

White Paper Construction Law Conference

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Latest Judicial Thinking on how Concurrency of
Contract and Client Events influence Extensions of Time
and Cost Recovery?

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Introduction – structure of talk

- What is concurrent delay?
- Development of the law on concurrent delay
- Defining true concurrency
- Most recent judgment is Thomas Barnes & Sons v Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC)
- Where does the law stand now?



What is concurrent delay?

John Marrin KC, 'Concurrent Delay' (2002) 18(6) Const. LJ 436:

“a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency”



What is the prevention principle?

Jackson J in Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd [2007] BLR 195 at [47] – [48]:

- *“The essence of the prevention principle is that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing”*
- *“the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from completing by that date”*



Prevention principle & concurrent delay?

- Debate in authorities about relationship between the prevention principle and the concept of concurrent delay
- Jerram Falkus Construction Ltd v Fenice Investments [2011] EWHC 1935 (TCC) at [52]: prevention principle will not apply if *“that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the contractor’s own default”*
- Contrast Court of Appeal in North Midland Building Ltd v Cyden Homes Ltd [2018] EWCA Civ 1744 at [32]: *“the prevention principle has no obvious connection with the separate issues that may arise from concurrent delay”*



Consequences of concurrent delay

Keating on Construction Contracts (12th ed.) paragraph 9-105:

“In respect of claims under the contract:

- (i) depending upon the precise wording of the contract a contractor is probably entitled to an extension of time if the event relied upon was an effective cause of delay even if there was another concurrent cause of the same delay in respect of which the contractor was contractually responsible; and*
- (ii) depending upon the precise wording of the contract a contractor is only entitled to recover loss and expense where it satisfies the “but for” test. Thus, even if the event relied upon was the dominant cause of the loss, the contractor will fail if there was another cause of that loss for which the contractor was contractually responsible.*



Consequences of concurrent delay

- **Starting point is terms of the contract**; if unclear, look to authorities
- Law in England & Wales: where there is concurrent delay, contractor is entitled to '**time, but no money**', per Henry Boot Construction v Malmaison Hotel (1999) 70 Con LR 33 and De Beers v Atos Origin IT Services [2011] BLR 274
- The **difficulty** comes in **defining true concurrent delay**
- Note different position in Scotland: fair & reasonable apportionment of time and money: City Inn v Shepherd Construction [2010] BLR 473
- That case is not good law in England, per Akenhead J in Walter Lilly v McKay [2012] EWHC 1773 (TCC)



Defining true concurrent delay

Three approaches:

- **Dominant cause approach:** two delaying events of equal causative potency
- **Reverse 'but for' test:** whether the delaying event for which an EoT is claimed would have delayed completion but for the Contractor Delay Event
- **First-in-time approach:** where an existing event has caused delay to completion, a subsequent delay event is not treated as being a cause of delay unless it increases the delay already caused by the existing event



First-in-time approach

Leading case on this approach is Royal Brompton Hospital NHS Trust v Hammond (No. 7) (2001) 66 Con LR 148 which at [31] contrasted:

- A situation in which, work already being delayed, 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, by reason of the existing delay, made no difference = NO CONCURRENCY
- A situation in which two things happen, either of which, had it happened on its own, would have caused delay, and one is a relevant event, while the other is not = REAL CONCURRENCY



First-in-time approach

- Royal Brompton was followed in Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848:

“there is only concurrency if both events in fact cause delay to the progress of the works and the delaying effect of the two events is felt at the same time” [279]

- See also Saga Cruises BDF Ltd v Fincantieri SPA [2016] EWHC 1875



First-in-time approach

This was reflected in SCL Protocol on Delay & Disruption (2nd ed.):

- Example: a Contractor Risk Event will result in 5 weeks' delay to Completion (delaying Completion Date from 21 January to 25 February). A few weeks later, an Employer variation is instructed which, in the absence of the preceding Contractor Delay, would have delayed Completion Date to 14 February [10.7].
- SCL's answer: no concurrent delay – Contractor Risk Event is the only effective cause of delay [10.9]
- *“True concurrent delay will be a rare occurrence”* [10.3]



Barnes v Blackburn: the Facts

Thomas Barnes & Sons v Blackburn with Darwen Borough Council
[2022] EWHC 2598 (TCC)

- Council engaged Barnes to build bus station in Blackburn for £4.4m
- JCT Standard Building Contract with Quantities 2011
- Works fell into delay and Barnes claimed EoTs (some were granted)
- Council issued default notices after completion date missed; Barnes stopped work
- Council terminated contract and engaged replacement contractor to complete works



Barnes v Blackburn: the Bus Station



Barnes v Blackburn

- Barnes claimed EoT of 251 days and £1.8m loss & expense
- Council said Barnes entitled to only 27 days EoT
- Council also said it was in any event entitled to set off the net cost (£2.7m) of the replacement contractor completing works against any loss & expense Barnes may recover



Barnes v Blackburn: the critical path

- The delay experts agreed that the internal finishes in the Hub (office space) was the last activity on the critical path
- Barnes said critical delay was due to steel deflection in the Hub (Employer Event)
- The Council said the critical path ran through the delayed roof coverings (Contractor Event)
- The steel deflection was identified before the roof works fell into delay (first in time??)
- Neither party argued that the delays were concurrent; this was raised by Judge during cross-examination of delay experts



Barnes v Blackburn: the Judgment

“...completion of the remedial works to the hub structural steelwork was essential to allow the concrete topping to be poured and the hub SFS to be installed, without which the hub finishes could not be meaningfully started, but completion of the roof coverings was also essential for the hub finishes to be meaningfully started as well. It is not enough for the claimant to say that the works to the roof coverings were irrelevant from a delay perspective because the specification and execution of the remedial works to the hub structural steelwork were continuing both before and after that period of delay. Conversely, it is not enough for the defendant to say that the remedial works to the hub structural steelwork were irrelevant from a delay perspective because the roof coverings were on the critical path. The plain fact is that both of the works items were on the critical path as regards the hub finishes and both were causing delay over the same period.” [140]



Barnes v Blackburn: the Judgment

- Relying on judgment of Akenhead J in Walter Lilly v Mckay [2012] EWHC 1773 (TCC), HHJ Davies found that the court is not compelled to choose only between the rival approaches and analyses of the experts.
- Ultimately, it must be for the court to decide *as a matter of fact* what delayed the works and for how long.
- When ascertaining what is delaying a contractor at any one time, one should generally have regard to the item of work with the longest sequence.

Barnes v Blackburn: the Judgment

- HHJ Stephen Davies therefore held Barnes entitled to EoT of 119 days but prolongation of only 27 days because the Employer Delay Event was concurrent with the Contractor Delay Event
- Barnes v Blackburn does not follow the first-in-time approach (in that steel deflection was identified before roof works fell into delay)
- Court also found termination was valid at common law therefore any loss Barnes incurred was extinguished by the Council's set-off



Barnes v Blackburn: the Judgment

- More akin to 'effective cause' approach: both delays causing critical delay during the same period of time
- Question of what amounts to a concurrent delay is still a subject of controversy
- Judge took common sense approach on the evidence: *"for a very considerable period of time there was also a problem caused by the delay to the roof coverings which was itself a cause of delay to the critical path"* [144]
- But answer will be fact-specific and Court may take common sense and pragmatic approach
- Application of difficult principles of causation: 'concurrency' is not a self-contained area of jurisprudence all of its own

