



RIGHTS & REMEDIES:

The recurring debate over Concurrent Delays

The recent publication of the John Marrin QC paper Concurrent Delay Revisited, updated to reflect the Walter Lilly judgement, helpfully summarises the approach likely to be taken by the English courts in considering concurrent delays.

In February 2013, the Society of Construction Law in the UK published a paper by John Marrin QC entitled “Concurrent Delay Revisited” (SCL paper number 179) as an update to his previously published paper entitled “Concurrent Delay” of February 2002 (SCL paper number 100).

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Marrin’s narrow definition of concurrent delay is one caused by two or more events which take place in parallel and are approximately equal in terms of causation. So if the events are not taking place simultaneously, or if one of the events can be said to be only a minor cause of the delay, it may be disregarded as, in effect, there is no concurrency. Therefore under his definition, in all likelihood, genuinely concurrent delays are going to be rare events.

Proof of a genuine concurrent delay is a question of fact but sometimes the facts alone cannot answer the question and the law is required to take a position in determining entitlement. In his updated paper, Marrin reviews the various approaches that the courts have historically taken in determining entitlement in the event of concurrent delay and identifies three different credible approaches which have been used to identify entitlement to an extension of time.

Dominant Cause Approach

This methodology, identified in *Leyland Shipping Company Ltd v Norwich Union Fire Insurance Society Ltd* [1918] HL AC 350, and summarised in the 8th edition of Keating (2006), is based on an assessment of the individual causes of delay

in order to establish the one which forms the dominant cause of the delay encountered.

This approach relies upon the notion that it is possible to determine that one of the competing concurrent causes of delay is of greater dominance than others and, therefore, should be used to determine the actual cause of delay and the length of that delay. Deciding this dominance therefore not only requires a review of criticality of the competing delays but also consideration of the factual position.

Malmaison Approach

The Malmaison approach, so called after the case of Henry Boot Construction v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR states that a contractor is entitled to a full extension of time for a delay caused by two or more events, provided one of them is an employer's risk event (be it a Compensation Event or a Relevant Event) under the contract. This entitlement is irrespective of whether the contractor is to blame for the other concurrent delay event(s).

Apportionment Approach

The Malmaison approach was called into question by the Scottish case of City Inn Ltd v Shepherd Construction Ltd [2010] Scot CS CSIH 68 where a new method for assessing the effect of concurrent delay was introduced. This new approach stated that where there are two competing causes of delay, neither of which is dominant, the delay should be apportioned between the contractor and the employer, based on relative culpability and significance of each of the factors in causing delay.

The three approaches outlined above show that determining an entitlement to an extension of time where there is concurrent delay is historically a difficult and uncertain subject matter.

Following Malmaison in 1999, it appeared to be accepted wisdom that where it could be established that an employer's risk event had occurred, and that it caused delay, the contractor would be entitled to an extension of time. This position was made less certain after City Inn in 2010 where an apportionment approach was adopted in deciding an award of extension of time in the event that a dominant cause could not be identified. This decision, being a Scottish case, was only persuasive and not binding on the English Courts.

The immediate impact of the City Inn judgement was to raise uncertainty on how the Courts in England would deal with the issue of concurrent delay. To this end, the recent case of Walter Lilly v Giles Mackay and DMW Developments [2012] EWHC 1773 (TCC) reviewed the authorities regarding concurrent delay and brought some clarity by re-stating that the Malmaison approach was consistent with English law, and that there was no place for the apportionment approach that had been adopted in Scotland.

Conclusion

Based on this decision, and as concluded by Marrin in this recent paper, the position under English law regarding concurrent delay in the circumstances he considers has indeed, for now, been clarified and where concurrent delay occurs, if at least one of the delays is an excusable delay pursuant to the terms of the contract, the contractor will be entitled to an extension of time, irrespective of the contractor's own delays. This follows the approach taken in Malmaison as applied in Walter Lilly.



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