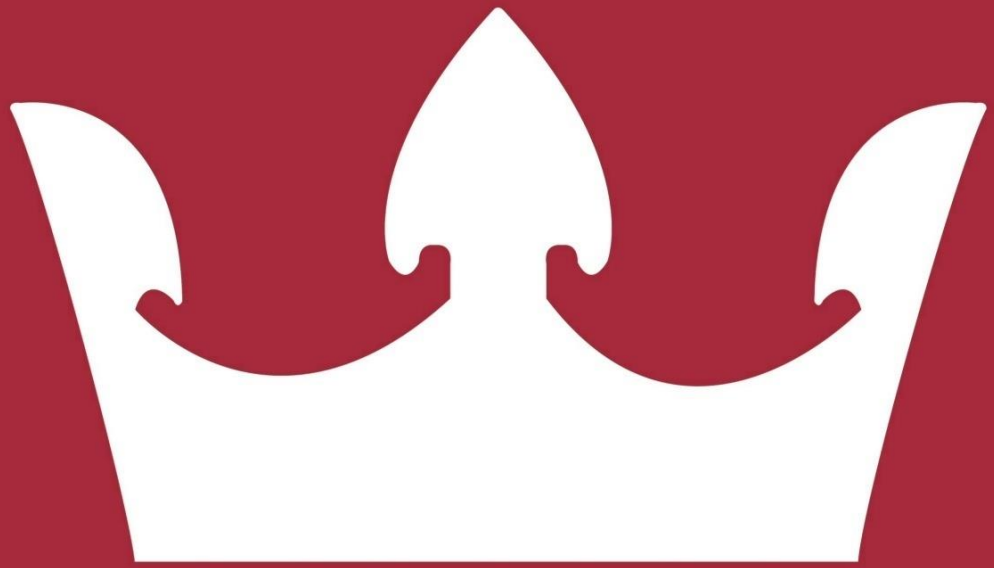

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CONCURRENT DELAY – EFFECTIVE CAUSE OR DOMINANT CAUSE?

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“The subject of concurrent delay in construction contracts is well trammelled terrain. Commentators strive to find a new approach to the topic in order to captivate their jaded audiences”

(Editorial, Construction Law Journal, 2011, Vol.27 No.3 p. 163)

"Extra time is an endless source of disputes. Nineteen of the twenty teams in the English Premier League are convinced that the extra time Manchester United gets at the end of each game at Old Trafford (so called "Fergie time") never makes a fair and reasonable allowance for the delay and disruption that took place in the preceding ninety minutes. Awards of extra time in construction and engineering contracts cause almost as much trouble."

(Time For Completion, Concurrent Delay and Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm), Michael Curtis QC, Construction Law Journal,)

1) What do the authorities seem to say about extensions of time?
2) What arguments are there to get round what the authorities seem to say about extensions of time?
3) How does the position differ where the contractor seeks to recover loss and expense?

Concurrent delays and extensions of time

What is an act of prevention and why does it matter?

1) The completion date is set aside.
2) Time becomes ‘at large’ – in other words, the contractor’s obligation to complete by the agreed date is replaced by an obligation to complete within a reasonable time.

3) The liquidated damages clause is unenforceable; and
4) The employer's only remedy is a claim for unliquidated damages in the event of the contractor's failure to complete within a reasonable time.

Holme v Guppy (1838) 2 M&W 387, Peak Construction (Liverpool) v McKinney Foundations Ltd (1970) 1 BLR 111 and Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 1 WLR 601.

Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (2007) BLR 195 at [56], Jackson J:

(i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterized as prevention, if those actions cause delay beyond the contractual completion date.

(ii) Acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events.

(iii) In so far as the extension of time clause is ambiguous, it should be construed in favour of the contractor.

To get an extension of time, three things must be proved.

First, that an event at the Employer's risk has occurred.

Second that the event has caused a delay to progress of an activity on the critical path.

Third, that the delay to progress has caused delay to the completion of the works after the contractual completion date.

