What is concurrent delay?

The term “concurrent delay” means a situation where a construction project is delayed by two events at the same time, one being an event for which the employer takes responsibility under the contract and the other for which the contractor takes responsibility. Under a typical construction contract, the contractor would claim for an extension of time and possibly damages for delay caused by an employer risk event. The employer would claim liquidated damages for delay caused by a contractor risk event.

The definition of concurrent delay put forward by John Marrin QC in a paper produced for the Society of Construction Law in 2002 has been used by the courts and was confirmed in Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm) as a useful working definition:

“a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency”.

It is generally accepted that the effects of an employer risk event and a contractor risk event must be simultaneous for a
delay to be classified as a concurrent delay. The two separate events do not have to have occurred at the same time but the delaying effects of the events must occur at the same time. Each event needs to have caused delay in its own right. A narrow definition of concurrency, also known as “true” concurrency, used in The Royal Brompton Hospital NHS Trust v Hammond (2001) 76 Con. L.R. 148, where the two events in question should start and finish at the same time, was subsequently criticised as too narrow.

**Parties free to allocate risk in contract**

Construction contracts often do not address the issue of concurrent delay but the parties can set out an express provision in the contract to deal with this situation. In North Midland Building Ltd v Cyden Homes Ltd [2017] EWHC 2414 (TCC), the Technology and Construction Court (TCC) clarified that the parties to a contract are free to allocate the risk of concurrent delay. In this case, the court upheld a clause that disallowed a contractor’s claim for an extension of time in cases of concurrent delay. The contract was an amended JCT Design and Build Contract, 2005 edition, which stated that any delay caused by a relevant event (that is an employer risk event) which is concurrent with another delay for which the contractor is responsible shall not be taken into account when assessing a claim for an extension of time. The wording was found to be “crystal clear” and the contractor’s claim that the prevention principle invalidated the clause did not succeed (see below for analysis of the prevention principle in the context of concurrent delay). The Court of Appeal upheld the decision of the TCC and concluded that the clause in the contract, that did not allow the contractor an extension of time in circumstances of concurrent delay, was valid and could not be said to be uncommercial. It had been agreed by the parties to amend the JCT contract in this regard and place the benefit of concurrent delay on the employer.

**The Malmaison case – contractor granted extension of time**

Where there is no provision in the contract to cover concurrent delay, Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd [1999] 70 Con. L.R. 32A is a leading case under English law. In this case, often referred to as the Malmaison case, the contract was the JCT Standard Form of Building Contract, Private with Quantities, 1980 edition that was not amended to refer to the risk of concurrent delay. The court granted the contractor an extension of time for the period of delay caused by a relevant event under clause 25 of the standard form of contract, notwithstanding the concurrent effect of another delaying event caused by the contractor.

The judge gave an example where no work is possible on a 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). 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. The architect cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour.

The Malmaison case set out the rationale that, provided one of the concurrent causes of the delay was at the employer’s risk, the contractor will receive a full extension of time for the whole period of delay, even though the delay was partly caused by an event for which the contractor was responsible. The courts went on to adopt an approach which has become known as the Malmaison approach whereby, when determining the delay caused by an employer risk event under a contract, the existence of a contractor risk event is irrelevant to the assessment of an extension of time entitlement.

In Walter Lilly & Co Ltd v Mackay [2012] EWHC 1773 (TCC), the Malmaison approach was taken and the judge was of the view that where two or more events caused delay and one of them was a relevant event, the contractor was entitled
to a full extension of time on the terms of the extension of time clause, in this case under the JCT Standard Form of Building Contract, Private Without Quantities, 1998 edition. It was held that the straight contractual interpretation of clause 25 of the contract points very strongly in favour of the view that, provided that 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. There was nothing in the wording of clause 25 which expressly suggested that there was any proviso to the effect that an extension of time should be reduced if the causation criterion was established.

**Time but no money**

Although the courts have allowed the contractor an extension of time in circumstances of concurrent delay, a contractor has not usually been entitled to a payment for loss and expense in respect of an employer risk event in such circumstances, as set out in the Society of Construction Law Delay and Disruption Protocol. In claiming for loss and expense caused by the delay, the contractor would find it hard to satisfy the “but for” test of causation. This general rule was outlined in *De Beers UK Ltd (formerly Diamond Trading Co Ltd) v Atos Origin IT Services UK Ltd [2010] EWHC 3276 (TCC)*. The contractor is entitled to an extension of time where delay is caused by the employer because although the contractor must complete within a reasonable time, he 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. By contrast, the contractor cannot recover damages for delay in circumstances where he would have suffered exactly the same loss as a result of causes within his control or for which he is contractually responsible.

