Concurrent Delay Reviewed

One thing that immediately strikes you about concurrent delays is the absence of any readily identifiable definition along with a failure by the courts to give any clear guidance on the most suitable or appropriate method for considering an extension of time award when there is a current delay when one is the responsibility of the contractor and the other his employer.

It is not particularly surprising that concurrent or simultaneous delays cause considerable confusion and even the term itself can often be understood differently in different quarters. Notwithstanding that there is no clear definition of its meaning the problems may start much earlier in determining the inherent reasons for the cause of the concurrent delays, which often create their own factual problems such as the event in question is not critical.

There are quite a few methods for trying to determine an extension of time each having varying degrees of success in the courts. The more common ones are:

- Apportionment;
- The 'but for' test;
- The dominant cause approach; and
- The most recent one recognised in the case of Malmaison Hotel v Henry Boot. 'Malmaison'.

Taking each in turn to consider and review their applicability:

Apportionment

Where you have two completing causes of delay of equal or relative causative potency a natural response would be to suggest that the overrun and its consequences should be 'apportioned' between the contractor and employer on the basis to their relative causative potency.

This would appear to be a reasonable approach but this method has attracted little support in common law jurisdictions where there is a tendency to apply principles of causation in an 'all or nothing' way. Consequently the courts tend to seek a single event to a cause and the claimant would either win or lose.

Arguably the apportionment approach is dependant on the courts interpretation of the facts and the application of difficult concepts of causative potency. This may be contrasted with the terms of the standard JCT forms of contract, which tend to involve concepts of fairness and reasonableness. It would also create difficulties over the split between time and cost and it is generally perceived to be contrary to the usual express contractual mechanisms contained within JCT standard forms of contract.

The second method is:

The 'but for' test

This method tends to attract the most support from the contracting paternity as it trends to support the claimant. It is based on a simple concept that the overrun would not have occurred 'but for' the Architects instruction. It's generally been given unsympathetic support and certainly in one reported case Judge Hicks declined to apply it.

This method can therefore generally be discounted.

The penultimate method and very popular method is:

The Dominant Cause approach

This became a popular method during the 1980's and gained popularity as the most appropriate method of calculating and dealing with concurrent delays.

Keating on Building Contracts defined it as:

> *'It there are two causes, one the contractual responsibility of the Defendant and the other the contractual responsibility of the Plaintiff, the Plaintiff succeeds if he establishes that the cause for which the Defendant is responsible is the effective, dominant cause. Which cause is dominant is a question of fact, which is not solved by the mere point of order in time, but is to be decided by applying common sense standards.'*

The dominant cause rationale is based on the parties having intended that in the event of a delay one of them must be responsible. Where you have competing delays and with the absence of apportionment one claim either for an extension of time or a cross claim for liquidated damages must succeed. Keating has referred this to the 'obverse problem'.

It anticipates for the architect or employer's agent to consider the cause or reasons for the delays and chose a 'dominant' one, which in theory sounds perfectly reasonably. However, in practice it often creates considerable difficulties to the extent that it could be impossible or impractical to apply when the two causes have equal potency or you cannot simply determine the difference.

Whilst Keating may champion this method there is little evidence that the courts do, in fact the general weight of evidence tends to support the opposite view. Moreover it is generally considered by most practitioners that this method does not sit particularly well in context to the standard JCT forms of contract.

The final approach is what some practitioners have dubbed the **'Malmaison'** approach, which is considered to be the leading modern decision on concurrent delay.

The Malmaison approach

As the author of the articles was one of the protagonists in the Malmaison project and involved in the resolution of the disputes it may be that I have a biased view. However, this method has come about not from the resolution of the dispute itself but from elements of a dispute, which were agreed between the parties and approved by the court.

The Malmaison was a hotel in the centre of Manchester, which experienced significant delays. These enviably crystallised into disputes eventually arbitration and finally ending up in the courts.

During the course of the dispute concurrent delays were discussed at length and more particularly how they ought to be interpreted when there are delays each being the responsibility of the employer and the other the contractor. An agreement was reached, which was later ratified by the court before Mr Justice Dyson who said in passing:

> *'if there are two concurrent delays, one which is a relevant event and the other not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant delay notwithstanding the concurrent effect of the other event.'*

He demonstrated this by citing a simple example, if the contract suffered a delay of a week because of exceptional weather, a Relevant Event and the same period of delay because of the shortage of labour, not a Relevant Event. Then if the architect feels it fair and reasonable to do so, he should grant an extension of time and he cannot refuse to grant one on the grounds that the delay would have occurred anyway because of the shortage of labour.

This is not dissimilar to the principles discussed in the previous leading case of ***Balfour Beatty v Chestermount***, which Mr Justice Dyson referred to with approval in the Malmaison. In Chestermount, Mr Justice Coleman was asked to consider what happens to granting an extension of time 'in respect of a Relevant Event occurring during a period of culpable delay'. As is well known Mr Justice Coleman adopted the so-called 'net' effect for determining an extension of time, where time equivalent to the delay is added to the existing Completion date.

Predictably it is not necessarily as straightforward as it could be as in a later case of ***The Brompton Hospital v Hammond (No 7)*** Judge Seymour, postulated different types of concurrency and suggested that Mr Justice Dyson was referring to a type of concurrency, which he called a 'true concurrency'. This was apposed to concurrency where work having already been delayed for say shortage of labour, when 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.

This is clearly difficult to reconcile with the decision in Chestermount and Malmaison. But you can see Judge Seymour's point when he made the following comment:

> *'There may well be circumstances where a relevant event has an impact on the progress of the works during a period of culpable delay if 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 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'*

Looking at this example, perhaps, this would appear not to so unreasonable and may indeed generally reflect the JCT 'fair and reasonable' requirements for the architect or employers agent to consider and extension of time. Unfortunately, this interpretation may limit the scope of the decision in Malmaison and may in fact encourage the 'dominant' approach.

Summary

Concurrent delay is a particularly vexed and difficult subject and at the present time there is little coherent guidance from the courts as to the accepted principles for dealing with this matter.

Whilst it may be tempting to make sweeping statements as to the status and validity of any of the above methods this would be clearly unwise and probably wrong.

Each specific case of concurrent delay should be viewed on there own merits and the appropriate procedure adopted. In this respect, it may also be worth noting that whilst the Society of Construction Law's Delay Protocol has no legal standing unless it has been adopted within the contract, the philosophy for dealing with concurrent delays is lifted from the Malmaison scenario.

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