

Who Owns the Float?

The issue regarding float comes down to the question of whether, if the Contractor has built float into his programme, the Employer should get the benefit of it even if any Employer-related delay occurs (such as variations/additional work being instructed).

From a Contractor's point of view, any float has been built into the programme for the Contractor's own benefit. This allows them to manage the sequence and timing of activities, allocate resources appropriately and protects against liquidated damages. Given that, the Contractor will argue, they should be able to dictate how it is used.

The Employer, on the other hand, may argue that the Contractor has built the total programmed time on site (including the period of float) into the price. Accordingly, the Employer has already paid for it and should therefore be entitled to the benefit of it. Whether that is in fact the case is open to debate. It may be that the Contractor has simply gone along with the Employer's indicative contract period but, in order to gain a competitive advantage, has in fact priced for a shorter period on site due to anticipated time savings made by more efficient working practices, methods of working or other time saving measures.

It is evident from the short analysis above that arguments based on such principles of ownership can easily lead to uncertainty over where parties stand in relation to float.

Another approach is to look at the contract provisions on extension of time and at the result brought out by critical path analysis. This tends to be the way the courts now approach the question.

In NEC 3, where there has been a compensation event, the Project Manager does not change the Completion Date or Key Dates if the event has no effect on Completion or meeting a key date. (cl 61.4). This means that if a compensation event affects a non critical path activity (ie one with float) and does not push it onto the critical path, the Employer gets the benefit of the float on that activity since there is no impact on the Completion Date.

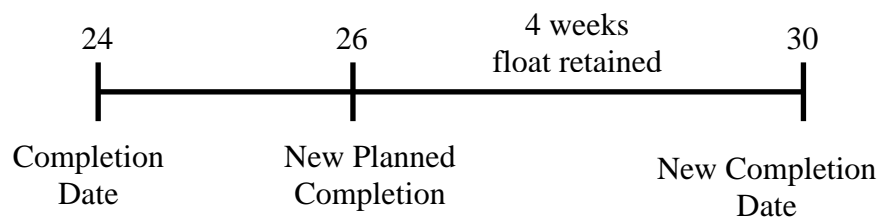
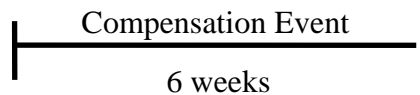
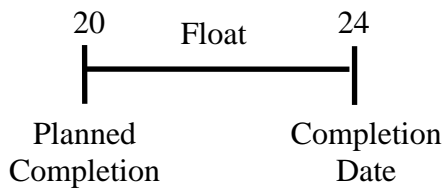
Alternatively, if a compensation event does affect a critical path activity, the delay to the Completion Date will be assessed as the length of time that, due to the compensation event, planned Completion is going to be late as compared to planned Completion in the programme (cl 63.3). Note that this clause does not refer to the length of time the Completion Date is going to be late.

If there is a gap between planned Completion and the Completion Date this wording means that the Employer does not get the benefit of this float (sometimes referred to as terminal float).

As an example:

- A contract has planned Completion at week 20.
- The Completion Date is week 24.

- That means four weeks of terminal float is built in.
- A compensation event takes place with a 6 week duration.
- That causes a six-week delay to planned Completion.
- In terms of cl 63.3 the Contractor is entitled to an extension of time for the length of time planned Completion is going to be late as compared to planned Completion in the Programme.
- The extension of time would be six weeks from week 24 to week 30. Not two weeks from week 24 to week 26.
- This preserves the terminal float for the Contractor in case it is required for future Contractor delay.



The JCT form, however, does not contain the same distinction as NEC3. In the JCT standard form, entitlement to extension of time is dependent on a Relevant Event having occurred and the completion of the Works or of any Section being delayed beyond the relevant Completion Date. Where that is the case, the extension of time is calculated as being such later date as the Architect/Contract Administrator estimates to be fair and reasonable. Where the activity affected by the Relevant Event has float, this will only result in a delay beyond the Completion Date once it has used up the float. If the delay caused by the Relevant Event can be absorbed by the float then no extension of time will be awarded and the Employer gets the benefit of any float. This argument was accepted in *Henry Boot Construction v Malmaison Hotel*, where the Engineer argued that the variations and late information relied upon by the Contractor did not cause delay because they were not on the critical path.

In reality, it is more usual for there to be a mixture of Contractor and Employer delays. In those cases, it can be the case that the float is dealt with on a 'first come first served' approach. This is sometimes referred to as the project, as opposed to the Contractor or Employer, owing the float. Under this analysis, if an activity on the programme has float, it is not a critical path activity. If the Employer then instructs a variation to that activity which uses up the float, it becomes critical. If the Contractor

then causes a delay to that activity, the Contractor is likely to move into being in culpable delay, in which case the Employer got the benefit of the float by getting to it first.

