

What You Need to Know

In the recent case of *John Holland Pty Ltd v Minister for Works* [2021]WASC 312, the Supreme Court of Western Australia confirmed that the appropriate methodology for delay analysis is “dictated by and depends on the proper construction of the Contract”.

The dispute before the court in this case related to John Holland’s purported entitlement to extensions of time arising out of its design and construction of the Perth Children’s Hospital in Western Australia.

A central issue for the court was the basis for any assessment for an extension of time prescribed under the contract.

John Holland submitted that its claims should be assessed using a prospective analysis.

The state’s defence submissions did not plead whether the state’s position was that the contract required a prospective analysis, retrospective analysis or a combination of the two. The state submitted that it would provide “particulars of the appropriate methodology or methodologies to assess whether John Holland incurred actual delay by way of exchange [of] expert evidence prior to trial”.

The court found that this was not a matter of “engineering expertise” and the assessment was to be done “in accordance with the principles for proper construction of a commercial contract”.

Accordingly, it was necessary for the state to provide particulars as to the proper construction of the contract prior to exchange of expert evidence.

In coming to its decision, the court considered the “real risk” to John Holland’s preparation for trial, should it be required to wait, in this case several months, for the provision of expert evidence to understand the case contended by the state.

Notwithstanding the court’s primary findings, it held that there was no obligation on the state to plead the particulars of the methodology to be adopted, as that “is properly an area for expert evidence”.

The decision serves as a timely reminder to parties to ensure consideration is given to the proper construction of the contract to identify the methodology by which an extension of time is to be assessed, prior to engaging experts to opine on any alleged entitlement.

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