



“Delay Dismay”

New Supreme Court Case on Construction Delays

CASE NOTE: WHITE CONSTRUCTIONS PTY LTD V PBS HOLDINGS PTY LTD [2019] NSWSC 1166

Delay and disruption in construction disputes often require detailed expert analysis to prove the effects on a project of a qualifying cause of delay.

In preparing expert analysis, experts commonly use one of the methods set out in the Society of Construction Law (UK). Delay and Disruption Protocol (2nd ed) (**the Protocol**).

This approach was reviewed by the recent decision delivered by His Honour Justice Hammerschlag of the Supreme Court of NSW on 6 September 2019 in *White Constructions Pty Ltd v PBS Holdings Pty Ltd* [2019] NSWSC 1166¹.

This case dealt primarily with a delay claim and the Court looked at different methodologies for assessing whether a project was delayed by an alleged delay event.

BACKGROUND

In this matter, White Constructions Pty Ltd (“**White**”), an experienced property developer had engaged PBS Holdings Pty Ltd (**PBS**) as a water servicing coordinator and Illawarra Water & Sewer Design Pty Ltd (IWS) as the sewer designer for development of a 100 lot subdivision, known as Cedar Grove, at Kiama NSW.

The project required design and installation of sewer infrastructure, in respect of which Sydney Water was the relevant statutory authority.

IWS proposed an installation involving pumping stations to Sydney Water rather than a gravity-based solution involving a deep underbore. This latter solution was eventually approved by Sydney Water and not the initial proposal.

WHITE’S ALLEGATIONS

White alleged that:

- in breach of contract, IWS failed to prepare a satisfactory sewer design within a reasonable time with the consequence that completion of the development was delayed, which caused White to suffer loss and damage.
- IWS’s breach caused the completion of the project to be delayed from 15 July 2016 to 1 March 2017.
- the project would have been completed by 15 July 2016 and that IWS’s delay in lodging for approval an acceptable sewerage design with necessary backup documentary support caused the whole project to be delayed.
- PBS breached its obligations by failing to ensure that IWS did not breach its obligations to White.

THE CLEARY BROS CONTRACT

On 7 July 2015, White entered into a works contract with Cleary Bros for the construction of the works necessary to achieve the subdivision, which included drainage works, road works, water reticulation and sewer works.

On 1 April 2016, Cleary Bros gave a Notice of Delay to the work reaching Practical Completion, allegedly because of delay in approval of the sewer works.

The Superintendent under the Building Contract certified that White pay to Cleary Bros delay costs of \$2500 per day plus GST.

White claimed common law damages against IWS for breach of contract in the sum of approximately \$1.93m, being the increased construction costs paid to the contractor due for the alleged delays and design changes.

The critical focus of the Court was the issue of causation and in particular whether the sewerage redesign caused the overall delay.

DELAY EXPERTS METHODOLOGY

On the issue of delay, the parties each called an expert civil engineer programmer who applied their own methodology and came to “profoundly differing conclusions” as follows:

- White’s expert used the “**as-planned versus as-built windows analysis**”, described as follows:

“under which the duration of the works is broken down into windows which are framed by revised contemporaneous programmes, contemporaneously updated programmes, milestones or significant events. Key measuring points are identified on the path taken by the analyst to be critical. Changes to the critical path, critical path delays and the causes of those delays within and between each of the windows are examined to determine slippages and causes of delays.”

- IWS’s expert used the so-called “**collapsed as-built (or ‘but-for’) analysis**”, which involves:

“extracting delay events from the as-built programme to provide a hypothesis of what might have happened had the delay events not occurred. This method requires the selection of “logic links” which link various components of the works to assume relationships of dependency to determine a critical path.”

EXPERTS REPORTS WERE COMPLEX AND “IMPENETRABLE”

His Honour noted that the expert reports were complex and “*To the unschooled they are impenetrable*” [22]. For this reason His Honour relied upon UCPR r 31.54(1) which provides that the Court is able to obtain assistance by other persons “*specialty qualified to advise*” [23]

Under UCPR r 31.54, the Court obtained the assistance of an independent Court expert (on whose appointment the parties agreed), a fellow of the Institution of Engineers Australia, who has many years of programming and delay analysis experience, including in major projects [25].

