

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.

To read the full article, see the PDF linked below.

[Time-Is-Not-On-Your-Side-A-Quick-Overview-of-Delay.PDF](#)