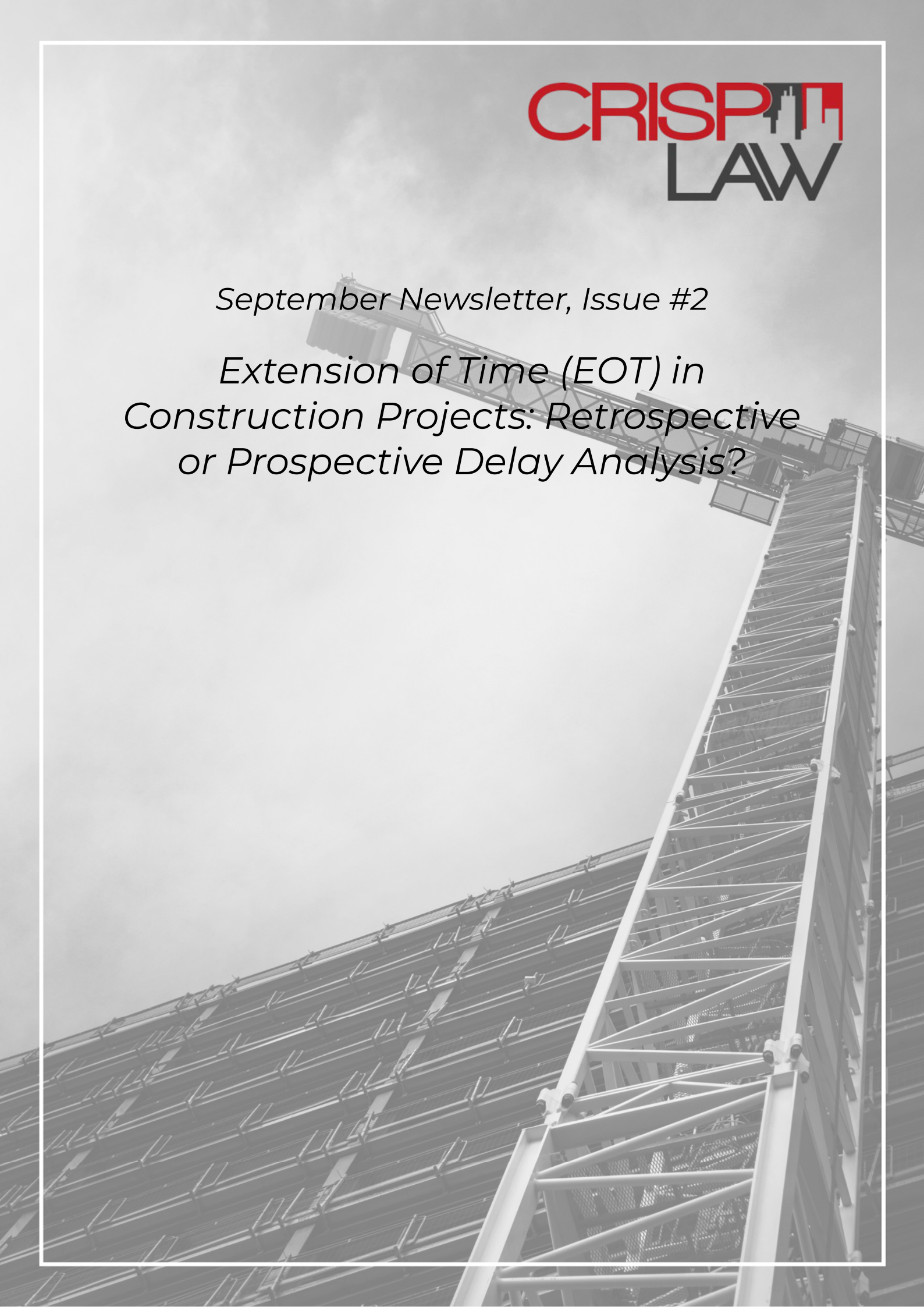

CRISP LAW

September Newsletter, Issue #2

Extension of Time (EOT) in Construction Projects: Retrospective or Prospective Delay Analysis?