As far as the third requirement is concerned, the standard form contracts require the Contractor to establish one of the following things in order to obtain an extension of time:

1) That completion is likely to be delayed (for example JCT 80, JCT 98 and JCT 05).
2) That completion is likely to be or has been delayed (for example, GC/Works/1 and FIDIC).
3) That completion of the works has been delayed (for example, MF/1).
4) That the Contract Administrator considers it is reasonable to grant an extension of time (for example, HK 05)

How do these principles apply where there is concurrent delay?

The first question is: What is concurrent delay?

The SCL Protocol:

“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. The term ‘concurrent delay’ is often used to describe the situation where two or more events arise at different times, but the effects of them are felt (in whole or in part) at the same time. To avoid confusion, this is more correctly termed ‘the concurrent effect’ of sequential delay events.”

Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm) Hamblen J at [277]:

> "A useful working definition of concurrent delay in this context is 'a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency' – see the article *Concurrent Delay* by John Marrin QC (2002) 18 Const LJ No. 6 436."

The relevant principles are set out in the following cases:

Balfour Beatty Building Ltd v Chestermount Properties Ltd 62 BLR 1

Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited (1999) 70 Con LR 32

Royal Brompton Hospital NHS Trust v Hammond & Others (2001) 76 Con LR 148

Steria Ltd v Sigma Wireless Communications Ltd [2008] BLR 79, [128]-[132]

Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)

Walter Lilly & Co Ltd v Mackay and anor (No.2) [2012] BLR 503

Balfour Beatty Building Ltd v Chestermount Properties Ltd 62 BLR 1 was the case all about whether the gross or the net method of awarding extensions of time is the right one. It was not about concurrent delay. But Colman J said things about causation in general which are cited and relied on in the later cases about concurrent delay.

"There may well be circumstances where a relevant event has an impact on the progress of the works during a period of culpable delay but where that event would have been wholly avoided had the contractor completed the works by the previously fixed completion date. For example, a storm which floods the site during a period of culpable delay and interrupts the progress of the works would have been avoided altogether if the contractor had not overrun the completion date. In such a case it is hard to see that it would be fair and reasonable to postpone the completion date to extend the contractor's time."

In *Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited* (1999) 70 Con LR 32 the contractor claimed in an arbitration an extension of time as a result of delay said to have been caused by variations and late information (among other things).

Dyson J made the following general observations about causation:

> "15…. It seems to me that it is a question of fact in any given case whether a relevant event has caused or is likely to cause delay to the works beyond the completion date in the sense described by Colman J in the *Balfour Beatty* case… In my judgment it is incorrect to say that, as a matter of construction of clause 25 when deciding whether a relevant event is likely to cause or has caused delay, the architect may not consider the impact on progress and completion of other events."

At [13] Dyson J considered what the position is where there are two concurrent causes of the delay:

> "...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."

Dyson J *cont*

"Thus to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers if fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour."

Royal Brompton Hospital NHS Trust v Hammond & Others (2001) 76 Con LR 148, Judge Richard Seymour QC at [31]:

> "However, it is, I think, necessary to be clear what one means by events operating concurrently. It does not mean, in my judgment, 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'."

Judge Seymour cont:

> “The relevant event simply has no causative effect upon the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, the works are 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 causes of the delay...”

Judge Seymour referred to Dyson J's judgment in *Malmaison*, and said Dyson J had in mind the sort of situation

> "...in which, as it were, the works are 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 causes of the delay..."

Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm).

Hamblen J referred to Judge Seymour's judgment in *Royal Brompton* and said [279]:

> "This makes it clear that 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. In HHJ Seymour QC's first example, the relevant event did not in fact cause any delay to the progress of the works. His first example is consistent with Colman's J's comments as to the situation in which a variation is instructed during a period of culpable delay at pages 30-31 of the report in Balfour Beatty.

These cases seem to establish that in the case of a conventionally worded extension of time clause:

Where two events (1) occur sequentially (2) then run concurrently, (3) cause the same delay to progress and (4) cause the same period of delay to completion, only the event which starts first is to be regarded as the cause of the delay to completion.

