Concurrent and Dominant Delay –

How to Control?

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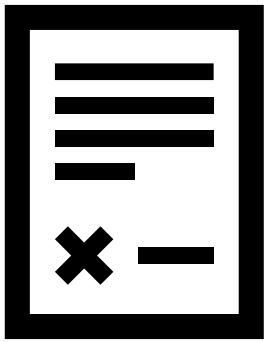
The Prevention Principle

Contract Solution: Extensions of Time (EoT)



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Types of Delay

While not defining delay, most construction contracts provide for a Completion Date but also for the consequences of failure to meet that date. The consequences are dealt with by allocating responsibility:

- **Employer Risk Events:** Contractor will be excused and allowed an opportunity to apply for an EOT and claim damages (subject to the existence of critical delay to the Completion Date)
- **Contractor Risk Events:** Contractor carries the risk, and Employer can claim liquated damages if there is an extension to the Completion Date because of this delay.

Concurrent Delay

Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 case:
"…. *A period of project overrun which is caused by two or more effective causes of delay , which are approximately of equal causative potency*"

Typical scenario:

- Contractor argues it is entitled to an EOT (and possibly damages) in respect of delay from an Employer Risk Event.
- Employer argues it is entitled to liquidated damages from Contractor Risk Event.
- A simple example was given (in this case of **Henry Boot Construction Ltd v Malmaison Hotel Ltd [1999] 70 Con. L.R. 32A**.) where no progress was possible, not only because exceptionally inclement weather (an Employer Risk Event under the JCT Contract) but also because the Contractor has a shortage of labour.

Simultaneous vs Sequential Concurrent Delay

- Sequential effects : still tricky but at least the delays can be segregated
- Concurrent effects : the really troublesome area because the delays become intertwined
- ***Abu Dhabi v SD Marine Services [2011] EWHC 848*** there is only concurrency where *"both events in fact delay progress of the works and the delaying effects of two events are felt at the same time.."*
- True Concurrency is narrow: where the 2 events start and finish at the same time (simultaneous)
- Clarification given in ***Royal Brompton Hospital National Health Trust vs Hammond (no.7) [2001]*** *to* say concurrent delay is not applicable where the Contractor is already in delay when the Employer delay occurs.

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Concurrent Delay

- Where a construction project is delayed by **two events** at the **same time**, one for which Employer is responsible and one for which Constructer is responsible

- **SCL Protocol on Delay and Disruption Definition:**

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 delays must both affect the critical path.

Consensus

Keating on Construction Contracts (Sweet & Maxwell) :
Confirms the effects of an Employer risk event and a Contractor risk event must be simultaneous for a delay to be classified as a concurrent delay.

General Consensus on Concurrent Delay

Henry Boot Construction Ltd v Malmaison Hotel Ltd [1999] 70 Con. L.R. 32A.

Walter Lilly & Co Ltd v Mackay [2012] EWHC 1773 (TCC)

- An Employer Risk Event which causes delay gives rise to an EOT despite the Contractor Delay running concurrently

BUT

- This does **not necessarily** mean the Contractor can claim damages from the Employer. Recovery of damages depends on application of the "but for" test.

City Inn Ltd v Shepherd Construction Ltd [2010] ScotCS CSIH 68

- Apportionment
- Dominant Delay

Demerits

- Not followed in England
- Requires relaxation of the but-for test
- May conflict with the prevention principle

WHAT DO CONTRACTS TYPICALLY HAVE TO SAY?

Definition of delay

- Although a common occurrence in construction projects, the term “delay” lacks technical definition.
- Not defined in standard contracts.
- Generally, refers to:
  a. A period of time that extends the construction project beyond the original planned completion date.
  b. An incident that effects a particular activity on a programme and may postpone a particular activity without prolonging the completion date.

Impacts of Delay

- Time [EoT]
- Money [damages and loss]

In principle, claims for delay typically mean:

- Employer to levy liquidated damages against Contractor.
- Contractor seeks to prolong the construction and obtain disruption costs from the Employer.

Common Causes/Reasons for Delay

- Site Access
- Contractor management and performance problems.
- Change to the scope of the works or change to
- Inclement weather.
- Shortage of Labour /materials / equipment
- +++

Contractual Position

Little Guidance

In FiDIC 2017 suite - parties are free to agree the rules and procedures if concurrent delay occurs and amend the contract by way of special provision

Irish PWC contract

Clause 10.7.2: If a delay has more than one cause, and one or more of the causes is not a Compensation Event, there shall be no increase to the Contract Sum for delay cost for the period of ***concurrent delay****.*

Contractual Provisions

In the absence of express provisions, parties turn to generic EOT provisions

Parties are free to amend:

- North Midland Building Ltd v Cyden Homes Ltd [2018] EWCA Civ 1744 *'Any delay caused by the Relevant Event [*Employer Delay*] which is concurrent with another delay to which Contractor is responsible shall not be taken into account'*
- An amended JCT was perfectly permissible; parties had made clear that any Employer delay which is concurrent with another delay for which the Contractor is responsible, shall not be taken into account
- i.e. ability to claim for an EOT explicitly diluted
- On appeal, still upheld. Coulson, LJ:
  - the clause was unambiguous and plainly allocated risk.
  - The prevention principle was not an overriding role of public or legal policy.