In this Newsletter, we explore the significant legal cases of Built, Civil Mining, C601, and CMA Assets, offering valuable insights into the assessment of delays and the application of retrospective and prospective analysis within construction projects.

Introduction

Delay analysis methodology plays a pivotal role in the extension of time (EOT) claims within construction projects, with differing methodologies potentially leading to varied outcomes. Prospective and retrospective analyses are two primary methods utilised, each offering distinct perspectives on project delays. Prospective methodologies (i.e. "time impact" or "impact as-planned" analyses) consists of examining criticality and delay contemporaneously at the time the event in question occurred. Contrastingly, the retrospective methodologies consider subsequent events in question that caused delay to completion when the progress of the work as a whole is considered.

This newsletter explores pertinent legal cases, namely Built, Civil Mining, C601, and CMA Assets, all of which provide useful guidance on the issue of delay assessment and the use of retrospective analysis in construction projects.

Built Qld Pty Ltd v Pro-Invest Hospitality Opportunity (ST) Pty Ltd [2021] QSC 224 ('Built')

Overview

Built concerns the confirmation of the view that EOT clauses based on the Australian Standards (for instance clause 34.3 in AS4902-2000 ("is or will be delayed") allow for an assessment of delay on a prospective or retrospective basis.

The dispute arose out of a contract between the contractor, Built Qld Pty Ltd (Built), and the employer, Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd) (Pro-Invest), for the design and construction of a hotel in Spring Hill (the "Contract"). To evaluate Bulit's EOT claim, the Supreme Court of Queensland examined the appropriateness of the different methodologies adopted by the parties.

Relevantly, clause 34.3 of the Contract provides:

> The *Contractor* shall be entitled to such *EOT* for carrying out *WUC* (including reaching *practical completion*) as the *Superintendent* assesses, if:

(a) the *Contractor* **is or will be delayed** in reaching *practical completion* by a *qualifying cause of delay*;
...
(e) the *Superintendent* is satisfied that *WUC* was actually delayed.

Built argued that a prospective analysis should be utilised based on the words "is or will be delayed,"[1] and sought to distinguish the decision in the earlier *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd (WICET)* [2017] QSC 85 ('Civil Mining') (which held that both a prospective and retrospective analysis should apply).

Judgement

Built's argument was rejected by the Court as the language "[1064] is or will be delayed" was consistent with the language "has been or will be delayed" in *Civil Mining*.[2] The difference between the two phrases lies in the fact that the former takes into account considerations prior to the commencement of the delay while the latter considers activities, namely those during the period of delay.

Ultimately, the Court held that the contractual clause allowed for *either* a prospective or a retrospective methodology to determine the entitlement to an extension of time, on the basis that the disjunctive 'or' permits both a prospective and retrospective analysis. The language used in clause 34.3 of the Contract was consistent with the language considered in *Civil Mining,* whereby Flanagan J stated:

> '[1065] Accordingly, it is open on the proper construction of clause 34.3 of the Contract for either a prospective or a retrospective methodology to be used to determine the entitlement to an extension of time.'

The Court in *Built* seemingly agreed with the construction that the words 'will be delayed' align with a prospective analysis, while the words 'is... delayed' and 'was actually delayed' align with a retrospective analysis. The judgement in *Built* is illustrative of its strict application to the *Mining Case*[3], and thus is open on the proper construction of clause 34.3 of the Contract to either a prospective or a retrospective methodology in determining the entitlement to an EOT.

Built Qld Pty Ltd **[2022] QCA 266[4] – Court of Appeal**

[1] *Built Qld Pty Ltd v Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd [2022] QCA 266 ('Built')* [1044].
[2] *Built* (n 1) [1064].
[3] Ibid.
[4] *Built Qld Pty Ltd v Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd [2022] QCA 266*

Even in the instances where a party to a dispute relies upon prospective/retrospective analysis, the Court is free to decide and assess otherwise. Despite *Built* [2021] being overturned, the delayed analysis methodology remains the same.

