# Patches of light on the dark road of 'Concurrent Delay'

**Construction delay disputes follow a typical format, and part of it is each side contending that even if it caused a period of delay, that same delay was also caused by the other side. The question of how entitlement should be assessed when the claimant and defendant are both responsible for a period of delay is, therefore, the source of much contentious debate.**

Although there have been a number of reported cases concerning concurrent delay on construction projects under English Law during the last nineteen years, until recently, they have all been in the court of first instance. Even allowing for the fact that some of these cases concern different contract terms, it would be fair to say that there has been a degree of inconsistency between the judgments. In this writer's experience, there is also inconsistency in how tribunals interpret the facts when allegations of concurrency are made.

To combat this a number of informed client organisations have taken it upon themselves to include contract amendments to the JCT standard forms. These amendments remove some of the uncertainty by pre-agreeing how such issues, if they arise, will be addressed (i.e. to the advantage of the client organisation). Such an amendment was the subject of a decision in July 2018 by the Court of Appeal (*North Midland Building Limited v Cyden Homes Limited*[1]). In that case, the Court of Appeal considered the following amendment to the extension of time clauses which requires that when assessing an extension of time entitlement:

> *"any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account"*

In short, the clause was upheld as the parties had expressly agreed to it and there was no public or legal policy, (for example concerning the prevention principle[2]) that could operate to override it.

In passing its judgment, the Court of Appeal has perhaps shed some light on part of the debate, namely what concurrent delay is. If there had been some light, however, on the crucial issue of what effect concurrent delay has on entitlement when a JCT contract is unamended, then that light has been switched off.

## The Definition of Concurrent Delay

In *North Midland Building* LJ Coulson described concurrent delay as follows:

> *"Although in one sense of tangential relevance to this appeal, it is also necessary to say something about concurrent delay. In Adyard Abu Dhabi v SD Marine*

[1][2018] EWCA Civ 1744.
[2]The "prevention principle" provides that a party may not enforce a contractual obligation against the other party where it has prevented such other party from performing that obligation.

*Services [2011] EWHC 848 (Comm), Hamblen J (as he then was) said:*

> "*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 (6) Const L.J. 436.*"

*Like other judges dealing with concurrency, I gratefully adopt that definition*"[3]

The 'context' in which Hamblen J (as he then was) applied the definition was in rejection of Adyard's case on "*causation in law*". Adyard had suggested that,

> "*One looks only at the event/act [caused by the Buyer] in question and how it relates to the contractual completion date…*
>
> *…the Buyer's risk event has to be measured against the contractual completion date and that this does not require any analysis of competing causes of delay for which the Builder might be responsible*"[4].

In dismissing Adyard's case, it was held that for an event to qualify as a ground for an extension of time, it must cause a period of 'actual delay' to the progress of the works. Approaching a tribunal with a claim of what could have caused the contractual completion date to be missed, whilst ignoring the causes of actual critical delay to completion, will clearly not suffice. Furthermore, for concurrent delay to exist "*the delaying effect of the two events must be felt at the same time*".

As credited in Adyard, the adopted definition was provided by John Marrin QC in his seminal paper "*Concurrent Delay*", published by the Society of Construction Law (SCL paper number 100) in February 2002. Within that paper, John Marrin QC stated:

> "*where there are two competing causes of delay, they often differ in terms of their causative potency. Even where both competing causes are effective causes of the delay, in the sense that each taken on its own would be regarded as the cause of the whole of the delay, the two may be of unequal causative potency. It is common place to find that during the course of the factual inquiry, it becomes obvious as a matter of common sense that the two supposed causes of delay are of markedly different causative potency. One is then regarded as the effective cause and the other as ineffective. In other words, the minor cause is treated as if it were not causative at all.*"

The definition approved by the Court of Appeal differs, however, from two definitions provided in the Society of Construction Law Delay and Disruption Protocol 2nd Edition February 2017[5].

The first meaning provided by the protocol, defined as "*true concurrent delay*" is "*the occurrence of two or more 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*"[6].

The definition approved by the Court of Appeal however, does not require the competing events to occur at the same time.

The second meaning provided by the protocol, which is described as being of "*more common usage*" is "*two or more delay events arise at different time, but the effect of them are felt at the same time*"[7]. In terms of timing, this does not appear to conflict with the approved definition.

