

MDA PRESENTS



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CONCURRENT DELAYS UNDER THE NEW FIDIC RED BOOK₁

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Concurrent delays are a constant bone of contention on most contracts where employer delays affect the contractor's ability to timeously complete the Works.

The problem arises where two delaying events occur at about the same time and one delaying event is caused by the contractor and the other the employer.

To properly understand the issue, it may be advantageous to quote from John Marrin QC₂, who defined concurrent delay as follows:

“the expression “concurrent delay” is used to denote a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency.”

The plot thickens, if we refer to the author of the “*Delay and Disruption in Construction Contracts*”₃, Mr. Keith Pickavance who said that “*Parallelism*”, was another category of delay where delays occur concurrently.

However, to try and simplify for the readers understanding, where more than one cause of delay occurs at the same time, one being a contractor delay event and the other an employer delay event, and these are of approximately equal causative potency, then these will be concurrent delays.

¹ FIDIC Conditions of Contract for Construction Second Edition 2017

² Society of Construction Law article, titled “Concurrent Delay Revisited” dated February 2013, issue 179 and authored by John Marrin QC

³ Published by LLP Limited

This article will deal with the subject of concurrent delays as they are intended to be administered under the new FIDIC Red Book Construction Contract, second edition, released late last year (2017).

To set the scene, a brief overview of how concurrent delays have and are being dealt with under other contract forms is considered beneficial:

Concurrent delays are not a new phenomenon. They have been with us for a very long time.

Notwithstanding that the drafters of previous editions of modern contract forms in every day use, must have known that there was a strong likelihood that concurrent delays would arise, they made no express provision for how they intended them to be dealt with.

None of the previous drafted standard form contracts prior the release of the FIDIC 2017 suites, dealt expressly with concurrency.

The only reference to concurrency in any of the standard form contracts recommended for use in South Africa by the CIDB (Construction Industry Development Board) is in our local GCC construction works contract. This contract, has since its first edition, required the engineer to take into account a number of things including concurrency when he assesses the extension of time which might be due to the contractor. How such concurrency was intended to be assessed is not explained however.

In the absence of any express provision or explanation of how concurrent delays are to be administered, the

industry could only rely on other authorities, such as the following:

In 1918, the English case of *Leyland Shipping Company Ltd v Norwich Union Fire Insurance Society Ltd*⁴, introduced the ‘dominant cause approach’, to concurrent delays. The party responsible for the dominant cause of delay, was responsible for the delay. Although the dominant cause approach is still used, owing to a test referred to as the “but-for” test, the dominant approach to concurrent delay analysis, has been abandoned as the main tool for sorting out the concurrency problem.

Eventually, in 1999, in the English case of *Henry Boot Construction v Malmaison Hotel (Manchester) Ltd*⁵ (“*Malmaison case*”), ruled that where two events of similar causative potency take place, the contractors delay is ignored and that the contractor was entitled to claim full extension of time under the contract for the duration of the employer delay.

The judgement in the *City Inn Ltd v Shepherd Construction Ltd*⁶ (“*City Inn case*”) in 2010 before the Scottish courts, disagreed with the Malmaison approach and stated that where there were two competing delay events and if none was more dominant than the other, then the delay should be apportioned between the employer and the contractor on the basis that, each of the factors and circumstances causing the delay, must be considered to establish relative culpability.

4 [1918] HL AC 350

5 (1999) 70 Con LR

6 [2010] Scot CS SIH 68

So, there are essentially two approaches that can be used, based on these persuasive quoted case law rulings. The Malmaison approach or apportioning.

The new FIDIC Red Book 2017 suite of contract, has introduced Clause 8.5, which states:

“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 EOT shall be assessed in accordance with the rules and procedures stated in the Particular Conditions (if not stated, as appropriate taking due regard of all relevant circumstances)”

So, the first consideration, is what kind of rules and procedures would the engineer include in the Particular Conditions?

He might for example make the statement that Malmaison will/will not apply or that City Inn (apportionment) would be applicable.

Much more likely in this observer’s view would be that a special condition would be introduced to say that where a contractor delay is concurrent with an employer delay, that in assessing the effects of the delays, the employers delay is ignored.

What happens when the engineer does not include any rules and procedures. Does the fact that concurrency has been expressly mentioned, mean that Malmaison does not apply and that the apportionment approach should be used?

In this observer’s view, it seems that Clause 8.5 would lean towards the apportionment approach as adopted in the City Inn case.

Of further concern is how the industry in South Africa is going to deal with the apportionment of a Contractor’s claim where the statutory act, the Apportionment of Damages, Act 34 of 1956, come into play. This act deals with the legal position regarding contributory negligence and the effect on recovery of damages. This Act may be considered if it becomes necessary to deal with the issue of liability. However, it primarily effects the quantum of a damages award and is not generally considered to apply under contract.

In circumstances where the Particular Conditions does not stipulate the parties agreed procedures to deal with concurrent delay. Then (as the clause states) due regard should be given to all circumstances. In the writer’s view, although this clause would appear to lean more towards the City Inn approach (apportionment), this may not prevent an engineer from making a determination using other approaches at his discretion. The party assessing the contractor’s claim, will have the freedom to determine in line with either the dominant cause approach, alternatively the Malmaison approach or the City Inn approach. This would appear to be fertile grounds for dispute!

In conclusion, it would appear, that as the industry currently stands, there is no right or wrong approach on how to deal with concurrent delays. It is evident that English courts adopted a different approach to the Scottish courts.

The new FIDIC contract second edition, does not prescribe a new procedure, but it prompts the engineer/employer, to decide on a mechanism or approach at their discretion, which they want to adopt and to confirm this in the Particular Conditions of the contract.

If this is not done, and no rules and procedures are set out in the contract, then anything goes, and you might find yourself at the end of a determination which can go either way (the English way or the Scottish way or something that the engineer has dreamed up)!