

Concurrent delays – an expert's view

Expert witness **Roger Gibson** of **Gibson Consulting Ltd** gives his view of a potentially landmark case in the Scottish courts that involved analysis of concurrent delay.

KEY POINTS

- | **Concurrent delays, the story so far; *Chestermount, Malmaison and Brompton***
- | **Are your 'concurrent delays' really concurrent? Check the detail and the facts first**
- | **After *City Inn*; what does the decision mean in practice**
- | **Apportionment of delay. Will this be followed in England?**

In July 2010, the Inner House of the Court of Session in Scotland issued its judgment in *City Inn v Shepherd Construction*. The Scottish Court decided that where two concurrent causes are operative, one being a relevant event and the other being an event for which the contractor is responsible, the certifier should approach the matter in a fair and reasonable manner and apportion the delay between the causes unless one of them is dominant.

The analysis of concurrent delay by the Inner House is of great interest, particularly the adoption of apportionment as a general means of fair and reasonable assessment of extension of time.

What are concurrent delays?

A question that frequently arises is the method of dealing with extensions of time which may be due to either or both of two causes, ie concurrent delays. The more complex the project the more likely that this issue

will arise.

Concurrent delays refer to delay situations when two or more delays, regardless of the type, occur at the same time or overlap to some degree – either of which had the delays occurred alone, would have affected the project completion date.

In analysing concurrent delays, each delay should be assessed separately and its impact on other activities and the project date for completion calculated. Much will turn on the quality of planning and programming, and record keeping. Not only will there often be several delay events running in parallel, but there may be parallel critical paths to contend with and periods of acceleration and/or mitigation to take into account. The contract conditions will also have to be taken into account on the analysis technique used.

The prominent authorities on concurrent delays

There are three disputes which are generally considered to provide the leading authorities on 'concurrent delay'. These are:

- | *Balfour Beatty Building Ltd v Chestermount Properties Ltd* [1993] 62 BLR1 (*Chestermount*)
- | *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [1999] 70 Con LR 32 (*Malmaison*)
- | *The Royal Brompton Hospital NHS Trust v Hammond* [2000] EWHC (Tech) 39 (*Brompton*)

Chestermount was heard before Mr Justice Coleman in the Commercial Court, and arose from an appeal against an arbitration award of Mr Christopher Willis.

The following preliminary question was put before the Court:

'In granting an extension of time in respect of the Relevant Event occurring during a period of culpable delay, ought the Architect to award a "gross" extension (that is one that re-fixes the Completion Date at the calendar date upon which the work would reasonably be expected to be completed, having regard to the calendar date upon which it is instructed), ought it to be a "net" extension (that is one which calculates the revised Completion Date by taking the date currently fixed and adding the number of days which the Architect regards as fair and reasonable).'

The Court confirmed that the correct approach was that the architect should start with the existing completion date and extend it to the date that he considers 'fair and reasonable', having regard to the delay caused by the requirement to execute the variation instructions. The Court confirmed that it was the 'net' method that was appropriate.

Malmaison also concerned concurrent delays. In his judgment, HHJ Dyson considers how two concurrent causes of delay should be determined; one being a relevant event such that a contractor was entitled to an EOT and the other having no entitlement to an EOT. The judge said:

'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 of time for the period of delay caused by the relevant event, notwithstanding the concurrent effect of the other event. Thus to take a simple example, if no work is possible on site for a week, not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week.'

HHJ Dyson went on to say that an architect is not precluded from considering the effect of other events when determining whether a relevant event is likely to cause delay to the works beyond completion.

Following on from *Henry Boot*, Judge Seymour QC in his judgment in *Brompton* provided a further explanation of what is meant by events operating concurrently. Where a relevant event occurs after a contractor-responsible event but runs concurrently on

the critical path, this is referred to as net concurrency. But for either true or net concurrency to occur, the events must be shown to be on the critical path of the programme. In his judgment, His Honour Judge Seymour QC stated:

'... In order to make an assessment of whether a particular occurrence has affected the ultimate completion of the work, rather than just a particular operation it is desirable to consider what operations, at the time the event with one is concerned happens, are critical to the forward progress of the work as a whole.'

In other words, an event complained of must be shown to have been on the critical path as opposed to one that is merely concurrent with the critical path. If an event is not on the critical path, it cannot affect completion and hence there is no entitlement to time.