Most notably, for both meanings the protocol states that for

> "*concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event must be an effective cause of Delay to Completion (not merely incidental to the Delay to Completion)*[8]."

This is notable because the 'not merely incidental' qualification does not meet the requirement that each competing cause must be of 'approximately equal causative potency' to the other. In the absence of that requirement, the protocol does not include any recommendation along the lines that a 'factual inquiry' should be undertaken when two causes are in competition to see whether as a matter of common sense one of the competing causes can be "treated as if it were not causative at all".

For example, let us say a critical delay is felt just when the structural works are about to commence, caused simultaneously by:

> **Cause A):** A Relevant Event. The employer's structural engineer has not issued the structural design information; and
>
> **Cause B):** A Contractor Risk Event: The contractor is remedying its defective works to the foundations.

[3] *North Midland Building Limited* v Cyden Homes Limited [2018] EWCA Civ 1744, Para 16.
[4] Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm), Para 260 and 285.
[5] That two meanings are provided possibly reflects the difficulty of achieving consensus on these sorts of issues.
[6] Society of Construction Law Delay and Disruption Protocol 2nd Edition February 2017, Para 10.3, page 30.
[7] Para 10.4, page 30.
[8] Para 10.5, page 30.

In this case it might be possible to elect one of the causes as having markedly more or less causative potency than the other. For example:

> **a)** Cause B could be considered to have 'markedly less causative potency' if there had been an opportunity to remedy the defective works to the foundations by some alternative method which would not have caused a delay. In the event, however, there was no reason to adopt this alternative method as the structural design was not available.
>
> In such circumstances cause A might be considered as providing an 'occasion' for cause B. Cause B is therefore eliminated as a cause of critical delay.
>
> In the absence of concurrent delay, the contractor would be entitled to receive an extension of time together with prolongation loss and expense.
>
> **b)** Cause A could be considered of 'markedly lesser causative potency' if there had been an opportunity for the employer's structural engineer to provide enough design information for the structural works to proceed. In the event, however, there was no reason to do so, as the defective works to the foundations needed to be remedied by the contractor before any structural works could commence.
>
> In such circumstances cause B might be considered as providing an 'occasion' for cause A. Cause A is therefore eliminated as a cause of critical delay.
>
> As a result there is no concurrent delay, the contractor would not receive an extension of time and the employer would be entitled to levy liquidated damages for the period of delay.

In this scenario causes A and B would only be considered to be of 'approximately equal causative potency' if both causes operate independently from each other to cause critical delay to the progress of the works at the same time, with no opportunities existing to avoid or reduce either cause of delay.

Clearly, the facts surrounding each cause would need careful consideration before any view could be taken as to whether one cause is more potent than the other. Whilst the protocol appears to be enthralled by the question of whether both events occurred at the same time (as distinct from the effect being felt at the same time), the qualification of 'true concurrent delay' does not appear to be a primary factor, at least in this scenario, when considering which cause is of more potency than the other.

Although the recent case of *Fluor v Shanghai Zhenhua Heavy Industry Co*[9] concerned the assessment of general damages for the breach of a purchase order and not extension of time entitlement under a JCT contract, it does provide a neat example of a judge distinguishing between two causes of simultaneous delay. The installation of wind turbines in the North Sea was delayed as a result of: (1) welding defects, for which the defendant was liable; and (2) 'out of roundness', for which the defendant was not liable. Mr Justice Edwards-Stuart considered that if the 'out of roundness' had been the only problem, it would have been a matter of "*common sense and experience*" for the claimant to devote all its energies to rectifying this issue. Damages were, therefore, assessed on the basis that if the welding defects had not existed the 'out of roundness' problem would have been resolved earlier than it actually was. In effect the period of concurrency was reduced exposing the defendant to additional damages befitting the fact that it was responsible for the more serious of the two competing causes.

## What effect does concurrent delay have on entitlement?

A core principle of the SCL protocol is that "[w]*here Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due*"[10]. It is also a core principle that *"*[w]*here Employer Delay to Completion and Contractor Delay to Completion are concurrent and, as a result of that delay the Contractor incurs additional costs, then the Contractor should only recover compensation if it is able to separate the additional costs caused by the Employer Delay from those caused by the Contractor Delay. If it would have incurred the additional costs in any event as a result of Contractor Delay, the Contractor will not be entitled to recover these additional costs."*[11]

There is case law in support of these principles.