The Court of Appeal affirmed the primary judge's decision that the contractual provision allowed for both (or either) a prospective and retrospective analysis, rejecting the related submission by Built that a Court "stands in the shoes of the superintendent" and must assess the delay as only the superintendent could have assessed it, for instance, on a prospective basis.[5] Importantly, the Court stated that:

> '[111] Having regard to the language used in this contract, if the appellant contractor lodged a claim on the basis of a prospective assessment, it was open to the superintendent to assess it on a prospective basis, a retrospective basis, or on an incremental basis.'

While the Court may step into the shoes of the superintendent, it is not restricted to the basis of assessment so performed (or claimed), or material available at the time, where the contract permits a prospective, retrospective, or incremental methodology. In other words, it can be concluded that while a party may assert that the delay is to be assessed prospectively or retrospectively, this can be overturned or rejected by the Court on the basis it deems appropriate.

Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd (WICET) [2017] QSC 85 ('Civil Mining')

Overview

Wiggins Island Coal Export Terminal Pty Ltd (**WICET**) entered into a contract (**Contract**) for bulk earthworks to be undertaken by Civil Mining and Construction Pty Ltd (**CMC**). During the project, CMC claimed a series of directions issued by WICET significantly affected progress and the scope of works under the Contract.

In *Civil Mining*, the issue concerned the programming methodology, or more specifically, whether the contract permitted both a prospective and a retrospective delay analysis, or if the assessment required only one or the other of those methodologies. Like *Built*, the issue arose as the contractual provision in question contained a disjunct 'or' and a mixture of tenses.

---

[5] Ibid, [112] – [117], referencing Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd [1999] 1 AC 266 and Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co [1903] AC 426.

Clause 35.5 of the Contract provided:

> 'If the Contractor *is or will be* delayed in reaching Practical Completion... and within 28 days after the delay occurs the Contractor gives the Principal's Representative a written claim... the Contractor shall be entitled to an extension of time for Practical Completion.'
>
> ...
>
> The Contractor will only be entitled to an extension of time for Practical Completion pursuant to this Clause if –
>
> (B) the Contractor –
>
> (5) demonstrates to the satisfaction of the Principal that the Contractor has been or will be actually delayed in achieving Practical Completion.

Judgement

Flanagan J found that the optimal view is that the contract permitted **both** a prospective and retrospective analysis. Flanagan J in *Civil Mining* construed "has been or will be actually delayed in achieving Practical Completion" as permitting both a prospective and retrospective delay analysis based on the ordinary meaning of the terms.

Clause 35.5 of the Contract entitled an EOT if the Contractor could demonstrate that it "has or will be actually delayed" and that the use of the disjunctive word 'or' gave the Contractor a choice to demonstrate that it either had been actually delayed or would be actually delayed, in achieving practical completion. Relevantly, Flanagan J stated:

'[660] The use of the words "has been...actually delayed" addresses past delay permitting or indeed inviting retrospective analysis. A Contractor would be entitled to an extension of time for Practical Completion if it demonstrates either a past or future delay.'

In these circumstances, Flanagan J preferred and accepted the retrospective, or "as-planned" vs "as-built" analysis methodology used by CMC's delay expert. This approach was retrospective in the sense that CMC's delay expert compared the baseline program with an as-built program.

V601 Developments Pty Ltd v Probuild Constructions (Aust) Pty Ltd [2021] VSC 849 ('Probuild')

Overview

The issue in *Probuild* concerned 'whether the assessment of a relevant delay pursuant to clause 34.4(b)(ii) should be made using a prospective or a retrospective method of analysis, or whether either is permissible under the Contract.'[6] The plaintiff, V601, argued that the delays must be assessed by prospective analysis of the delay, while the defendant, Probuild, argued that delays may be assessed either retrospectively or prospectively (but hoping to rely on a retrospective analysis).

Clause 34.3 of the Contract provided:

> Claim
> (a) Subject to clause 34.4, the Contractor shall be entitled to such EOT as the Project Manager assesses, if the Contractor is or will be delayed in reaching Practical Completion by a Qualifying Cause of Delay.