Alternatively, if the Contractor's delay happens first, thereby using up float, and, subsequently, an instruction is issued by the Employer once that activity has become critical, that instruction will have caused a delay to the planned completion date and therefore will trigger an extension of time.

The issue in both of these scenarios will be how to prove the sequence of events and what state the programme was in at the relevant times.

In NEC 3, the Contractor is to submit revised programmes at intervals specified in the contract and issue early warning notices of any matters which could cause delay to completion. This might make it easier to prove the sequence of events than in a contract where this is not done and the analysis is left to the end. Issuing the revised programmes and giving the required notices could in such a contract protect the Contractor's entitlement to extension of time. These will put the Employer on notice if the Contractor has been eating into the float and if activities have become critical as a result.

Even if the contract does not have provisions like those in NEC3, it may still be possible to establish this if the Contractor gives notice as the job progresses that a delay is likely which will use up float rendering certain activities critical. Such notice might be sufficient to put the Employer on notice that any subsequent change by him will affect the completion date so that it is that change which is the cause of delay. In that case, the float will have been effectively pre-booked by the Contractor giving notice of this.

In the JCT form, the Contractor is obliged to give notice to the Architect/Contract Administrator if and whenever it becomes reasonably apparent that the progress of the Works or any section is being or is likely to be delayed (clause 2.27). The notice procedure is not restricted to Relevant Events but includes any causes of delay. Further, the notice is to cover delay to progress of the works, so that it is not necessary for it to involve delay to the Completion Date. The notice is to include particulars of the expected effects, including (but, it is suggested, not limited to) any delay to the Completion Date. An effect of delay could therefore be the erosion of float and, if notified, this could assist the Contractor in future questions of extension of time entitlement.

JCT does not contain the same requirements as NEC3 to reissue programmes. The JCT requirement is that the Contractor provides the Architect/Contract Administrator with the master programme identifying, if the Contract Particulars require it, the critical paths along with any other information requested in the Contract Documents (cl 2.9.1). The programme then only requires to be reissued to take account of any decision to grant an extension of time or any agreed revision to the Completion Date on acceptance of a Variation or Acceleration Quotation (cl 2.9.2). This would not, however, prevent a reissue along with a delay notice if this was thought to assist.

In terms of case law specifically on ownership of float, there is relatively little. The issue did arise though in **Ascon Contracting v Alfred McAlpine** in 1999. There, the main contract works finished late. McAlpine alleged this was due to the Subcontractor Ascon's late completion. The main contract programme contained 5 weeks of float, which McAlpine claimed it could use in any way it chose. This included, it argued, allocation of the float to McAlpine leaving the claim against Ascon

intact. The court, however, took another view to allocation and found that all those culpable for the delay should share in the benefit of the float. The main contractor was not entitled to pick and choose in the way he wanted. Unfortunately, the question of how this allocation is to take place in practice was not dealt with by the Court and could be a difficult area.

In NEC3, distinct from float, are Time Risk Allowances. The Contractor is to show on each programme submitted for acceptance any provisions for time risk allowances (cl 31.2). This is listed separately from the requirement to show float so that each is meant to be identifiable on the programme.

According to the Guidance Notes, Contractor's time risk allowances are to be shown as allowances attached to the duration of each activity or to the duration of parts of the works. They have been described as being the difference between the quickest time in which an activity can be completed and the (more realistic) time allowed on the programme. It is said that these allowances are owned by the Contractor as part of the planning/programming exercise to cover Contractor risks. This suggests that these would be ignored in assessing any delay to Completion due to a compensation event so the Contractor retains the benefit of them.

It is worth noting the terms of cl 31.3. The Project Manager can notify the Contractor that the programme is not being accepted due to it not representing the Contractor's plans realistically. This protects against the Contractor over-providing for risks through long Contractor-owned time risk allowances (effectively float under another guise).

The JCT form does not contain any equivalent provisions generally being much less prescriptive as to the form and content of any Contract programme.

The above focuses on the consequences of float as far as extension of time is concerned. Whilst the existence of float can mean the Contractor is not entitled to an extension of time, it does not necessarily follow that there is no entitlement to loss and expense. The test for that in the JCT form is that the Contractor has incurred direct loss and/or expense for which he will not be reimbursed by a payment under any other provision in the Contract, because the regular progress of the works has been materially affected by a Relevant Matter. The effect on progress does not necessarily have to be a delay to the Completion Date but can be, for example, the disruptive effect of a Relevant Matter.

In NEC3, the occurrence of a compensation event also results in the financial consequences being assessed separately from any time consequences so, again, the existence of float does not necessarily deprive the Contractor of entitlement to loss and expense.

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