

Time Is Not On Your Side: A Quick Overview Of Delay

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Introduction

During the course of a construction project, events occur which delay or disrupt the progress of the works and which may, as a result, affect the contractor's ability to complete the works by the completion date. Such events are, of course, one of the most common causes of disputes in the construction industry.

This article contains an overview of the position under English law in relation to three areas that are often the subject of dispute in such delay claims. The first section discusses the evolving approach of the courts on the issue of concurrent delay. This is followed by an examination of a party's entitlement to use the float in the contract programme for their own benefit. The article concludes by considering the correct approach a party should adopt when selecting a delay analysis methodology, in order to successfully persuade a court or tribunal of its case.

The Evolving Approach to Concurrent Delay

Concurrent delay describes the situation on a project which is suffering delay in which two or more independent events have occurred which, if either had occurred on their own, would have caused delay to the project.

Typically, one of the events causing delay will be at the employer's risk, whilst the other will be at the contractor's risk. Such delays may occur at exactly the same time (although this is rare) or they may overlap to some degree.

The issue of concurrent delay becomes relevant when a party to a construction contract seeks recovery of loss and/or expense arising out of the delay to the project. If the project is delayed beyond the completion date or progress has not met particular contractual milestones and the employer has a contractual right to levy liquidated damages, the contractor may raise concurrent delay as a defence to the employer's claim by asserting that, even if the contractor had not been in culpable delay, progress would have been delayed by reason of an event which was the employer's responsibility.

Some standard form contracts deal with this issue specifically but many are silent on it. The JCT and NEC forms of contract do not set out what will happen in the event of concurrent delay, save for the JCT Major Project Construction Contract, which provides for a 'fair and reasonable adjustment' to be made to the completion date in the event of concurrent delays.

By contrast, while earlier editions were silent on the issue, clause 8.5 of the 2017 editions of the FIDIC Red, Yellow and Silver Books now provide:

"If a delay caused by a matter which is the Employer's responsibility is concurrent with a delay caused by a matter which is the Contractor's responsibility, the Contractor's entitlement to [an extension of time] shall be assessed in accordance with the rules and procedures stated in the Special Provisions (if not stated, as appropriate taking due regard of all relevant circumstances)."

Assessing the contractor's entitlement to an extension of time "as appropriate taking due regard of all relevant circumstances" is somewhat vague. That default position should be avoided. The main purpose of this clause is to really direct the parties' attention to the possibility of concurrent delay and to encourage them to state in the FIDIC Special Provisions how they wish that delay to be treated.

In cases where concurrent delay is not expressly addressed in the parties' contract, the English courts have been less than consistent in the jurisprudence they have used to underpin their decisions. For much of the last 100 years the question the courts asked in cases of concurrent delay was which event was the dominant, or 'proximate', cause of the delay.

This approach was supported by the House of Lords in the case of *Leyland Shipping Co. Ltd v Norwich Union Fire Insurance Society Ltd* (1918) AC 350, in which Lord Shaw stated:

"proximate cause is an expression referring to the efficiency as an operating factor upon the result. Where various factors or causes are concurrent, and one has to be selected, the matter is determined as one of fact, and the choice falls upon the one to which may be variously ascribed the qualities of reality, predominance, efficiency."

However, by the turn of the century the dominant cause approach was increasingly viewed as artificial, as often it seemed arbitrary to choose which one of several competing causes of delay was 'dominant'. Instead, cases in which one cause of delay was obviously dominant are no longer treated as cases of concurrent delay at all. The 'dominant' cause is treated as the only effective cause of the delay, and the other cause of delay is deemed immaterial.

This position was recently affirmed by Mr Justice Hamblen in the case of *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848, in which he observed:

"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'."

The approach that emerged from the ashes of the dominant cause test was established by the well known case of *Henry Boot Construction v Malmaison Hotel (Manchester)* [2001] QB 388. In that case, the Court of Appeal held:

"if there are two concurrent causes of delay, one of which is a Relevant Event and the other is not, the contractor is entitled to an extension of time for the period of delay caused by a Relevant Event notwithstanding the concurrent effect of the other event".

In other words, the default position under English law is that if there are two causes of delay to a project, one of which is at the risk of the employer, the contractor will be entitled to an extension of time to the contractual completion date for the period that the effect of those delays overlap. It does not follow that the contractor is entitled to be compensated for the loss and/or expense it incurs during that period of delay. That is a separate matter to be in accordance with the contract. This is why the contractor's default entitlement is often labelled 'time but no money'.

After *Malmaison*, some argued that a more flexible approach should be taken to the issue of concurrent delay, and entitlement to an extension of time in such circumstances could be apportioned between the parties fairly and reasonably after a common sense analysis of the culpability and significance of each cause of delay.