In *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*[12], Mr Justice Dyson (as he then was) recorded, without dissent, the following as common ground between the parties:

> "*…it is agreed that 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*

[9][2018] EWHC 1 (TCC) para. 121.
[10]Society of Construction Law Delay and Disruption Protocol 2nd Edition February 2017, Core Principle 10, page 6.
[11]Society of Construction Law Delay and Disruption Protocol 2nd Edition February 2017, Core Principle 14, page 7.
[12][1999] 70 Con LR 32, para 13.
[13][2010] EWHC 3276 (TCC), para 177.

*of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event*".

Mr Justice Edwards-Stuart said the following in *De Beers UK Ltd v Atos Origin IT Services UK Ltd*[13]:

> "*The general rule in construction and engineering cases is that where there is concurrent delay to completion 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 the delay. In the case of the former, this is because the rule where delay is caused by the employer is that not only must the contractor complete within a reasonable time but also the contractor must have a reasonable time within which to complete. It therefore does not matter if the contractor would have been unable to complete by the contractual completion date if there had been no breaches of contract by the employer (or other events which entitled the contractor to an extension of time) because he is entitled to have the time within which to complete which the contract allows or which the employer's conduct has made reasonably necessary.*"

The 'Malmaison approach' was followed by Mr Justice Akenhead in Walter Lilly and Co Ltd v Mackay[14], who said:

> "*Part of this logic of this is that many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to construe Clause 25 on the basis that the Contractor should be denied a full extension of time in those circumstances. More importantly however, there is a straight contractual interpretation of Clause 25 which points very strongly in favour of the view that, provided the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question*"

However, as pointed out by LJ Coulson in *North Midland Building* these are judgments of first instance. There is no authority from an appellate court and the position which says that the contractor is entitled to an extension of time (and thus the employer is not entitled to liquidated damages) when there is concurrent delay "*is not entirely free from doubt*". Significantly in *Jerram Falkus Construction Ltd v Fenice Investments Inc (No. 4)*[15] Coulson J (as he then was in the TCC) supported a proposition that the prevention principle is not triggered when there are concurrent causes of delay (one the contractor's responsibility and the other the employer's):

> "*…for the prevention principle to apply, the contractor must be able to demonstrate that the employer's acts or omissions have prevented the contractor from achieving an earlier completion date and that, if that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the contractor's own default, the prevention principle will not apply.*"

If the prevention principle has no application when there is concurrent delay, it would be a matter of 'straight contractual interpretation' as to whether an extension of time should be awarded when there is concurrent delay under an unamended JCT form. The difficulty of course, absent any consideration of the prevention principle, is that the current editions of the JCT forms of contract have potential to be interpreted either way. It certainly seems possible that the 'Malmaison approach' will not be followed next time the matter appears before the courts.

[14][2012] EWHC 1773 (TCC), para 370.
[15][2011] EWHC 1935 (TCC), para 17.

## Summary

The Court of Appeal has upheld an amendment to the extension of time clauses in a JCT standard form which goes as follows:

> "*any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account*".

In passing, the Court of Appeal also adopted a definition of concurrent delay which applies a different test of causation when compared to other definitions circulating within the industry.

One can surmise that the direction of travel is now as follows:

(i) The criterion of "approximately equal causative potency" will mean that a tribunal adhering to (or even persuaded by) English law and adept at applying common sense judgements is unlikely to make a finding that concurrent delay exists on the facts;

(ii) There will be an uptake in employers amending contracts to inhibit entitlement to an extension of time when there is concurrent delay. Under the approved definition, concurrent delay will be increasingly infrequent in any event, and in view of this contractors may ultimately (but possibly under protest) accept such amendments;

(iii) Under the approved definition allegations of concurrent delay (by either contractor or employer) are increasingly likely to fail. In the absence of concurrency, the financial risk of causing delay will increase and;

(iv) The principle that a contractor receives an extension of time when there is concurrent delay under a standard JCT form, which was generally accepted within the industry, is now in doubt and will remain so until a suitable case is brought before the Court of Appeal.

In conclusion, a 'patch of light' may have been shed on what concurrent delay is by the Court of Appeal, however, the road ahead has, if anything got darker on the definitive issue of what effect concurrent delay has on entitlements.

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