The Court noted that the descriptions of the methods adopted by the parties’ experts were derived from the Protocol. His Honour observed that the Protocol enumerates six different methods of delay analysis, and these methods “have apparently been accepted into programming or delay analysis lore” [190].

OPINION OF COURT APPOINTED ADVISOR

It was the opinion of the Court’s expert, upon which His Honour chose to act, that neither method is appropriate to be adopted in this case and found:

“196. *(the Court expert’s) opinion, upon which I propose to act, is that close consideration and examination of the actual evidence of what was happening on the ground will reveal if the delay in approving the sewerage design actually played a role in delaying the project and, if so, how and by how much. In effect, he advised that the Court should apply the*

common law common sense approach to causation referred to by the High Court in March v E & MH Stramare Pty Ltd (1991) 171 CLR 506.”

“197. *The Court is concerned with common law notions of causation. The only appropriate method is to determine the matter by paying close attention to the facts, and assessing whether White has proved, on the probabilities, that delay in the underboring solution delayed the project as a whole and, if so, by how much.”*

THE COURT’S OBSERVATIONS

The Court made the following observations of the facts relating to the delay:

- the sewer designs submitted were not of a standard that complied with the requirements of Sydney Water until on or about 17 May 2016, being the date that the final options report was submitted to Sydney Water;
- nothing that happened or did not happen before 18 May 2016 caused any delay to the sewerage installation;
- a design should have been submitted by 24 November 2015 and, if prepared to the prescribed standard, would likely have been approved on or about 4 January 2016;
- White bears the onus of establishing that it suffered loss and the quantum of it;
- this required White to establish that:
 - ◆ the whole project would have been completed by 15 July 2016,
 - ◆ the final sewer approval delay delayed sewer works,
 - ◆ the sewer works delay prevented non-sewer works from otherwise proceeding, that is, that the programme could not reasonably have been varied to accommodate the consequences of late approval, and
 - ◆ other works could not have been done to fill downtimes so as to save time later.

On an analysis of the facts and dates the Court found that, White failed to discharge this burden in order to prove delay.

SITE DIARIES

The Court relied upon the Cleary Bros site diary as the primary source of evidence as to what was happening on the ground in order to determine what works were or were not delayed.

The Court observed that although the diary was comprehensive and well kept, the contents of the diary was not adequate. Although there were repeated references in the site diary to “*Waiting for approved sewer design*”, “*Waiting for sewer and water subcontractor to start redesign work*” and “*Waiting for sewer designs to be approved...*” [212], the Court found that “*the diary does not identify the activities, if any, which were being adversely affected by the wait...*” [212].

The court said further that the “*entries do not enable a finding of particular consequences*” caused by the sewer design issues [212].

LESSONS AND TIPS FROM THE CASE

White did not establish that any of the delays between 29 March 2016 and 16 May 2016 was fairly caused by the defendants.

Even though a site diary was maintained, the details it contained were inadequate to prove the delays.

The Court said that in determining a delay claim, what is required is a “close attention to actual facts rather than opinions about what the evidence establishes ...”. [201]

The decision is a reminder that a Court will look closely at the facts and not just the opinion of experts.

Without proper facts that establish the delay, expert opinions will not be enough.

Rather than accepting expert opinion, the Court applied the “common law, common sense” approach and said that the “only appropriate method of delay was a close consideration and examination of the actual evidence of what was happening on the ground...”

When compiling the necessary facts, parties should:

- 1) make sure that the project team is properly trained in the recording and documenting of delay events.
- 2) Insist onsite staff complete site diaries with a factual account of:
 - a) delay events; and
 - b) The effect of the delay on other activities.
- 3) Take daily program photographs of the project which are date stamped.
- 4) Update all delay registers.
- 5) Make sure all delay and Extension of time claims are notified in accordance with the Contract.
- 6) Ensure compliance with proof requirements for delay and disruption claims under the Contract.

The consequence of not adhering to the above was that White failed to establish any breach of contract by IWS or SWC and the case was dismissed with an order that White pay the costs of IWS and SWC.

CONTACT US

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1. <https://www.caselaw.nsw.gov.au/decision/5d70aadce4b0ab0bf6071bc0>

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