

Claims Class Case Studies

Establishing Cause and Effect

By Andy Hewitt

E: andy.hewitt@hewittconsultancy.com

Andy Hewitt is the Principal of Hewitt Construction Consultancy, a practice that specialises in construction contracts and claims. He is also the Principal of Claims Class, an organisation that provides education and training on construction claims. Andy is the author of *Construction Claims & Responses* and *The FIDIC Contracts: Obligations of the Parties*.

In Claims Class Case Studies, we present a case study of a real situation for the reader to study and decide on the correct contractual outcome. The author's opinion of the solution is presented underneath.

The following describes the situation for this edition's case study.

The project consists of a 36-storey hotel tower and a 36-storey serviced apartment tower constructed over a 4-storey podium and a 4-level basement car park. The basement and podium 'footprint' covers approximately 80% of the site.

The general conditions of contract are the *Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, First Edition 1999*.

The Employer engaged a separate contractor to excavate the basement to formation level, install a secant pile shoring system (referred to on the project as the 'diaphragm wall') and install a dewatering system. The diaphragm wall included several whaling beam supports, the removal of which is included in the Contractor's scope of work. The responsibility for the operation and maintenance of the dewatering system was transferred to the Contractor on taking over the Site.

The basement construction includes a reinforced raft, reinforced suspended slabs and a peripheral retaining wall constructed against the diaphragm wall. A sheet membrane waterproofing system was required to be installed between the diaphragm wall and the retaining wall.

The Contractor was in the process of constructing the reinforced walls, slabs and columns to the Basement when a leak occurred in the diaphragm wall. The following is a chronology of the events:

Date	Event
11/07/10	The Contractor writes to the Engineer to advise that a leak has been discovered and requests the Engineer for instructions.
18/07/10	The Contractor writes to the Engineer to further advise that the leak is worsening and no action has been taken
22/07/10	The Contractor writes to the Engineer to advise that waterproofing work has stopped in the affected area.
25/07/10	The Engineer requests the Contractor to investigate and provide a report on the cause of the leak in order for the Engineer to further assess the situation.
03/08/10	The Contractor wrote to the Engineer to advise that no action had been taken and gave notice of delay.
08/08/10	The Contractor wrote to the Engineer to inform the Contractor of the rectification required.
26/08/10	The Contractor contacted ICL Inspectors ('ICL'), an independent

Date	Event
	consultant by email and asked them to investigate the root of the problem and to advise a suitable method of stopping the water leakage.
28/08/10	ICL visited the site to view and discuss the problem.
16/09/10	The Contractor issued ICL's report and recommendations for remedial work to the Engineer.
21/09/10	The Engineer instructed the Contractor to proceed with the repairs in accordance with ICL's report and recommendations.
22/09/10 – 05/10/10	The Contractor carries out remedial work.
06/10/10	The Contractor submits a request for inspection of the remedial work.
07/10/10	The Engineer approves the remedial work.
07/10/10	Waterproofing works to diaphragm wall starts in the affected area.

The Contractor submitted an extension of time claim, which included a time impact analysis based upon a delay from 11 July 2010, when the leak was discovered, to 7 October 2010, when the waterproofing work to the affected area could start. The delay analysis showed that the delay also extended the Time for Completion by 20 days.

On the basis of this information, was the Contractor entitled to an extension of time to the extent claimed? Take some time to think about it before you scroll down to the author's opinion.

Claims Class Case Studies – Author’s Opinion

The Contractor would be entitled to an extension of time under the following provisions:

Sub-Clause 4.12 (Unforeseen Physical Conditions) which provides that an extension of time shall be given *‘If the Contractor encounters adverse physical conditions which he considers to have been Unforeseeable’*. In this respect the Contractor had the right to rely on the enabling works being carried out to a satisfactory standard. The leak does not fulfil this requirement.

The instructions of the Engineer to the Contractor to carry out the remedial works constitute a Variation to the Contract. Sub-Clause 8.4 (*Extension of Time for Completion*) states that Contractor shall be entitled to an extension of time in respect of *‘a Variation ... or other substantial change in the quantity of an item of work included in the Contract.’* Of course, to fulfil this condition, any delay caused by the variation must have actually affected the Time for Completion.

The Contractor’s claim asserted that the start of the delay was 11 July 2010, when the leak was discovered. The leak however, only began to delay the Contractor’s work from 22 July 2010, as confirmed by the Contractor’s letter of the same date.

Additionally, the Contractor did not act proactively in this matter. The Engineer instructed the Contractor to investigate and provide a report, in order for the Engineer to further assess the situation on 25 July 2010, but the Contractor did not take any action for 34 days, when he contacted ICL Inspectors 28 August 2010. It was considered that 7-days would have been adequate time to source a suitable company to provide the report, therefore the Contractor contributed 24-days to the delay (34 – 7 = 24-days).

The Engineer’s assessment therefore amended the start of the delay to 22 July 2010 and the remaining delay duration was reduced by 24 days. The effect on the Time for Completion was recalculated to provide the extension of time to which the Contractor was entitled, which in this case was zero.