Clause 34.4 of the Contract provided:

> Assessment
> (b) The *Contractor* is not entitled to an *EOT* unless:
> (i) it has made an EOT claim in accordance with the requirements of clause 34.3 (and in this regard time is of the essence)
> (ii) the delay has affected an activity which is, in the reasonable opinion of the *Project Manager*, on the critical path of the *Approved Contractor's Program* as it existed at the time of the occurrence of the *Qualifying Cause of Delay*...'

Judgement

The Court uniquely held that a retrospective analysis must be preferred. The Court noted that given the circumstances of the case, retrospective analysis may be 'the only practical way of doing so.'[7]

In elaborating on the above, the Court stated:

'[623] Given the particular and relatively special circumstances of this matter, in particular the lack of contractually compliant and effective determination of Probuild's delay entitlements during the currency of the construction of the Precinct Project, and as a result of the time between the relevant delaying events

[6] *V601 Developments Pty Ltd v Probuild Constructions (Aust) Pty Ltd* [2021] VSC 849 [523].
[7] *V601 Developments Pty Ltd v Probuild Constructions (Aust) Pty Ltd* [2021] VSC 849 [623].

and the presentation of the parties' delay cases, including the expert evidence on delay, a retrospective analysis of the delays which occurred on the Precinct Project is, I consider, not only the most appropriate method of identifying the actual delay which occurred, but is also likely the only practical way of doing so and satisfying the real intent of cl 34 of the Contract and also doing justice as between the parties.'

This was further echoed in paragraphs [586]-[588], where the Court also highlighted the particularity of the circumstances that called for a preference for a retrospective analysis. This included the Principal's (V601) unjust refusal and neglect of approving the Contractor's Programs, the Principal's agent's (i.e., Project Manager) lack of independence, and the Principal's 'manufacturing' of considerable difficulties for the Contractor (for its own commercial interests). The Court suggested it would be:

'[587] more practical and more accurate and sensible to analyse delay and the effect of delay retrospectively, with the benefit of hindsight, and the higher level of assurance now achievable from a retrospective delay analysis utilising the "as build" facts to ascertain how the WUC were actually constructed and delayed.'

Moreover, the Court held that *CMA Assets* (No 6) [8] '[620] is of little assistance' and criticised the court's reasoning in favoring a prospective analysis. The Court's reasoning in *V601* demonstrated its willingness to honor the specific use of words characterising the relevant delay as one which "has affected" the critical path of execution work. It can be assumed that the prospective delay analysis was rejected in *Probuild* because of the aforementioned unique and particular circumstances of the case, all of which a retrospective delay analysis would yield a more practical and accurate analysis in this particular case.

Conclusion

The cases discussed provide valuable insights into the interpretation of contractual clauses regarding EOT claims and the applicability of prospective and retrospective delay analysis. While there appears to be a growing preference for retrospective analysis[9], particularly in cases where significant time has elapsed since the delay events, it is essential to recognise the continued relevance of prospective methodologies, such as Time-Impact Analysis (TIA), especially when assessing delays in real-time. Changing delay methodologies simply because the Principal or the Court assesses the claim at a much later date is costly and often impractical for a contractor.

[8] *CMA Assets Pty Ltd v John Holland Pty Ltd (No 6)* [2015] WASC 217 ('CMA Assets').
[9] *V601 v Probuild* [2021] VSC 849 at [588].

Furthermore, it is submitted that if the wording prescribes the use of a particular methodology in a clear manner, an expert should remain faithful to it unless this produces an unreasonable or illogical result.[10] Ultimately, adherence to contractual language and the pursuit of methodologies aligned with the specific circumstances of each project remain paramount in determining the responsibility of the parties involved.

Contact Crisp Law for advice and information:
Telephone: +61 2 8042 8701
Email: admin@crisplaw.com.au

[10] 'Built Qld Pty Ltd v Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd', *HWL Ebsworth Lawyers* (Web Page, 25 January 2023) < https://hwlebsworth.com.au/built-qld-pty-limited-v-pro-invest-australian-hospitality-opportunity-st-pty-ltd/>.