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Concurrent Delay

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What is the impact of concurrent delay and client events on extensions of time and cost recovery?

Delays and Extensions of Time

- Contractual mechanisms for dealing with events that may impact the programme for the works – clear risk allocation
- Every construction contract should identify events which, if they occur and if they delay completion, will entitle the Contractor to
 - An extension of time (and adjustment of the date for completion)
 - Sometimes, additional costs (loss and expense, associated with the extended period on site) where due to act, default or omission of Employer, and
 - Relief from liability for liquidated and ascertained damages

What do you need to establish an entitlement to an Extension of Time?

- Typically, a contractor will be required to establish that:
 - An event has occurred which is at the employer's risk
 - The event has caused delay to an activity or activities which are on the critical path, and
 - This will or is likely to result in a delay to completion beyond the contractual completion date

NOTE: there may also be notice formalities to be complied with.

- The contract administrator will typically then determine what, in his or her opinion, is a fair and reasonable extension of the time for completion

What about Acts of Prevention?

- Employer will not, by its acts, defaults or omissions, hinder or prevent the contractor from completing the works
- Should such acts of prevention occur, the Employer should not be able to benefit from its acts or omissions

- *...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.*

[Multiplex Construction v Honeywell Control Systems (2007)]

- Typically, the contractual mechanisms provide that acts or defaults of the employer which delay completion will entitle the contractor to an EOT

What about Acts of Prevention? (cont'd)

- BUT if they don't:
 - Contractual completion date falls away and time becomes 'at large'
 - Contractor's obligation is then to complete works in a 'reasonable' time,
 - No entitlement for Employer to recover liquidated damages
 - But can still seek to establish general damages for failure to complete in reasonable time.
- Principles around concurrency take account of this principle, namely that the employer should not be able to benefit from its own defaults.

NOTE: acts of prevention by an employer will not set time at large IF the contract provides for an extension of time for those events

So what is Concurrent Delay?

First answer, a “contentious issue”, a “complex and intellectually troublesome concept”!

- General move away from need to show dominant cause of delay, rather concerned with establishing that event relied upon is an effective cause of delay

“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.”

For concurrent delay to exist, each of the employer risk event and the contractor risk event must be an effective cause of delay to completion (i.e. the delays must both affect the critical path).”

SCL Delay and Disruption Protocol, 2nd edition, February 2017

And what happens in Practice – some Guidance

SCL: Core Principle 5 – Procedure for granting an EOT

“Subject to the contract requirements, the EOT should be granted to the extent that the Employer Risk event is reasonably predicted to prevent the works being completed by the prevailing contract completion date. In general, this will be where the employer risk event impacts the critical path of the works and thus extends the contract completion date. This assessment should be based upon an appropriate delay analysis, the conclusions derived from which must be sound from a common sense perspective.”

And what happens in Practice – some Guidance (cont'd)

Time?

“Where contractor delay to completion occurs or has an effect concurrently with employer delay to completion, the contractor’s concurrent delay should not reduce any EOT due.”

And Money?

“Where employer delay to completion and contractor delay to completion are concurrent and, as a result of that delay, the contractor incurs additional costs, then the contractor should only recover compensation if it is able to separate the additional costs caused by the employer delay from those caused by the contractor delay.

If [the Contractor] would have incurred the additional costs in any event as a result of contractor delay, the contractor will not be entitled to recover those additional costs.”

And what happens in Practice – some Caselaw

- Royal Brompton Hospital NHS Trust v Hammond & Others (2001) – Judge Richard Seymour QC
 - *".... I think it is necessary to be clear what one means by events operating concurrently. It does not mean ... a situation in which work already being delayed ... 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..... The relevant event simply has no causative effect on the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, the works were proceeding in a regular fashion and on programme, when 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. In such circumstances, there is a real concurrency of the causes of the delay ..."*

And what happens in Practice – some Caselaw (cont'd)

- City Inn v Shepherd Construction (2010) – Lord Osborne
 - *... if a dominant cause can be identified as the cause of some particular delay in the completion of the works, effect will be given to that by leaving out of account any cause or causes which are not material. Depending on whether or not the dominant cause is a relevant event, the claim for an extension of time will or will not succeed.*
 - *.... where a situation exists in which two causes are operative, one being a relevant event and the other some event for which the Contractor is taken to be responsible, and neither of which can be described as the dominant cause, the claim for extension of time will not necessarily fail. In such a situation, which could, as a matter of language, be described as one of concurrent causes,... it will be open to the decision maker,.... approaching the issue in a fair and reasonable way, to apportion the delay in the completion of the works occasioned thereby as between the relevant event and the other event..*

And what happens in Practice – some Caselaw (cont'd)

- Walter Lilly & Co Ltd v Mackay and another (no. 2) (2012) – Aikenhead J
 - *..I am clearly of the view that where delay is caused by two or more effective causes, one of which entitles the contractor to an extension of time ... 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...*
- Probably a more accurate statement of the current position on concurrency

And what happens in Practice – some Caselaw (cont'd)

- Thomas Barnes & Sons Plc v Blackburn with Darwen Borough Council (2022)
 - Delays due to (i) structural steel work and (ii) roof finishes
 - Stephen Davies J made clear that for the court to consider totality of evidence to determine whether there were concurrent delays and if so, the effect of same.
 - Reference made to the principles set out in Keating, namely, and depending on exact wording of contract provisions,
 - A contractor will be entitled to an EOT if the event relied upon was an effective cause of delay even where there was another concurrent cause of the same delay for which the contractor is responsible, and
 - A contractor is only entitled to recover loss and expense where it satisfies the 'but for' test i.e. the contractor will not be entitled to any loss and expense for such delays where there is another concurrent delay for which it is responsible i.e. where the contractor would have been delayed and would have incurred the additional costs in any event.

Can parties agree something different?

- North Midland Building Limited v Cyden Homes Limited (2018)
 - Amended JCT
 - Required Contractor to make reasonable and proper efforts to mitigate impact of any delays due to relevant events
 - Included provision that: *Any delay caused by a relevant event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account*
 - Despite protests from Contractor that this offended against the prevention principle, the court decided that the clause was unambiguous and meant that where there was such concurrency, the Contractor would not be entitled to an extension of time to the extent there were concurrent delays for which the Contractor was responsible
 - Upheld on appeal as 'crystal clear'
 - Argument on appeal that there should be an implied term that the Employer should not be entitled to apply LADs also rejected.

Conclusion

- Will depend on the specific contract wording but based on most standard form contracts, where there are concurrent delays,
 - Contractor will be entitled to time but (generally) no money
 - Employer not entitled to apply LADs
- Dispute resolvers in Ireland likely to follow position established through English cases and/or in SCL Protocol (but alternatives can always be argued!) namely where there are delays due to two or more events and one of these would entitle the Contractor to an extension of time, the Contractor will be entitled to a full extension of time
- BUT where Contractor is already in culpable delay, c.f. SCL Protocol, subsequent Employer delays may not result in additional delays or any entitlement to EOT
- It is open to parties to amend their contracts to
 - Create greater certainty and/or
 - Specifically provide for how concurrency is to be dealt with

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Thank you

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