It follows that where the Contractor's risk event starts first, that is regarded as the only effective cause of the delay and so the Contractor is not entitled to an extension of time.

However, where the Employer's risk event starts first, that is regarded as the only effective cause of the delay and so the Contractor is entitled to an extension of time

Where two events (1) start at the same time and then run concurrently and (2) cause the same delay to progress and (3) the same period of delay to completion, the Contractor is entitled to an extension of time – in other words, the Employer's risk event is regarded as the only effective cause of the delay.

City Inn v Shepherd Construction [2010] BLR 473

Lord Osborne in two respects took a different approach to the award of an extension of time where there is concurrent delay. He summarised the position as follows:

Lord Osborne:

> “42. ... In the fourth place, 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.”

Lord Osborne cont:

> “In the fifth place, 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 to be taken to be responsible, and neither of which could 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, in a broad sense... it will be open to the decision maker, whether the architect, or other tribunal, 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...”

On the face of it, Lord Osborne's analysis differs from the one in the earlier English authorities. His "fourth place" he introduces the concept of "dominant cause" as an apparently additional step in the process of deciding whether the contractor is entitled to an extension of time; and his "fifth place" suggests that where both events are effective causes of the delay, there should be an apportionment of the delay between the two causes i.e. between the contractor and the employer.

There is a school of thought, which appears to say that where two or more events cause the same period of delay, the contractor is entitled to an extension of time only where the relevant event is the “dominant cause” of the delay: see for example *“Concurrency, Causation, Commonsense and Compensation”* in [2010] ICLR 166 by Andrew Stephenson.

However, the proposition been widely doubted: see, for example, the discussion in *“Dominant Cause and its Relevance to Concurrent Delay”,* Society of Construction Law Paper 153 January 2009; and *Keating* Eighth edition (2006) para 8-021, adopted and approved by HHJ Stephen Davies in *Steria Ltd v Sigma Wireless Communications Ltd* [2008] BLR 79, [128]-[132].

Furthermore, in *Walter Lilly & Co Ltd v Mackay and anor (No.2)* [2012] BLR 503 at [370] Akenhead J, after referring to the earlier authorities, said:

> "In any event, I am clearly of the view that, 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 …"

As far as Lord Osborne's "fifth place" (i.e. apportionment) is concerned, since *City Inn* was reported, the prevailing view has been that it is unlikely to be followed in England. This view now has the support of Hamblen J in *Adyard*:

> "288. [In the fifth place] envisaged by Lord Osborne the English law approach would be to recognise that the builder is entitled to an extension of time, not an apportionment – see, for example, *Malmaison* at para 13."

The point was put beyond doubt in *Water Lilly* where Akenhead J said in terms at paragraph [370] that the apportionment approach “is inapplicable in this jurisdiction”.

In summary, these authorities appear to support the following propositions:

(1) Dominant cause has no role to play in English law. Effective cause is the proper test.

(2) In cases of true concurrency, where the delay is caused by two or more events and one of them entitles the Contractor to an extension of time, the doctrine of act of prevention means that the Contractor is entitled to an extension of time in full.

(3) Where two or more events occur sequentially but lead to the same period of delay, the contractor is entitled to an extension of time in full if the event entitling the contractor to an extension of time (the Employer's risk event) occurred first. In those circumstances the Employer's risk event is regarded as the only effective cause of the delay.

(4) *City Inn*-type apportionment is not part of English law.

However, it is suggested that when a suitable case arises there may be room for the court to consider one or more of the following arguments:

(1) None of the authorities should be regarded as establishing rigid rules about causation because they turn on (a) the wording of the contracts in question and (b) findings about causation which are findings of fact. A court, arbitrator or adjudicator can therefore come to a different conclusion in a suitable case. This is particularly so since none of the authorities contain any detailed discussion of the cases on causation in the law of contract discussed, for example, in *Chitty*. These cases, such as *Galoo v Bright Grahame Murray* [1994] 1 WLR 1360, appear to demonstrate a more flexible approach to the issue of causation.