**Apportionment**

A significantly different approach to resolving the issue of concurrent delay was taken in *City Inn Ltd v Shepherd Construction Ltd [2010] ScotCS CSIH_68*, where the Scottish appeal court decided that apportioning the delay between the parties would be appropriate where there was no dominant cause of delay. If a dominant cause of delay to completion of the works can be identified and the dominant cause is a relevant event under the contract then the contractor will be entitled to an extension of time. If there are two causes of delay which are concurrent and one is a relevant event and the other is an event for which the contractor is liable, but neither is dominant, then the delay can be apportioned between the two causes in a fair and reasonable manner by the architect or person responsible for such decisions. If liquidated damages are payable then this is a factor which should come into the equation. The exercise of apportionment should be similar to apportionment of liability in cases of contributory negligence and account should be taken of relative culpability in the causes of delay and the significance of each of the factors in causing delay. The apportionment approach was justified by the fact that under clause 25 of the JCT 1980 Standard Form of Building Contract the architect is required to fix such new completion date as it considers to be “fair and reasonable” in the circumstances.

In the Malmaison case, it was maintained that it was wrong to suggest the architect could not consider the impact of other events on progress and completion when deciding whether there was a delay caused by a relevant event. However, in *Walter Lilly & Co Ltd v DMW Developments Ltd [2012] EWHC 1773 (TCC)*, it was held that the approach of the Scottish Courts in this situation to permit an apportionment of the relevant period of delay between the parties so as to permit a partial award of an extension of time to the contractor probably does not reflect the law of England.

**The prevention principle**

The “prevention principle” provides that no party may require the other to comply with a contractual obligation in...
circumstances where that party has itself prevented such compliance.

In the recent case of North Midland Building Ltd v Cyden Homes Ltd [2017] EWHC 2414 (TCC) the contractor claimed that the wording in the contract, which disallowed an extension of time where there was concurrent delay, could not be valid due to the prevention principle and therefore time was at large and any liquidated damages provision void. At first instance, the court confirmed that the prevention principle does not apply to cases of concurrent delay, citing previous authorities on the point. In Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm), the court maintained that the act of prevention must render it impossible or impractical for the other party to do his work within the stipulated time. The logic is that such an outcome cannot occur when the contractor is already in culpable delay. Jerram Falkus Construction Ltd v Fenice Investments Inc [2011] EWHC 1935 (TCC) set out a summary of the law on prevention and concurrent delay and emphasised that for the prevention principle to apply, the contractor must demonstrate that the employer's acts or omissions prevented the contractor from achieving an earlier completion date. 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.

The contractor appealed the decision in North Midland Building Ltd v Cyden Homes Ltd on the grounds that the prevention principle would apply to negate the concurrent delay clause as a matter of legal policy. This argument did not succeed as the appeal court stated that the prevention principle is not an overriding rule of public or legal policy and there is no authority to back this claim. The clause in question was an agreed term of the contract and there is no suggestion in any previous case that the parties cannot contract out of some or all of the effects of the prevention principle.

In appealing North Midland Building Ltd v Cyden Homes Ltd, the contractor went on to argue, that if the relevant clause was found to be enforceable, so that he was not entitled to an extension of time for concurrent delay, there was an implied term which would prevent the employer in those circumstances from levying liquidated damages. It would be bizarre if the employer could recover liquidated damages for a period of delay for which it was responsible. This ground for appeal did not succeed. The extension of time provisions were inextricably linked to the provisions relating to liquidated damages and there could be no basis for arguing for a result in respect of liquidated damages that was different to the result in respect of extensions of time. As the concurrent delay clause was an effective clause, it expressly permitted the employer to levy liquidated damages for periods of concurrent delay, because it would not grant the contractor relief against such liability by extending the completion date.

Avoiding disputes on concurrent delay

We have seen a number of disputes on unamended JCT contracts in particular, which do not address concurrent delay in the contract terms. The standard forms of construction contract used in the UK, such as JCT and NEC do not refer to concurrent delay. The new FIDIC 2017 rainbow suite of contracts does however include a sub-clause on concurrent delay, leaving it to the parties to set out rules and procedures to cover this situation in the Special Provisions. Although there are a number of common law principles that have been developed in the English courts to apply in circumstances of concurrent delay, it can be advisable to address the issue when negotiating a contract rather than risk a dispute if the matter arises.

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