That approach was in fact adopted by the Scottish courts in the case of *City Inn v Shepherd Construction* [2011] S.C.L.R. 70. The English courts, however, have not shown the same enthusiasm towards apportionment. Apportionment of delay was decisively rejected by Mr Justice Akenhead in *Walter Lilly & Co. v Mackay* [2012] EWHC 1773. The judge re-affirmed the principles set out in the *Malmaison* decision:

“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 ... The fact that the Architect has to award a “fair and reasonable” extension does not imply that there should be some apportionment in the case of concurrent delays. The test is primarily a causation one. It therefore follows that, although of persuasive weight, the City Inn case is inapplicable within this jurisdiction.”

It therefore seems that the approach of the English courts to concurrent delay is settled, at least for now, when it comes to dealing with instances of concurrent delay. However, the most prudent course of action remains for parties to expressly deal with the issue of concurrent delay in their contracts. Doing so will settle the position conclusively. The advantage to the employer of dealing with these matters in the contract was highlighted in the recent case of *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744. The Court of Appeal upheld a contract clause that expressly disallowed a building contractor’s claim for an extension of time in cases of concurrent delay. The insertion of such a clause will therefore give the employer certainty as to the contractor’s entitlement if concurrent delays occur.

The message here remains that parties should deal with all delay issues expressly in the contract. Delay is part of the life cycle of most projects. Discussion and agreement up front will save (ironically) a great deal of delay later.

Who Owns the Float?

The total amount of float in a programme, sometimes referred to as ‘terminal float’, is the time between the date the contractor plans to finish the work and the contractual completion date. Float can also be viewed on an activity by activity basis, in which case it is the amount of time that an activity can be delayed or prolonged without it causing an impact on subsequent activities in the programme.

A contractor usually allows for some float in a project so that it can absorb delays that do not entitle it to an extension of time. In this way the contractor has a cushion of time to use in case of delay before negative effects are triggered under the contract, including liability for liquidated damages for late completion.

It is not uncommon on construction projects for parties to dispute who ‘owns the float’ in the contractor’s programme to complete the works. Disputes arise in one of two circumstances. First, when the employer seeks to use the float, for example by instructing a variation without granting the contractor an extension of time.

Second, when the contractor seeks an extension of time even though, because of float built into the contractor’s programme, a delay event for which it would otherwise be entitled to an extension of time does not affect the contractual completion date. The contractor will argue that it is entitled to an extension of time to preserve the float it incorporated into the programme.

In each case, the employer's position will be that an extension of time is not necessary because the float can be used to carry out the work without the need to extend the agreed completion date. The employer will say that it has effectively paid for any float as part of the contract price and so should be able to benefit from it.

The contractor, on the other hand, will say that it built the float into the programme to give it flexibility in the programme and protection against unforeseen delays, not so that the employer can avoid giving an otherwise due extension of time. It should be able to freely manage the sequencing and timing of its activities to ensure that it does not complete the works late thereby incurring liquidated damages.

Unfortunately, there is no general rule as to who owns the float on a construction project. There is no authoritative case in which the English courts have considered the principles of how float in a construction programme should be treated.

Ideally, float should be specifically addressed in the contract. It is, however, rarely referred to in standard form contracts. Instead, parties are left with the difficult task of interpreting the provisions regarding extensions of time in order to understand who is entitled to benefit from the float. Although there is no authoritative English case on the treatment of float, there are a few cases which provide some guidance in this area.

In *Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd* (1999) 66 ConLR 119, the contractor had the benefit of float that it had built into its programme under the main contract. When the subcontractor fell into delay, the impact of that delay was lessened due to the float in the contractor's programme. The contractor, however, wanted to claim against the subcontractor in relation to those delays as if the float did not exist.

The court held that the contractor could not, while accepting the benefit of the float as against its employer, recover from the subcontractor the hypothetical loss it would have suffered had the float not existed. In other words, when float is available in a contractor's programme, it can be used on a first come first served basis, regardless of who causes the delay.

This approach is supported by the Delay and Disruption Protocol prepared by the Society of Construction Law (the "SCL Protocol"). Core principle 8 provides that, unless there is express provision to the contrary in the contract, where an employer delay event occurs and there is float in the programme, the float should be used and an extension of time only granted to the extent that the period of delay exceeds the total float and means the completion date is missed. In other words, the contractor cannot claim for an extension of time in order to protect the float.

However, it is important to remember that the question of who owns the float is a matter of contractual interpretation. The SCL Protocol should not be regarded as setting out a default position which is binding on the parties in some way.

By way of example, it is generally accepted that effect of the extension of time provisions in the 2017 editions of the FIDIC Red, Yellow and Silver Books, is that the float is owned by the contractor. Those contracts provide that the contractor is entitled to an extension of time when the contractor's planned date for completion is delayed. In such circumstances the contractor is entitled to an extension of time to the contractual completion date even if there is float available in the programme.

It is very much worth emphasising that the most prudent course of action for parties is to deal expressly with the issue of how the float is dealt with upfront in their contracts. It is also important to maintain on site a properly prepared, and regularly updated, programme which identifies both by how much individual activities could be

delayed before affecting their successor activities (activity float), as well as showing the difference between the contractor's planned overall completion date and the contractual completion date (terminal float).

