

Insights

CONCURRENT DELAY: THE LATEST GUIDANCE FROM THE COURTS

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SUMMARY

In *Thomas Barnes & Sons plc v Blackburn with Darwen Borough Council*, the TCC had to consider whether there was a concurrent delay and if so how did that affect the parties' rights under the contract. The delay to the works in this case entitled the employer to terminate the contract and engage a third party to complete the works. There are debates as to what concurrent delay actually means but the SCL Delay and Disruption Protocol, 2nd edition helpfully explains that it is:

“the occurrence of two or more delay events at the same time (one an Employer Risk Event, the other a Contractor Risk Event) and the effects of which are felt at the same time. For concurrent delay to exist, each of the [events] must be an effective cause of Delay to Completion ([meaning] the delays must both affect the critical path).”

How this works in practice will depend on the facts, and this judgment provides a useful illustration and reminder of the court's approach to concurrent delay.

WHAT HAPPENED?

The claimant contractor, Thomas Barnes & Sons plc (in administration) and the defendant employer, Blackburn with Darwen BC, entered into an amended JCT SBC with Quantities, 2011 Edition for the construction of Blackburn bus station, to include office space and a concourse for access to the buses.

During the project there were delays to the structural steel works (for which the contractor was not contractually responsible), completion of which were necessary for the subsequent works and final interior finishes. However, while the structural steel work delays were ongoing, the contractor suffered delays to its roof works, which were also a prerequisite to the interior finish leading the employer to terminate the contract on this basis and procure a replacement contractor to complete the works.

The contractor sought an extension of time (EOT) due to the structural steel delays and brought a claim seeking:

- Monies considered due under the contract at the time of termination; and
- Damages for wrongful termination.

Overall, the court held that issues with both the structural steel and roof covering works were concurrent causes of delay, as both works items were on the critical path (to completion of the internal finishes) and both were causing delay over the same period. The judge agreed with the employer's delay analyst, that the roof cladding and glazing could not be progressed until the roof coverings were completed and also that the majority of the internal finishes and services could not be progressed until the roof coverings were in place.

The court held that although the contractor had established an entitlement to an EOT, because of the contractor's delay-related default, the employer was still entitled to exercise both its contractual right to terminate and its common law right to terminate for repudiatory breach.

Consideration of the termination rights and the related sections of the judgment are outside the scope of this blog. In brief, while the employer had failed to comply with the notice requirements of the JCT contract, that did not invalidate the effectiveness of its acceptance of repudiatory breach, nor did it, in itself, amount to a repudiatory breach of contract that could be accepted by the contractor.

DETERMINING CONCURRENT DELAY

The judgment provides useful commentary on determining concurrent delay based on established case law and industry guidance.

The court considered the decision of Akenhead J in *Walter Lilly v Mackay*, stating that four observations were helpful in deciding this case:

- The court is not compelled to choose only between the rival approaches and analyses of the experts. It is a matter of fact for the court to decide what delayed the works and for how long.
- When considering delays, one should generally have regard to the item of work with the longest sequence.
- It is not necessarily the last item of work that causes delay.
- Contemporaneous complaints that were never agreed upon by the parties, established or implemented, are irrelevant to a delay analysis.

The judge referred to Keating on Construction Contracts, 11th edition with regard to the application of the principle of concurrent delay in the context of an EOT contractual claim (counsel agreed that this was an accurate summary and settled law). In brief:

- It depends on the precise wording of the contract.
- A contractor is probably entitled to an EOT if there was an effective cause of delay, even if there was another concurrent cause of delay for which the contractor was responsible.
- A contractor will only be entitled to recover loss and expense if it satisfies the “but for” test. The contractor’s claim will fail if there is another cause of loss for which the contractor was responsible (even if the cause relied on is the dominant cause).

The court held that there was concurrent delay in this case:

“The plain fact is that both of the works items were on the critical path as regards the hub finishes and both were causing delay over the same period.”

The internal finishes could not have started earlier because of the delay to the structural steelwork. The court was satisfied that the converse was also true – it could not have started earlier due to the roof delays.

The court also considered the SCL Protocol when considering the differing delay analysis methods selected by each expert. The Protocol aims to provide “useful guidance on some of the common delay and disruption issues” and that “irrespective of which method...deployed, there is an overriding objective of ensuring that the conclusions derived from [the delay] analysis are sound from a common sense perspective”, highlighting that a practical approach depending on the facts of the case was important in this case.

CONCLUSION

In this case, the court seems to have taken a very practical approach in determining that both events were causes of delay and therefore there was concurrent delay entitling the contractor to an EOT but not recovery of losses (in line with the approach in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*. This was the case on the facts here and this is a useful addition to the guidance from the courts in other cases such as *Adyard Abu Dhabi v SD Marine Services* and *De Beers UK Ltd (formerly Diamond Trading Co Ltd) v Atos Origin IT Services UK Ltd*.

Concurrent delay is an area that is not expressly covered in the JCT form of contract, although the North Midland decision (as upheld by the Court of Appeal in *North Midland Building Ltd v Cyden Homes Ltd* has shown that parties can agree in advance how to deal with concurrency. This is what the FIDIC 2017 suite of contracts has sought to do in clause 8.5 (Red Book 2017) and if compensation events are assessed chronologically and prospectively as intended, concurrency should be less of an issue under the NEC form of contract. What is certain is that this will continue

to be a common issue when looking at delay and one for the courts to decide based on the specific circumstances, and contract, in each case.

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