



Technical

## Time and Money Claims - The Problem of Concurrency

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1. This article reviews the case law relating to time related concurrency in construction. The case law has seen a number of fundamental shifts in the last decade or so and as yet some of the underlying principles remain unresolved.

### What is a Delay?

2. A delay can occur to either the progress of the works or to the completion of the works. Usually when we talk about a delaying event we mean a delay to the progress of the works. This is a cause of delay, that is the progress is delayed for some reason and that delay may or may not have an consequential impact on completion depending on whether the delay sits on the critical path or not.

### Entitlement to Additional Time Due to a Delaying Event

3. Where a delaying event has occurred and has had an impact on the completion date and if the event is an Employer's risk event rather than a Contractor's risk event then most forms of contract will allow for additional time to be given to the contractor to complete the works. The difficulty arises in establishing how much time the Contractor is entitled to. It could be considered that the Contractor is entitled to the

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duration of the causal period however this may result in the Contractor being provided more time than is necessary if the impact of the delaying event did not actually cause a delay to the completion of the works. It is therefore normal practice to provide additional time measured against the impact of the delaying event on the completion of the works rather than for the causal period. This is somewhat different to the measurement of additional cost.

4. In some forms of contract such as the NEC suite of contracts this principle is stated within the contract terms and conditions. Within other forms of contract such as JCT the method of establishing additional time is less specific but follows the same principle.
5. Difficulty occurs when two or more delaying events occur on the same project. For example if an Employer's risk event occurs but does not cause critical delay to completion and then a Contractor's risk event occurs afterwards on the same critical path and does cause critical delay the question arises as to whether the critical delay would have occurred had the Employer's risk event not happened. The answer to this question is generally dependent on the specific contract terms and conditions and a general principle cannot be applied other than to say that the ownership of float within the programme needs to be established before the question can be answered.

## What is Concurrency?

6. Concurrency occurs when two delays occur at the same time. What does at the same time mean. For every delay that occurs there are two periods, a causal period and a period of impact. These two may occur at the same time or at different times. For example, if the employer fails to provide design information the causal period is from when the information was required to when it is actually provided. The impact is unlikely to be felt in the design period and may only be felt on site after a period including procurement and manufacture.

## Cumulative Effect/Global Claim/Total Cost Claims

7. The requirement of most contract terms and conditions is to consider the effects of each delaying event in isolation and to assess the quantity of additional time that is required due to this delaying event. Where this is not possible or not desirable on the part of the Contractor a global time claim may be presented in which it is attempted to demonstrate the

cumulative effects of a number of relevant events where each relevant event taken in isolation would be minimal or zero. In other words the Contractor claims that its total overrun is the cumulative effect of a number of relevant events. The cost equivalence of a global time claim is for the Contractor to claim a total cost claim whereby it claims its entitlement to cost is the difference between the actual final value and the contract values.

8. Generally the courts are not in favour of global time claims.

## Concurrency and Case Law

9. The manner in which concurrency is dealt with to establish entitlement to an extension of time and therefore relief from liquidated damages has been the subject of several legal cases over the years. Unfortunately the outcome of these cases is not consistent and we still find ourselves in the position that there is no one concise protocol or set of rules for dealing with concurrency. This is further exacerbated by the differences in contract terms and conditions.

### Simple guidelines for a complicated issue:

10. The following guidelines may prove useful to assess entitlement where concurrency occurs. These guidelines should be tested against particular contract terms and conditions.
  - For true concurrency to exist both Employer's and Contractor's delaying events must be shown to critically affect completion. Where one of the delaying events is not critical then it cannot affect completion and therefore no entitlement will exist due to that delaying event.
  - If both an Employer's risk and a Contractor's risk event occur on separate paths both of which are critical to completion then either the Contractor is awarded time but may not be awarded loss and expense (Malmaison/DeBeers) or the time and money may be apportioned (City Inn).
  - Where delays occur that are not concurrent or are only concurrent for a relatively small duration of the overall delay then the dominant cause approach may assist in resolving entitlement. In such a case perhaps the first delay would be awarded in full with the impact of the second delay only being

considered once the first delay is complete. This requires careful consideration of float and when an event becomes critical.

A common sense approach as to the assessment of dominance should be adopted.

- In order to demonstrate that a delay is on the critical path some form of sensible, and therefore reasonably detailed, project programme is required as a starting point together with regular progress reports to establish what actually occurred. If either of these are not available as contemporaneous records any claim is only likely to be of a global nature. Where concurrency potentially exists in a global claim the claim may fail as a whole.

11. For information recent pertinent case law is identified below.

## DeBeers v Atos (2010)

12. The *DeBeers v Atos* case was an IT dispute but centred around additional time and associated costs was heard in the TCC and can therefore be considered relevant to construction in general.
13. The pertinent part of the judgement is reproduced below:

*“177. The general rule in construction and engineering cases is that where there is concurrent delay to completion caused by matters for which both employer and contractor are responsible the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by the delay. In the case of the former, this is because the rule where delay is caused by the employer is that not only must the contractor complete within a reasonable time but also the contractor 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.*

*178. 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 all for which he is contractually responsible.”*

14. In other words where concurrent delays occur the Contractor is entitled to the time as measured by the delay to the completion date to provide relief from liquidated damages but is not entitled to any loss and expense because it would have been late in any event

## City Inn v Shepherd (2010)

15. *City Inn v Shepherd* was a Scottish case which went to appeal. It is not part of English law but it should be considered that judges in the TCC are likely to consider the judgement in this case.
16. In this case, concurrency occurred between Employer's and Contractor's risk delaying events and it was decided that since neither could be described as dominant it would be open to the decision-makers to make a fair and reasonable apportionment of the delay to the completion of the works. This was the opinion of two of the three judges however the one dissenting judge argued that the contractor was entitled to a full extension of time for the duration of the concurrent events as per previous case law.

## John Doyle Construction Ltd v Laing Management (2002)

17. John Doyle presented a global claim for damages resulting from additional time from a number of additional instructions and variations. The court held that a global claim can succeed but if it is to do so then it must be established that the contractor did not contribute to the delay in any way. The case also established that common sense must be applied to the principle of causation and that if the dominant cause of loss can be established then that would be treated as the operative cause and the party responsible for that delay would be also responsible for the loss.

## Royal Brompton Hospital v Hammond and Others (2001)

18. The Royal Brompton case broadly supported the conclusion given in the Malmaison case but there are some differences concerning the '*first in*' principle.

## Henry Boot v Malmaison Hotel (1999)

19. The issue considered in this case was whether the contractor is entitled to an extension of time where two concurrent causes of delay occurred one of which was a relevant event, an Employer's risk event and the other is not. The case concluded that the contractor is entitled to an extension of time for the period of delay caused by the relevant event regardless of the fact that it was itself in concurrent culpable delay.

## Balfour Beatty v Chestermount Properties Ltd (1993)

20. In this case the Contractor was in delay due to his own lack of progress and then the Architect varied the works. The question arose whether the Architect was able to award an extension of time after the original completion date had elapsed and whether the entitlement of the Contractor shall be a gross additional time or a net additional time.
21. The gross time would be awarded on the basis of the date of the instruction beyond the original completion date and a net award would only take into account the amount of additional time required to perform the additional work instructed albeit that the instruction was awarded after the original completion date.
22. The court found that the Architect could make an award after the original completion date and that the entitlement was only the net entitlement. This is sometimes referred to as the "*dot on*" effect.

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