

# Concurrent Delay under English Law: the common law approach

## What is concurrent delay?

- Two or more delay events, one an Employer Risk event and the other a Contractor Risk event, both affecting the critical path.
- Common definition adopted in English cases: "a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency" (Abyard Abu Dhabi v SD Marine Services, adopting phrase originally from Mr John Marrin QC).

## Note:

- Both events must independently cause an actual critical delay to the progress of the works.
- "the effects of which are felt at the same time" (SCL Delay and Disruption Protocol 2nd Edition, February 2017).
- True concurrency under English law is therefore quite rare.
- Always depends on the contract.
- Consider effect of bespoke amendments (see for example North Midland Building Ltd v Cyden Homes Ltd).

## Examples adopted in English cases:

- "...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 real concurrency as to the causes of the delay." (Royal Brompton Hospital National Health Trust v Hammond and Others). Note that the Scottish approach does not favour this narrow distinction.
- "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)" (Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd).
- Distinguish from event that subsequently happens (see para 10.10, SCL Delay and Disruption Protocol).

## What are the consequences of concurrent delay?

- **General rule:** Contractor 'gets time but no money'.
- **Time:** "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". The 'Malmaison approach' (Henry Boot v Malmaison. See also De Beers UK Ltd v Atos Origin IT Services UK Ltd; Walter Lilly & Co Ltd v Giles Patrick Cyril Mackay and DMW Developments Limited).
- **Money:** "...where there is concurrent delay to completion caused by matters for which both employer and contractor are responsible, the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by delay...the contractor cannot recover damages for delay in circumstances where he would have suffered exactly the same loss as a result of causes within his control for which he is contractually responsible" (De Beers v Atos; see also para 14, SCL Delay and Disruption SCL Protocol).

## Prevention principle:

- Dictates that an Employer cannot benefit from his own act of prevention. Employers cannot delay Contractors, still require the Contractors to meet the original completion date, and claim liquidated damages for late completion.
- Contractual date falls away and time is at large unless the contract provides for an EOT.
- There is some debate as to whether the prevention principle would in fact be triggered where there is concurrent delay on the basis that the contractor would have been in delay anyway (notwithstanding the employer delay). See North Midland Building Ltd v Cyden Homes Ltd. This debate remains as the Court of Appeal decided that it was not necessary to resolve this point for the purposes of the case. However, what is clear from this case is that the parties are free to negotiate and agree an express provision in their contract to allocate the risk and responsibility for an act of prevention.

## The apportionment approach under Scottish Law:

- City Inn v Shepherd: if there are concurrent causes of delay, the issue should be approached in a fair and reasonable way and responsibility for the delay should be apportioned as between the Relevant Event and the Contractor Risk Event. This approach is rejected by English law (see Walter Lilly v Mackay: "although of persuasive weight, the City Inn case is inapplicable within this jurisdiction [of England and Wales]").

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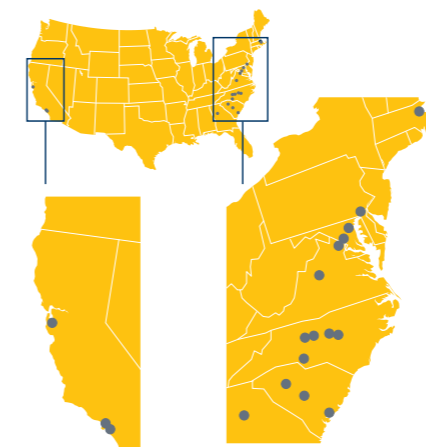
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