



Concurrency

Introduction

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, i.e. concurrency. 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.

It is important to differentiate between the delaying event or cause and the delay itself. It is generally recognised that there are times when there are delays which may be the result of different causes, but that sometimes the causes will run at the same time or overlap. This makes it difficult to decide how to treat the delay, particularly if the causes originate from different parties or the delays are of different kinds. For example, under most forms of contract, some causes may give the contractor entitlement to an extension of time; some causes may give the contractor entitlement to an extension of time and also loss and expense, whilst other causes may not entitle the contractor to any extension of time or loss and expense whatsoever.

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.

Methods of assessment

'Keating on Building Contracts' looks at a number of propositions as follows:

- 1) The Devlin Approach; which contends that if there are two causes operating together and one is a breach of contract, then the party responsible for the breach will be liable for the loss.
- 2) The Dominant Cause Approach; which contends that if there are two causes, the effective, dominant cause is to be the deciding factor.
- 3) The Burden of Proof Approach; which contends that if there are two causes and the claimant is in breach of contract, it is for the claimant to show that the loss was caused otherwise than by his breach.

A further method to consider is the 'Malmaison' approach, which is often considered to be the leading modern decision on concurrent delay. Disputes occurred on a hotel project in Manchester which culminated into arbitration and subsequently ended in Court before Mr Justice Dyson.

An agreement on concurrency was reached between the parties and this was ratified in Court by Judge Dyson, who said in his judgment,

"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."



Therefore, by using a simple example, Judge Dyson demonstrated that if a contractor suffered a delay of one week due to exceptionally inclement weather, a Relevant Event, and in the same period there was a delay due to the contractor's shortage of labour, which is not a Relevant Event. Then, if the architect considers it fair and reasonable to do so, he should grant an extension of time of one week; and he cannot refuse to grant one on the grounds that the delay would have occurred anyway because of the contractor's shortage of labour.

A simplistic approach sometimes used is the 'first past the post' method. This is based on the logic that where delays are running in parallel, the cause of delay that occurs first in terms of time will be used first to evaluate the impact on delay to the date for completion.

'Brompton Hospital'

In a subsequent case, Royal Brompton Hospital NHS Trust v. Frederick Alexander Hammond and Others (2000), a key issue was "concurrency". On this issue, His Honour Judge Seymour QC distinguished between sequential causes of delay and true concurrency, stating,

"However, it is, I think, necessary to be clear what one means by events operating concurrently. It does not mean, in my judgment, a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a Relevant Event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a Relevant Event, 'the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date'. The Relevant Event simply has no effect on the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, the works are proceeding in a regular fashion and on programme, when two things happen, either of which had it happened on its own would have caused delay, and one is a Relevant Event, while the other is not. In such circumstances there is real concurrency of causes of delay."

Therefore, an important matter to be gleaned from this case and the judgment was that the matter of concurrency should be looked at closely in order to determine those events which are sequential and those which are truly concurrent.

A practical approach to concurrency

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.

Complications are introduced when, for example, one delaying event is soon followed by another during the delay caused by the first event itself, and it may be unclear as to whether the second event was triggered by the first; or if the contractor's obligation to mitigate delays has to be reassessed.



Useful guidelines

Where there are overlapping, or concurrent delays, the most popular guidelines are,

- a. No extension of time granted when an employer responsible delay event is within a non-critical path while a contractor responsible delay (e.g. poor progress through lack of resources) is on a critical path.
- b. An extension of time is awarded when both an employer responsible delay event and a contractor responsible delay event occur concurrently on parallel critical paths, on the basis that either delay by itself could have prolonged the project by the same period.

However, where the delays are unequal, or where an employer responsible delay is followed by a contractor responsible delay (or vice versa) on the same or parallel critical paths, and it is unclear as to whether the second was triggered by the first, the 'dominant cause' approach could help to allocate liabilities.

Clearly, more explicit guidelines are needed based on sound principles to improve fairness, consistency and certainty in practice which would in turn lead to better planning and control of potential project risks and less resource wastage on acrimonious disputes if these risks eventually do materialise.

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