SCL Protocol on Delay and Disruption Definition:

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Critical and Non-Critical Delays

Critical Delay

- A construction programme will identify activities necessary to achieving the Completion Date; **critical activity** is one that is necessary for achieving the Completion Date.
- The **critical path** is a combination of critical activities in the programme that determines the overall project duration of the programme.
- A **critical delay** a delay to the progress of the critical activity which extends the overall project duration and completion (without acceleration or resequencing).

Non-critical activity

- Non-critical delay is delay to a non-critical activity (of course a non-critical delay may become critical where non-critical activities are excessively delayed …).

Generally

- What is critical and non-critical will be fact sensitive and may be disputed.
- The critical path will usually be a function of the logic applied by a programmer.
- The status of activity as critical or non-critical can also change as works progress.

Critical and Non-Critical Delays

Critical path Analysis / Delay Analysis

As- Planned or As – Built?

- A theoretical approach considers the impact of a delay by reference to a planned programme that is updated to a point immediately prior to the delaying event.
- The actual approach – this involves identifying the actual impact of a delay on a as built programme and shows the actual impact of delay.

The approach boils down to the quality and extend of records (i.e. if you don't have as- built records, one goes with the theoretical approach).

Limitations of planned programmes

- Can be inaccurate /optimistic
- Parties should exercise caution since they are nothing but a representative of future intent

Preference for As Built programmes (Retrospective vs Prospective Approach)

- The most accurate as the programme will be one recorded contemporaneously as the works progress supported by site diaries and progress reports.
- Programmes can be reconstructed retrospectively.
- Prospective assessment sometimes seen as Contractor preference.
- Some standard forms of Contract (NEC3 and NEC4) prospective endorse assessment by requiring EOTs be granted during course of the construction project.
- Benefits of retrospective analysis
    - Takes effects of the actual effective delay.
    - Tribunals tend to prefer this approach because it allows assessment with the benefit of hindsight.

Methods of Analysing Delay (+ Demerits of Each)

- As – Planned V As – Built.
  - As planned is just the Contractor's intent, may not have been adhered to; while simple & inexpensive & identifies periods of delay, not identify causes.
- As – Planned Impacted.
  - Delays are added so that programme dynamically updates. Good if poor as-built records. Theoretical in that it determines what Contractor should be granted but not showing as-built timing; often favours Contractor.
- Collapsed As – Built.
  - Uses As Built as baseline; show completion where Contractor would have achieved absent Employer delays. Depends on good quality as-built records.
- Time Slice Windows analysis.
  - Breaks project into slides to review & investigate each. Each window identifies the planned completion date at the beginning & end of that window, applying contemporaneous records. Depends on good quality records again.
- Time impact analysis.
  - Updating as planned programme, impact it with the effect of a delay so tedious lased on delay as they occur. If by perpetual retrospectively depends on availability of records.

Experts

Delay in programming experts may be often employed in complex delay claims forensically investigate, analysis and explain the cause.

Analysis of delay is a matter of fact; it should be ascertained in accordance with records.

Critical Path Analysis

- This involves isolating those events which impacted the critical path from those events which did not.
- Critical path analysis has received judicial approval (*Balfour Beatty Construction Limited V London Burrow of Lambeth [2022]*).

Nett test re Time and Money:

Depending on the precise wording of the contract, a Contractor is entitled to **an extension of time** if there is delay caused by the Employer even if there is another concurrent cause of delay in respect of which the Contractor is contractually responsible

Depending on the precise wording of the contract, the contractor is only entitled to recover **loss and expense** however where it satisfies the “but for” test i.e. even if the event relied upon was the dominant cause of loss , the contractor will fail if there was another cause for that loss for which the contractor was responsible

Saga Cruises BDF Ltd and Another v Fincantieri SPA [2016] EWHC 1875 (Comm):

The Contractor was already in delay when the Employer-delay events arose; the Employer –delay did not 'cancel' Contractor delays; Employer Saga was entitled to liquidated damages.

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Controlling Concurrent Delay - What to do?

Understanding Concurrent delay is the first step; true Concurrent delay is so rare that one can often deflect claims simply by understanding the nuances….

Other steps:

1. Contractual amendments – prudent since there is no guarantee Irish Courts will follow the English approach; prudent so each party is aware of their risk profile
2. Contractor side – review contract to ensure clarity of entitlement to EoT
3. Employer side - make explicit and minimize the entitlement where there's concurrency. Court do uphold amendments
4. Avoid delay!
5. Programme development (updating throughout project)
6. Engage expert programmers for disputes
7. Project Records invaluable to support claims

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