



Technical

Difficulties with Concurrent Delays – Part 1

Date: 09 May 2014

Part 1 – Introduction and Background to Concurrent Delays

1. The aim of this Article is to explain what is meant by concurrent delay and what the current view of the courts on this matter is.
2. The Society for Construction Law Delay and Disruption Protocol says:

“1.4.4 True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time....”

3. A similar but narrower definition was proposed by Judge Seymour in the case of *Royal Brompton Hospital NHS Trust v Frederick A Hammond & Ors* [2001] EXCA Civ 206, 76 Con LR148 when he described concurrent delay as:

“...Two or more delay events occurring within the same time period, each independently affecting the Completion Date...”

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4. Later Judge Seymour elaborated and said:

“...It is, I think necessary to be clear what one means by events operating concurrently. It does not mean, in my judgement, a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a Relevant Event and which, had the contractor not been delayed would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a Relevant Event, the completion of the Works is not likely to be delayed thereby beyond the Completion Date...”

5. In *Adyard Abu Dhabi v SD Marine Services* the courts adopted the description suggested by Mr John Marrin QC in his paper to the Society for Construction Law which was:

“...‘concurrent delay’ is used to denote a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency...”

6. In this paper Mr Marrin QC stated that the issue of causative potency needed to be considered applying a common sense approach and that often it may be decided that if one of the events is considered as having a considerably lesser causative potency it should be treated as having no effect. Mr Marrin QC differentiated delays into effective and ineffective causes of delay, ineffective causes being those which had significantly less causative potency.
7. When considering how Concurrent Delay should be dealt with, with reference to the issues of Extension of Time and Loss and Expenses these decisions referred to above were in line with *Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited [1999] 70 Con LR32 (TCC)*.

8. In this case the Judge stated:

“If there are two concurrent causes of delay, one of which is a Relevant Event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the Relevant Event notwithstanding the concurrent effect of the other event.”

9. This approach, often now referred to as the *Malmaison* approach was recently confirmed as being the English Courts favoured approach in *Walter Lilly & Company Ltd v Mackay & Anor* [2012] BLR 503 EWHC 1773 (TCC).
10. In this case the Judge succinctly described concurrent delay as

“...where a period of delay is found to have been caused by two factors...”

11. And later stated:

“...where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time. Part of the logic of this is that many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to construe Clause 25 on the basis that the Contractor should be denied a full extension of time in those circumstances. More importantly however, there is a straight contractual interpretation of Clause 25 which points very strongly in favour of the view that, provided that the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question. There is nothing in the wording of Clause 25 which expressly suggests that there is any sort of proviso to the effect that an extension should be reduced if the causation criterion is established...”

12. At this point it is worthwhile highlighting that there is a difference in approach between the Scottish and English Courts.

13. The Scottish Courts have taken a different approach. This approach is often referred to as the *City Inn* approach.
14. This approach comes from the case *City Inn v Shepherd* in 2010. This case was under a JCT form. The Scottish Courts decided that if there are concurrent causes of delay, the issue should be approached in a fair and reasonable way and responsibility for the delay should be apportioned as between the Relevant Event and the contractor risk event. In short, the parties share responsibility if there is concurrent delay. This has become known as the “*apportionment*” approach.
15. In devising the apportionment approach, the Scottish Judge relied on the wording in the JCT form that required the contract administrator to grant a “*fair and reasonable*” extension of time if there had been a Relevant Event. The Judge felt those words required the contract administrator to take account of any concurrent delays. In other words, it wouldn’t be “*fair and reasonable*” for a contractor to get a full extension of time if he was also in delay.
16. The apportionment approach whilst appearing sensible does not follow the words of the JCT. The JCT states that when a Relevant Event occurs, the contractor gets an extension of time. There is no scope for apportionment and the words “*concurrent delay*” or “*apportionment*” do not feature.
17. Whilst this apportionment approach may seem like “*common sense*”, it doesn’t provide the parties with certainty as to what happens if there is a delay. In fact, it possibly does the exact opposite.
18. For a while in 2010 it was thought that this *City Inn* approach was in fact the correct approach in England also but this was dispelled in a number of cases including *De Beers v Atos*.
19. It would appear then that broadly the courts (by way of the *Walter Lilly* decision) in England and the delay analyst community (by way of the SCL protocol) are in agreement as to what Concurrent Delay means and how it should be dealt with.
20. So, in its broadest sense Concurrent Delay is when two (or more) events impact on the completion date at the same time. It should be noted that they do not have to have the same effect in terms of duration but they must have an impact on the completion date at the same time.
21. It should be noted that true Concurrent Delay as advocated in *Royal Brompton* is very, very rare and in reality Concurrent Delay of whatever description is often shown not to have arisen when a detailed analysis is possible.

22. In line with many commentators and the English courts view it is important to assess all delay events in terms of *when they occur*, *whether they had or would have an effect* on the critical path and if so *when they had a critical effect* (when they delayed the completion date).
23. It is key to presenting a case regarding concurrent delay to establish what the actual date for completion was calculated as being at the time that the events in question start to effect the completion date.
24. This analysis is one of fact and common sense and is heavily reliant on the amount and nature of the available information and obviously depends on the standard of the programme in existence at that time.

[Click here for Difficulties with Concurrent Delays – Part 2](#)

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