(2) Where two or more risk events occur sequentially and cause the same period of delay to completion and the Employer's risk event stars first, there is nevertheless room to argue that at some point the Contractor's risk event should be regarded as a subsequent and intervening event which, from that point onwards, should be regarded as the only effective cause of the delay so that the Contractor is not entitled to an extension of time for that part of the delay. See the authorities on "intervening cause" in the standard works on contract such as *Chitty*.

(3) What difference does it make to Judge Seymour's analysis if the Employer's risk event started first but was a neutral event (for example, weather) rather than an act or omission of the Employer that can properly be regarded as an act or prevention? In that situation can it be argued that even if both risk events are regarded as effective causes of the delay to completion the Contractor should not be entitled to an extension of time? Because making him liable for liquidated damages would not be to compensate the Employer for an act of prevention?

Alternatively, the parties can avoid this debate altogether by including in their contract clearly worded terms setting out what is to happen where there is concurrent delay.

Concurrent delay and claims for loss and expense

Where there is concurrent delay in the sense in which that term is used in the SCL Protocol, the contractor may incur additional loss and expense during the period of prolongation.

Can the contractor recover loss and expense?

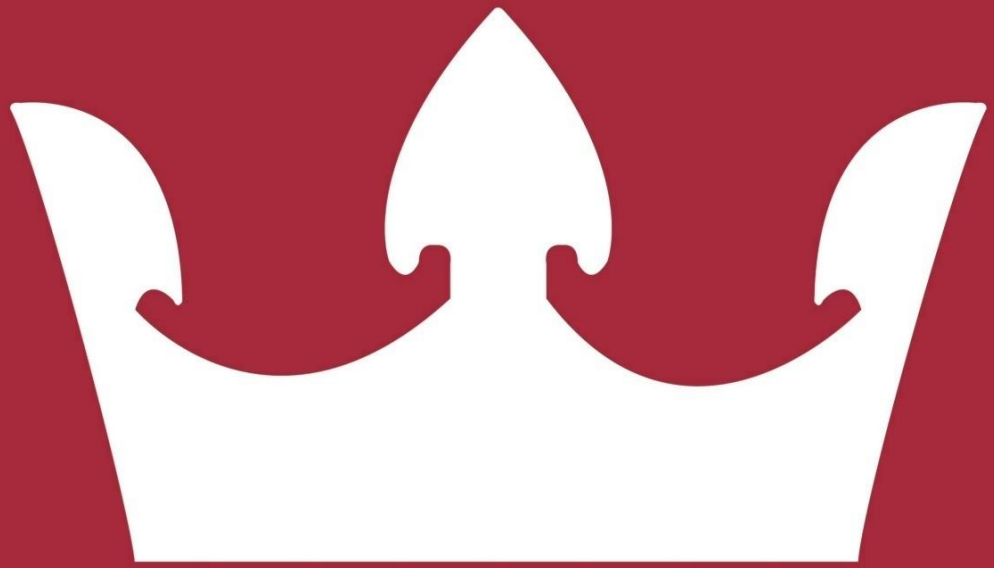
In *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2002] ScotCS 110 at [35], Lord Macfadyen said:

> "Ordinarily, in order to make a relevant claim for contractual loss and expense under a construction contract (or a common law claim for damages) [the Contractor] must aver:
>
> (1) the occurrence of an event for which [the Employer] bears legal responsibility,
>
> (2) that he has suffered loss or incurred expense, and
>
> (3) that the loss or expense was caused by the event.

Lord Macfadyen cont:

> In some circumstances, relatively common in the context of construction contracts, a whole series of events occur which individually would form the basis of a claim for loss and expense. These events my inter-react with each other in very complex ways, so that it becomes very difficult, if not impossible, to identify what loss and expense each event has caused. The emergence of such a difficulty does not, however, absolve [the Contractor] from the need to aver and prove the causal connections between the events and the loss and expense. However, if all the events are events for which [the Employer] is legally responsible, it is unnecessary to insist on proof of which loss has been caused by each event."

In short, the Employer is not required to compensate the Contractor for loss and expense, which the Contractor would have incurred anyway as a result of the Contractor's risk event.



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