Which Delay Analysis Methodology?

A contractor wishing to claim under its contract for delay will need to show cause and effect. In particular, they will need to establish that a particular event caused delay to the works, and demonstrate the effects of that event on the progress of the works. If there is one clear cause of delay this can be straightforward, but often it is more complex. Sometimes, although the cause of delay may be clear, the consequences of the delay can be difficult to map. This raises the question of which methodology should be used to analyse the delay.

Computer modelling is often used to evaluate the impact of events on a project programme. Various software packages are available for use in the construction industry. Their use of different delay analysis techniques creates difficulties because they produce different results, some more realistic than others. Some techniques look at the hypothetical impact, others at the actual impact. The differing methodologies have found varying levels of favour with the courts. In *Castle Trustee v Bombay Palace Restaurant Ltd* [2018] EWHC 1602, Jefford J noted that delay analysis was a common feature in construction claims, before emphasising that any such expert evidence had to offer something that was actually of assistance to the court (or tribunal):

“On one view the cause of delay is entirely a matter of fact but expert evidence may be admissible and may assist the court in a number of ways. For example, there may be a complex programme for the works produced using programming software. There may be issues as to the validity of a baseline programme which involves expertise either in programming as such or in the construction process. Assessment of the impact of a factual event on the programme may involve running or manipulating or adjusting the programme which itself involves an expertise (not to mention software) which the court does not possess. The programme may have been adjusted on numerous occasions over the course of a lengthy project and that itself may be the subject of expert opinion. The programme and impacts of events on the programme may involve analysis of logic links and dependencies which again may involve expertise in programming and/or the construction process.”

Delay analysis can rarely make up for the absence of contemporary records and documents, the importance of which cannot be overstated. As Wilcox J observed in *Skanska Construction UK Ltd (formerly Kvaerner Construction Ltd) v Egger (Barony) Ltd* [2004] EWHC 1748, the “sophisticated delay analysis” of an expert was “only as good as the data put in”.

These are useful judicial reminders that delay analysis is meant to facilitate a decision of what actually delayed the project rather than being an end in itself. Approaches that stray far into the hypothetical are unlikely to serve that purpose, and may be met with scepticism by the decision-maker. With that in mind, it is advisable for all parties to a dispute to decide, preferably upfront, which methodologies they should use. If a dispute over delay arises, this will assist in ensuring as consistent as possible an approach to the resolution of arguments about the parties' entitlements under the contract.

An early question that arises is whether the delay assessment should be on a prospective or retrospective basis. Contractors invariably prefer a prospective assessment because that assessment must be undertaken on a theoretical basis, often resulting in an overestimate of the delay. By contrast, a retrospective delay analysis will take account of the actual effect of the delay.

In the recent case of *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd* [2017] NIQB 43, the court stated that in circumstances where the works were complete a retrospective analysis was generally preferred because it allows the court to assess the delay with the benefit of hindsight. Ignoring what actually occurred to undertake a theoretical assessment was viewed as an artificial exercise. The court reached this decision even though the contract, an NEC3 form, expressly provided for prospective assessment. Deeny J asked:

“... why should I shut my eyes and grope in the dark when the material is available to show what work they actually did and how much it cost them?”

It seems therefore that the courts will prefer a retrospective analysis of the relevant delay events in almost all circumstances, and methodologies which rely on prospective assessments of delay should be avoided, at least when the project has already come to an end.

There are many variants and sub-variants of methodologies that parties have used in an attempt to persuade a court of their particular delay analysis. There are too many such methodologies to attempt to evaluate each of them in this article. Indeed, the preferred methodology will change depending on the information that is available.

It is, however, useful to be aware of one method of delay analysis that is still widely used by contractors, but has been discredited. That methodology, often referred to as ‘impact as-planned analysis’, is the simplest and least expensive way to analyse delay. It involves looking at the hypothetical impact of certain future delay events on a baseline programme. Their impact is then presumed to amount to the critical delay on the project.

This method is regarded as far too simplistic for most situations, not least because it does not establish whether actual delay flowed from the modelled events. It also only includes delay events caused by one party and presumes no delay on the part of the other party. It is therefore not considered to be a reliable methodology. It is still, however, used by contractors who wish to inflate their entitlement in respect of delay, given that it does not take into account any delays caused by the contractor itself. Employers should therefore be aware of such a tactic and look for a more reliable methodology.

Ultimately, facts are what matter. There is no magic to delay, and reality and reason should (and usually do) prevail in the end. The parties’ respective positions are to be assessed by reference to the contract. If a delay event is the employer’s risk under the contract, and that event has affected the critical path and thus actually delayed completion, then a reasonable employer should be willing to give the contractor its entitlement. The task for the contractor is to present the relevant information clearly, against the background of what can be a complex project with many hundreds of activities and many thousands of documents. A logical, factually grounded and persuasive delay claim that cuts through irrelevant information will always be a welcome sight.