



Technical

## Difficulties with Concurrent Delays – Part 2

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### Part 2 – Employer's View – Concurrent Delay

1. In my previous article on Concurrent Delay I considered what the current law was on this matter.
2. It was established that whilst there is possibly no definitive answer to this question broadly it seems that concurrent delay is

*“...when two (or more) events impact on the completion date at the same time...” but that “...Concurrent Delay of whatever description is not common if sufficient information is available and analysis possible...”.*

3. However when sufficient information is unavailable or accurate analysis is not possible or when true concurrent delay does actually occur we must consider what the impact of concurrent delay is and how it should be dealt with by the various parties to a construction contract.
4. During a period of concurrent delay ordinarily the Claimant in a situation involving concurrent delay would be entitled to an extension of time but would not be entitled to Loss and/or Expense/Compensation. This principle has been settled law since *Henry Boot Construction (UK)*

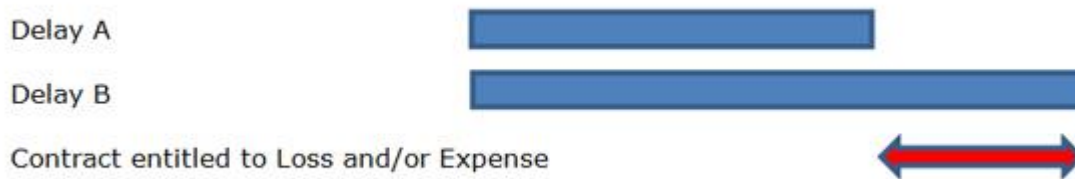
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*Limited -v- Malmaison Hotel (Manchester) Limited [1999] 70 Con LR 32 [TCC]* as detailed in our previous article on Concurrent Delay.

5. In this article I will look at this issue from the point of view of “*the Employer*”, whether that is the Employer in the normal JCT type sense or the Employer meaning the Contractor employing a Sub-Contractor or a Sub-Contractor employing a Sub-Sub-Contractor.
6. As explained above when concurrent delay occurs the current law suggests that the Employer should grant an Extension of Time but no Loss and Expenses should be paid.
7. In simple terms concurrent delay is represented pictorially as so:



8. A is the effect of a delay for which the Contractor is responsible i.e. late provision of materials.
9. B is the effect of a delay for which the Employer is responsible i.e. late instruction.
10. Delays A and B are, for the purpose of this article, equally potent i.e. that either delay had the ability to delay the completion date by an equal effect.
11. As both delays are effective during the same period and there is clearly a period of concurrency, the Employer is obliged to grant an Extension of Time for the whole period of B.
12. However the Contractor is only entitled (subject to any contract mechanisms) to Loss and/or Expense for the period between when A finishes and B finishes.



13. If B had not occurred the Employer would be entitled (subject to contract mechanisms) to deduct Liquidated and Ascertained Damages for the period between when A starts and finishes.



14. Commonly the Employer may feel aggrieved that effectively the Contractor “*gets away*” with the Delay A, in terms of its ability to recover damages from the Contractor, as the Delay A would have delayed the project. It should however be remembered that conversely the Contractor may feel equally aggrieved that the Employer does not have to pay for loss and expense for the whole period of B which wasn’t its fault and for which the Employer is responsible.
15. I believe that whilst not always a concern of the Courts this is probably the “*fairest*” interpretation of the contractual mechanisms. Neither party benefits unjustly for a delay which is affecting the completion date when other factors mean that, at that time, the completion date would not be achieved in any event.
16. Before the parties embark on assessing what time is due and how much money should flow, the various delays must be analysed in detail. As I advised in my previous article on concurrent delay true concurrency is rare and more often than not detailed analysis will result in it being established that concurrency did not actually occur.
17. As with any delay the key tasks which must be carried out are:

- Ascertain that a delay has occurred.
  - Ascertain what the cause of the delay is.
  - Ascertain what the impact was of the delay.
  - Ascertain when the delay occurred.
  - Ascertain when the delay impacted on the completion date.
18. To successfully do this it is vital that an adequate programme exists and that it shows the critical path, and ensure that this programme is monitored and regularly updated (with progress, delay and additional work).
  19. This is why it is vital that the Employer receives from the Contractor a properly linked programme which shows the critical path and that this is updated regularly. Without this information any analysis may be open to criticism in the future and meaningful analysis is extremely difficult to carry out.
  20. One of the most common mistakes made by the Employer is not maintaining a programme of its own or checking that any submitted programme of the Contractor is accurate. The veracity of the updated programme must be confirmed to ensure that all delays are recorded properly and is crucial if concurrent delay occurs or is suspected, as without this demonstrating the existence, or otherwise, of any delay becomes an extremely contentious matter which becomes expensive to resolve.
  21. For concurrent delay to exist it must be demonstrated that the delay or delays were effective (causing critical delay), at the same time (broadly in terms of both cause and effect). This can ideally be achieved using critical path network analysis based on accurate detailed records. Information and good records are key to any successful delay analysis.
  22. If the Employer intends to claim that the Contractor is not entitled to loss and expense for a period of time due to concurrent delay it must be able to demonstrate its assertions, meaning it must be able to demonstrate that on balance other delays were occurring around the same time which impacted on the completion date around the same time which had equal causative potency (meaning that either delay had the ability to cause critical delay during the same period). To do this accurate detailed records and analysis are of paramount importance. The obligation to prove your assertions is no different with time claims to the obligation on any other type of claim meaning the burden of proof rests with the party making the allegation.
  23. The Employer should be aware of the possibility of concurrent delay and should, I would suggest, always be on the “look-out” for such

circumstances as it may give rise to a reduction in any claim for loss and expense but may also impact in its ability to claim damages.

24. Another consideration for the Employer with regard to concurrent delay is regarding the terms and conditions of Contract. As the Employer is responsible for the introduction of the terms and conditions of Contract it may introduce detailed terms as to how to deal with concurrent delay, it can also decide upon a definition of concurrent delay. A full definition of what should be viewed as concurrent delay (time events that happen at the same time or which impact at the same time) and how it should be dealt with should, in theory, remove some of the doubt and therefore some of the cause of dispute.

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