the project as a whole and if so, by how much.

In fact, the judge concluded on the evidence available that the Plaintiff had failed to prove such alleged delay.

So, what can we conclude from this judgement:

1. Programming Experts should be careful in their choice of methodology for their analysis, keep such analysis simple and easy to follow.
2. Contractors need to ensure that their records are very clear as to when the delay commenced and to record the continuing effects whilst the delay continues, including, but not limited to, Notices of Delay, Progress Reports, Daily Site Diaries and Rolling Programs.
3. Whilst the SCL Protocol tries to set a standard in its delay methodologies, it is not the be all and end all for demonstrating delay.

Acknowledgements: Clive Randall on LinkedIn; Article by White and Case LLP; Article by Clayton Utz

Celebrating our 10th Anniversary!

We are pleased to announce that this year we are celebrating **our 10th Anniversary**. We would like to take this opportunity to give our sincere thanks to all of our clients, colleagues and our own team for the opportunities and support you have given us over the years. When circumstances allow, we will hope to celebrate with you in person.



Project News

China Harbour-China Geo Joint Venture have been awarded a **HK\$2.54 billion** contract for the Site Formation Works for Public Housing Developments at Pok Fu Lam South.

The works involve site formation works of a land platform of about 7ha, construction of two footbridges, and ancillary works. The works were scheduled to commence in the fourth quarter of 2020 and take approx. 72 months.

Staff News

The Contracts Group are pleased to welcome Mr. Reynaldo Ticsay a Senior Programming Analyst who is providing planning and programming services to our Clients.

Reynaldo has over 50 years of experience in civil, structural, architectural, E&M and building projects throughout the world, including Hong Kong, Japan, Iran, Italy, Nigeria, Saudi Arabia and the Philippines.



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2021年2月農曆新年特別版通訊 THE CONTRACTS GROUP

COMMERCIAL, CONTRACTUAL AND MANAGEMENT CONSULTANTS
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恭喜發財！我們祝您牛年一切順利！



延誤分析專家的反思時刻

澳州新南威爾士州最高法院最近判決的一宗案件，在香港似乎不為人知。在White Constructions Pty Ltd（原告）對PBS Holdings Pty Ltd（被告）[2019] NSWSC1166一案中，法官Hammerschlag最近的判決使人對項目進度規劃專家陳述案件的方式及其根據SCL協議得出的延誤方案的效力感到懷疑。

簡而言之，作為發展商的原告對下水道的設計者及其水務協調員提出起訴，理由是他們未能夠制定可行的下水道設計並提交給相關的水務部門，因此造成了工程項目完工日期的延誤和額外費用的開支。

原告和被告都聘請了工程延誤分析專家為聲稱的延誤進行評估。令人驚訝的是，儘管雙方的專家都同意了as-built項目進度計劃，但他們卻無法就採用那一種的延誤分析方法最為合適達成一致，雙方的專家都不同意對方所採用的方法。原告的專家使用‘as planned versus as-built window analysis’的方法分析所得出的結論是關鍵延誤了240日，而被告專家使用‘collapsed as-built (or but for) analysis’的方法分析所得出的結論是最多只能在實際完工日期前19日完成。

法官注意到專家報告的複雜性，稱其為“熟練他們的藝術”，得出了截然不同的結論，幾乎“難以理解”，因此，法官選擇聘請法院任命的專家，該專家採用的方法和意見，並駁回了原告和被告兩位專家的證據和他們採用的方法，法官選擇關注當時的工程進展記錄，不管這些記錄有沒有說明關於聲稱的延誤問題。

眾所周知，SCL協議提到了六（6）種評估延誤的常用方法，其中兩種方法是專家所採用的，但是，法官認為“出現在《協議書》的方法這一事實並未能夠賦予這方法地位。而沒有出現在《協議書》，但合乎邏輯或者是合理的方法，亦未能夠否認其地位”。

實質上，法官認為唯一適當的方法是關注事實，並評估原告是否能證明其聲稱的延誤拖延了整個工程的可能性，如能證明此延誤的話，確實又拖延了多少。

實際上，法官根據現有的證據所得出結論為原告並未能證明其聲稱的延誤。

因此，我們可以從這一判決得出以下結論：

1. 項目進度規劃專家應當謹慎選擇分析方法，並確保這種分析簡單易用及容易跟進。
2. 承建商需要確保其記錄非常清楚延誤是何時開始，並且在延誤持續發生的時候記錄其影響，包括但不限於延誤通知、進度報告、工程日誌和持續更新的工程進度規劃。
3. 儘管SCL協議試嘗為計算延誤的方法設定標準，但它並不是證明延誤的全部方法。

致謝：領英上的Clive Randall；White和Case LLP撰寫的文章；Clayton Utz的文章

慶祝我們十週年！

我們很高興宣布，今年我們將慶祝公司成立10週年。我們想藉此機會衷心感謝所有客戶，同工和我們自己的團隊多年來為我們提供的機會和支持。在情況允許之下，我們希望親身與您慶祝。



項目信息

中國港灣工程-中國地質工程合資贏得了25.4億港元的薄扶林南公共房屋開發地盤平整工程合約。

工程包括約7公頃土地平台的地盤平整工程，兩條行人天橋的建造及附屬工程。該工程原定於2020年第四季度開始，耗時約72個月。

員工信息

The Contracts Group 很高興歡迎高級編程分析師Reynaldo Ticsay先生為我們的客戶提供規劃和編程服務。Reynaldo在世界各地，包括香港、日本、伊朗、意大利、尼日利亞、沙特阿拉伯和菲律賓的民用，結構，建築，機電和建築項目方面擁有超過50年的經驗。

