



CONCURRENT DELAY

A Guide for New Zealand Construction Professionals

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“A great amount of confusion and muddled thinking has been experienced ... in trying to trying to unravel [concurrent delays]”¹

INTRODUCTION

- 1 Concurrent delay is a well known but poorly understood concept in construction.
- 2 This paper is a guide to the law on recoverability of time and costs for concurrent delay – that is, a delay caused by two or more events, one of which is the contractor’s responsibility and the other is the principal’s responsibility.
- 3 In summary, the prevailing view is that a contractor is entitled to an extension of time (“**EOT**”) for the full period of a concurrent delay, but not to prolongation costs. However, this has not yet been confirmed by the courts and, as always, the position depends on the particular terms of the contract.

WHAT IS CONCURRENT DELAY?

- 4 There are two types of concurrent delay:
 - a The first arises where “*two or more delay events occur at the same time, one an Employer Risk Event, and the other a Contractor Risk Event, and the effects of these events on the project are felt at the same time*”.² This is known as ‘true concurrency’. It is rare for concurrent delays to occur at the same time and have the same time impact.
 - b The second arises where two or more delay events occur at different times, but the delay effects of each overlap.³ This has the clumsy title of ‘concurrent effect of sequential delay events’. It is the more common variety of concurrent delay. There has been a suggestion this is not concurrent delay at all, however, that view is not generally accepted and is considered to be wrong.⁴
- 5 The delay events *must* affect the completion date (ie cause critical delay).⁵

¹ Roger Knowles *200 Contractual Problems and their Solutions* 3rd Edition at 6.1.3

² *SCL Delay and Disruption Protocol* 2nd Edition: February 2017 at [10.3]. See also Andrew Skelton *Concurrent Delay Demystified*, NZSCL, 22/24 October 2013 at [6(a)]

³ Protocol above n 2 at [10.4]

⁴ *Royal Brompton NHS Trust v Hammond (No 7)* [2001] EWCA Civ 2006 at [31] cf *City Inn Ltd v Shepard Construction Ltd* [2008] BLR 269 at [36], Skelton above n2 at [9] and John Marrin QC *Concurrent Delay Revisited* SCL Paper 179 February 2013 at p 2-3

⁵ Protocol above n 2 at [10.5]

FOUNDATION PRINCIPLES TO CONCURRENT DELAY

- 6 There are some important legal principles, which are relevant to understanding the different approaches to concurrent delay.
- 7 Most modern construction contracts include a fixed completion date.⁶ In commercial contracts at least, this will frequently be coupled with liquidated damages for late completion. These contractual measures give the principal greater certainty of completion and compensation for delay, while also arguably imposing greater programming discipline. Yet, despite this projects are still often delayed.
- 8 There are three causes of delay:
- a Acts or omissions of the principal (eg additional work);
 - b Acts or omissions of the contractor (eg defective work); and
 - c Neutral events, independent of the contractor or principal (eg bad weather).
- 9 In the absence of concurrency, a contractor is self-evidently responsible for their own delays. Where this arises, the contractor must either accelerate their works in order to overcome the delay or accept delay damages for late completion.
- 10 By contrast, where construction works are delayed by the principal (or a neutral event at the principal's risk), the contractor may – through no fault of their own – be unable to meet the completion date and would be exposed to delay damages. To protect against the injustice of this, the common law has developed two safeguards:
- a the prevention principle; and
 - b the time at large doctrine.
- 11 Under the prevention principle, a principal cannot prevent a contractor from completing the works on time and then receive the benefit of delay damages. This is known as an act of prevention. An act of prevention can include neutral events (if the contractor did not assume the risk of these) as well as acts/omissions of the principal.
- 12 Unless the completion date is extended, an act of prevention by the principal will set time at large. This means the completion date (and any liquidated damages) no longer applies, and the contractor is instead only obliged to complete the works within a reasonable time period.
- 13 In order to avoid the effect of the prevention principle and reduce the risk of time being put at large, modern construction contracts usually include an EOT mechanism. This enables the completion date to be extended where a delay occurs that is the responsibility of the principal. Contracts with EOT clauses typically spell out (with differing degrees of precision and success) what are:
- a Principal risk events (a “**Principal Risk**”) – which entitle the contractor to an EOT; and
 - b Contractor risk events (a “**Contractor Risk**”) – which do not entitle the contractor to an EOT. Often these are not specifically identified and, by implication, are any risks not said to be the Principal's Risks.

⁶ If no completion date or period is stated in the contract, the particular works must be completed within a reasonable time. What is reasonable is a question of fact in the particular circumstances.