City Inn v Shepherd Construction

(1) Background

City Inn employed Shepherd Construction to build a hotel in Bristol under a JCT 1980 form of contract, with bespoke amendments. A dispute arose concerning Shepherd's entitlement to an extension of time; with the delay to the completion date being due to a number of concurrent causes. Some matters for which the contractor was responsible, as well as matters for which the employer was responsible.

The contractor had been awarded a four week extension of time by the architect; and after referring the matter to Adjudication, was given an additional five weeks by the adjudicator. City Inn were unhappy with the adjudicator's decision and took the matter to the Outer House of the Scottish Court of Session.

(2) The judgment of the Outer House of the Scottish Court of Session

Following a trial of almost 30 days, Lord Drummond Young issued his decision ([2007] CSOH 190).

A major issue of the case was causation and delay. On this issue, Lord Drummond Young referred to cl 25 of the JCT contract, and said that under this clause the architect was to exercise his judgment and fix a 'fair and reasonable' completion date. He held that an apportionment exercise may be necessary where there is concurrency and no dominant event. Lord Drummond rejected City Inn's expert evidence which

tried to establish, retrospectively, a critical path which led to the conclusion that Shepherd was not entitled to any EOT at all. Instead, he favoured Shepherd's expert who said that he had attempted to establish a critical path, but that it was impossible to do so accurately. Lord Drummond preferred this common sense approach and found that, using this analysis, Shepherd was entitled to nine weeks EOT. City Inn appealed, and the matter proceeded to the Inner House of the Scottish Court of Session.

(3) The judgment of the Inner House of the Scottish Court of Session

The majority opinion was delivered by Lord Osborne ([2010] CSIH 68), and he endorsed the approach taken by Lord Drummond Young in the previous judgment.

However, the judgment of the Inner House sets out five principles relating to the evaluation of a delay and 'loss and expense' claims.

- (1) For an extension of time claim to succeed the relevant event must be shown to be likely to cause delay or have caused delay, and that completion of the works is likely to be delayed or has been delayed by that relevant event.
- (2) Whether or not a relevant event causes delay is a question of fact to be determined by common sense.
- (3) It is for the decision-maker to decide what evidence to use in forming his conclusion. This may take the form of a critical path analysis, but that the absence of such an analysis does not mean the claim will necessarily fail. What matters is that the evidence used is sound, whatever form it takes.
- (4) If there is one dominant cause, all other causes will be disregarded. The dominant cause must be a relevant event for a claim to succeed.
- (5) Where a situation exists in which two causes are operative, and one is a relevant event and the other is caused by the contractor, and neither can be described as a dominant cause, it will be open to the decision-maker to approach the issue in a fair and reasonable way to apportion the delay between the causes.

Furthermore, the court also approved the lower court's decision to the effect that the same approach should be applied to claims for loss and expense under the JCT Form.

In contrast Lord Carloway, in his dissenting opinion, agreed with the overall result of the other judges, but applied different reasoning. He considered that apportionment was not the correct method of awarding EOT between two concurrent causes of delay.

Observations and views

- | For there to be concurrent delays in the sense that that one is a relevant event, ie an employer-responsible event, and the other is a contractor responsible event; both events must be shown to be on the critical path of the project.
- | In my view, they are to be demonstrated as being on the actual critical path of the programme at the time of the events.
- | When faced with the problem of concurrent delays, it is always worthwhile pausing and asking whether the delays really are concurrent; as most delays are in fact consecutive. The test is to look at the project's critical path. Delays will generally be consecutive unless there are two or more critical paths. On some projects, several critical paths running in parallel is not uncommon, but even in such cases, true concurrency is rare. Usually, after investigation it can be established that one delay occurs after the other. Or, for example, only one delay is affecting the critical and the other delay is using up only available float, the non-critical delay is not delaying completion of the project.
- | Therefore, before the question of concurrency arises at all, it must be established that there are two competing causes of delay operating at the same time and affecting the critical path or paths of the project.
- | Apportionment. It is the author's understanding that apportionment is not applied as a general principle in English law to the entitlement to extension of time in the context of liquidated damages. Lord Carloway's approach is most consistent with established English law. It remains to be seen as to whether Lord Osborne's expansive approach agreed by Lord Kingarth is likely to be followed in English law
- | Scottish decisions are not binding in England, and the *City Inn* decision by the Scottish Inner House has received a mixed reception from UK commentators. However, it can influence the decision making of adjudicators and arbitrators, and it remains to be seen whether it will be approved by the courts in England. **CL**