Extensions of Time in the light of Walter Lilly v Mckay

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Alchemy & Serendipity
Concurrent Delay

• What is it?
• How should a contract administrator consider it in relation to an extension of time?
Concurrent Delay – what is it?

Is there an agreed definition?
- Royal Brompton Hospital v Frederick A Hammond & Ors [2000]
- EWHC Technology 39
- SCL Delay & Disruption Protocol, October 2002
- John Marrin QC – CLJ article 2002
- City Inn v Shepherd Construction [2007] CSOH 190
- Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848
- Walter Lilly v Mckay [2012] EWHC 1773 TCC
The narrow definition...

Royal Brompton Hospital NHS Trust v. Frederick A Hammond & Ors (No.7) [2000] EWHC Technology 39 **HHJ Seymour Q.C.**

"... 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 upon the completion date.
The narrow definition...

Royal Brompton Hospital NHS Trust v. Frederick A Hammond & Ors [2000] EWHC Technology 39 contd...

“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 a real concurrency of causes of the delay... "
Following on…

SCL Delay and Disruption Protocol  
- October 2002  
Concurrency

“True concurrent delay 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…”
Following on…

*SCL Delay and Disruption Protocol - October 2002*  
Concurrency

"...The term 'concurrent delay' is often used to describe the situation where two or more delay events arise at different times, but the effects of them are felt (in whole or in part) at the same time. To avoid confusion, this is more correctly termed the 'concurrent effect' of sequential delay events."
Equal causative events

*Concurrent Delay* - article by John Marrin QC (2002) 18 Const LJ No.6 436

“A period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency”
The wider view...

*City Inn v Shepherd Construction [2007] CSOH 190*

"It should not matter whether shortage of labour developed, for example, two days before or two days after the start of a substantial period of inclement weather; in either case the two matters operate concurrently to delay completion of the works..."

"... where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first."
Where we now are...

"The fact that the Architect has to award ‘a fair and reasonable’ extension does not imply there should be some apportionment in the case of concurrent delays. The test is primarily a causation one...”

"...Where delay is caused by two or more effective causes, one of which entitles the contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of timer."

Mr Justice Akenhead in Walter Lilly v Mckay
Ne’er the twain shall meet?

Another step towards Scottish Independence

• The contractor is entitled to a full extension of time for the delay caused by the two events, provided that one is a Relevant Event – (English)

• The extension of time should be apportioned between delaying the events, and the Contractor is awarded a reasonably apportioned part only in respect of the Relevant Event (Scottish)
Methodology for assessing criticality and delay in the absence of programmes?

• What approach might be adopted to assess what in reality was impacting upon progress, in the absence of contemporaneous critical path programmes?
Methodology in the absence of programmes

In the absence of a contemporaneous critical path programme a logical approach was to analyse delay on a month by month basis assessing “what was in reality impacting upon progress”.

[The expert’s] "...approach was a sensible variant on the conventional approach of delay experts which was to review on a month by month basis what in each month was probably delaying overall completion. He then applied a cross check by reference to what actually happened...”

– Mr Justice Akenhead, Walter Lilly
A month by month assessment

“... I will proceed on a month by month assessment because both experts accept that this would be relevant and helpful and this is a view with which I concur.”

“... *It is however a proportionate and sensible basis to look at delays on a monthly basis* and indeed most delay experts proceed on that basis. *As a tribunal, let alone a delay expert, one has to get a handle on what was delaying the project as it went along.*”

– Mr Justice Akenhead, Walter Lilly
A month by month assessment

If no longer preparing critical path programmes...

• Continue to prepare monthly progress reports
• Continue to record causes of delay in site meeting minutes
• Continue to distinguish events impacting upon progress to completion
• Maintain project records for resourcing
• For concurrent events where both are effective causes of delay and one is a Relevant Event, a full EOT entitlement will arise
The lunar cycle?

“I have the money and anger at this point to push on and make sure that you have to deliver or get punished for not delivering. I don’t what to have to fight for that, but trust me I NEVER give up...”

Mr Mckay