MDA PRESENTS

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Prevention is Cheaper than Cure

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CONCURRENCY- THE DEBATE RAGES ON!

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Show me a completion date for a contract and I'll show you extension of time applications for amending it. I will then also show you a collection of confused lawyers and engineers trying to decide on how to deal with these applications.

Delays in construction projects are as much a part of the construction process as using sliced bread to make sandwiches. However, the situation is often complicated where there are concurrent delays (two events taking place at approximately the same time), one caused by the employer and the other by the contractor, which affect the projects date for completion.

The focus point of this article is to set out the applicable principles and establish whether they still apply to latest editions of the FIDIC (2017) and General Conditions of Contract (GCC 2015) standard form contracts.

CALCULATING THE EXTENSION OF TIME IN A PERIOD OF CULPABLE DELAY- IN PRINCIPLE

The Gross Method vs The Net Method

The **Gross Method** is generally a contractor-based argument which says that if a delay event caused by the employer occurs during a period where the project is already delayed as a result of an event that the contractor is liable for, the architect/ engineer/ project manager must then establish a new time for completion from the date of the delaying event. liquidated damages for late completion.

This would have the effect of keeping the contract duration "alive" and then denying the employer the ability to claim liquidated damages for late completion.

The **Net Method**, on the other hand, states that even if a delay event caused by the employer occurs during a period where the project in delay (i.e. the date for completion has passed) as a result of an event that the contractor is liable for, then the architect/project manager/engineer must calculate the extension of time from the original completion date and add to this date the duration of the delay caused by the employer. This would mean that the contractor could still be liable for liquidated damages or penalties.

The British case of *Balfour Beatty v Chestermount Properties (1993) 62 BLR 1 QBD*, confirmed that Net Method is the correct method of calculating a new date for completion. The Court found that a contractor cannot escape liability for its own culpable delays even where a new delaying event occurred. Coleman J held "*it would be wrong in principle to apply the "gross" method, and that the "net" method represents the correct approach*".

Now let's have a look a concurrent delays.

CONCURRENT DELAYS

A **concurrent delay** has been defined by John Marrin Q.C., a prominent contractual commentator, and regular contributor to the Society of Construction Law bulletins, as '*a period of project overrun which is caused by two or more effective causes of delay which are of approximate equal causative potency*". In simple language, where two events have nearly the same effect in delaying a project.

Concurrent delays become especially problematic where construction contracts have not made provision for such circumstances or set out the contractor's entitlements, should such delays arise.

Working from first principles, there are a number of issues that need to be considered.

The **Prevention Principle** is often used as the starting point in any discussion relating to issues of concurrency. This principle, at its simplest, says that where "A" requires performance by "B" and "A" prevents said performance, "A" cannot insist on such performance. In the case of *Adyard Abu Dhabu v SD Marine Services [2011] EWHC 848* the learned Mr. Justice Hamblen held that if a party is trying to rely on the abovementioned principle, it was necessary to prove that, on the facts, the delay had been caused by the particular acts of prevention relied on.

This is a confirmation of the principle contained in the decision in the landmark UK case of Wells v Army and Navy Cooperative Society[1] in which it was stated:

"*If in the contract one finds the time limited within which the builder is to do the work, that means not only that he is to do it within the time, but it means also that he is to have that time within which to do it*".

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1 Wells v Army and Navy Cooperative Society (1902) 86 LT 764

These principles and other legal considerations, outside the scope of this article, have led to two divergent approaches to dealing with concurrent delays as defined.

THE SCOTTISH APPROACH TO CONCURRENCY

The Scottish courts have adopted the **Apportionment Approach**. In the case of *City Inn v Shepherd Construction Ltd [2010] CSIH 68 (Court of Session, Inner house)* the Court held that "*Where there is true concurrency between a relevant event and a Contract default, in that sense both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable. Precisely what is fair and reasonable is likely to turn on the exact circumstances of the particular case*."

This approach was upheld on appeal in Scottish Courts. It is used by Canadian Courts, and there are indications that New Zealand and Hong Kong Courts will follow suit.

It has not received support in the English courts. It would appear that the problem that the English Court faces with this approach is the issue of causation and just exactly how to apportion risk.

THE ENGLISH APPROACH TO CONCURRENCY

The case of *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd [1991] 70 Con LR 32*, has given rise to the **Malmaison Approach**. This is one of the most popular approaches that the South African construction industry has adopted in situations where there is no provision in the contract for concurrent delays. The Court in the abovementioned case stated as follows "*It is agreed that if there are two concurrent causes of delay, one of which is the Contractor's fault and one which is not, the Contractor is entitled to an extension of time caused by the relevant event notwithstanding the concurrent event of the other event*" The Court used the example of a builder unable to work for a week because he has a shortage of labour and the weather is of an inclement nature, the architect/ engineer/ project manager should grant an extension of time if he believes that it fair to do so, and cannot rely solely on the Contractor's culpable delay to refuse same.

In essence, the approach adopted above, is that the drafters of a contract have made provision for delays and extensions of time, they must have foreseen the possibility of a concurrent delay, and as a result, should have made provision for them. In not doing so, the Court in *Malmaison* ignores the Contractor's delay and relies on the Employer's act, (in essence, an act of prevention) because the Employer should not be able to insist on compliance from the Contractor when the ability to do so is compromised by its own actions.

WHICH OPTION SHOULD BE APPLIED UNDER THE LATEST FIDIC (2017) AND GCC (2015) CONTRACTS?

Since the **Malmaison Approach** relies, in principle, on the contract drafters silence concerning concurrency of delays, is this approach still appropriate when your contract is under either of the FIDIC2017 or GCC 2015 Standard Form Contracts?

FIDIC 2017

Clause 8.5 (e) of the 2017 FIDIC Conditions of Contract for Construction (the new Red Book) states the following:

"*The Contractor shall be entitled subject to Sub-Clause 20.2 [Claims for Payment and/or EOT] to Extension of Time if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over the Works and Sections] is or will be delayed by any of the following causes:*

…

(e) any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other Contractor's on site.

…

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 Special Provisions (if not stated, as appropriate taking due regard of all relevant circumstances)."

[Emphasis supplied]

GCC 2015

Similarly, **Clause 5.12.1** of the General Conditions of Contract 2015 edition makes specific reference to concurrent delays and states the following:

"*5.12.1 If the Contractor considers himself entitled to an extension of time for circumstances of any kind whatsoever which may occur that will actually extend the Practical Completion of the Works beyond the Due Completion Date, the Contractor shall claim in accordance with clause 10.1 such extension of time as is appropriate. Such extension of time shall take into account any special non-working days and all relevant circumstances, including concurrent delays or savings of time which may apply in respect of such claim*"

[Emphasis supplied.]

The drafters of the abovementioned standard form contracts now seem to have made provision for a situation where concurrent delays arise.

In light thereof, it may be concluded that the **Malmaison Approach** may no longer apply to these two contracts.

Accordingly, it appears to this commentator that under these contract forms, the **Apportionment Approach** would be the correct manner to be adopted in assessing extension of time claims where concurrency has occurred.

This would mean working on a pro rata basis in ascertaining the effect of each delay and apportioning the extension of time and costs according to the benefit/detriment of each party. The principle of apportionment has been adopted by South African Courts in dealing with issues of negligence, so this might be an area of law that could be used to establish how apportionment is carried out under these circumstances on construction contracts.

The FIDIC 2017 contract does not appear to have found its way yet onto the local construction scene. In contrast, the GCC 2015 contract has become quite common. It will be interesting to see how concurrent delays are dealt with, under this contract form, as and when they arise.