- 14 In relation to this, there are three important points to note:⁷
- a Actions by a principal that are perfectly legitimate (eg variations) may still be an act of prevention if they cause critical delay.
 - b Acts of prevention by a principal do not set time at large if the contract allows an EOT for those events.
 - c If an EOT clause is ambiguous, it should be construed in favour of the contractor.
- 15 Interestingly, despite allowing for EOTs, many construction contracts do not say what will happen where there is concurrent delay. This presents a quandary: is the contractor entitled to an EOT for some or all of the delay? If so, then the contractor would escape the consequences of their own delays. If not, then the contractor would be exposed to delay damages in circumstances where it could not have completed on time regardless of its own delay (unless the prevention principle applied putting time at large). This is sometimes known as the “*obverse problem*”.⁸ How this is resolved is discussed next.

IS A CONTRACTOR ENTITLED TO AN EOT FOR CONCURRENT DELAY?

- 16 The courts in other common law countries have adopted different approaches to awarding EOTs where there is concurrent delay. The issue is yet to be addressed, and therefore remains unresolved, in New Zealand.
- 17 Ordinarily, a claiming party must prove that their loss was caused by the other party’s breach. The “but for” test is commonly used to determine causation (eg but for the builder’s defects the owner would not have incurred remedial costs). However, the “but for” test leads to absurdity with concurrent delay since both parties are independently responsible. As a result, this test has been relaxed in favour of other methods for assessing EOTs for concurrent delay.
- 18 There are three main approaches – Dominant Cause, Apportionment and *Malmaison* – which are discussed below. Various other methods have been proposed, but have generally not gained traction and are unlikely to reflect the law (eg the Devlin approach,⁹ the burden of proof approach,¹⁰ and the first past the post approach).¹¹

Dominant cause approach

- 19 Under this approach, a contractor will only be entitled to an EOT for concurrent delay where the Principal Risk event is the “*dominant cause*” of the delay.¹² If the contractor’s own delays are the prevailing cause, there will be no extension. Which cause is dominant is a question of fact in each case.
- 20 This approach is based on an assumption that contracting parties must have intended that any particular period of delay should be attributable to one cause only.¹³

⁷ *Multiplex v Honeywell* [2007] EQHC 447 (TCC) at [47] – a case the writer was involved in.

⁸ Marrin above n 4 at p 7

⁹ The two delay events must be of “*approximately equal efficacy*” for the contractor to receive an EOT and prolongation costs (*Keating on Building Contracts* 6th Edition at 8.018). This has the practical difficulty of requiring an assessment of whether the two delay events are of approximately equal efficacy.

¹⁰ The contractor must show how much of the damage (or delay) was caused other than by his own breach (or delay) (*Keating* above n 8 at 8.018). This would likely deny any relief to the contractor in most cases.

¹¹ The cause of delay that occurs first will determine whether the contractor is entitled to relief (Knowles above n1 at 6.1.10). It is arbitrary to select the delay event that occurs first where both events have caused delay.

¹² *Keating on Building Contracts* 5th Edition at p 195

¹³ Marrin above n 4 at p13

21 There are difficulties, however, with this approach:¹⁴

- a First, there is the practical problem of having to decide which cause is dominant. That may be a difficult task with an uncertain outcome. The exercise is susceptible to an Engineer's inherent conflict of interest.¹⁵
- b Second, it provides no answer where the delay events are equally dominant.
- c Third, it conflicts with the prevention principle. If the dominant cause is a Contractor Risk event, the contractor will be denied an extension of time and may be exposed to delay damages even though the principal has also delayed the contractor. This would arguably put time at large.

Apportionment approach

22 Under this approach, responsibility for concurrent delay is apportioned between the principal and the contractor based on what is fair and reasonable. The appropriate apportionment is a question of fact in each case.

23 This approach has been likened to apportioning contributory liability, where multiple parties are liable for causing loss. It has been said that the power of apportionment arises where a contract says that a fair and reasonable extension of time shall be granted where a Principal Risk event has caused delay.¹⁶

24 Apportionment may mean a contractor can get a partial, but not full amount of time relief for concurrent delays to the works.

25 The rationale for this approach is that the parties should share risk and responsibility for concurrent delay. At face value, this might seem a fair and sensible solution. However, there are some difficulties with it:

- a First, there is again the practical problem of having to make an apportionment. That requires an assessment of the degree of culpability of each party and the significance of each delay event. This may not be straightforward, and it offers little certainty to commercial parties.
- b Second, it is questionable whether one party can be regarded as more culpable than the other. A delay is a delay, regardless of what caused it.
- c Third, it is doubtful that words like "fair and reasonable" are sufficient to create a power of apportionment (or oust the prevention principle – see next).
- d Fourth, it conflicts with the prevention principle. If a contractor is awarded less than a full EOT as a result of an apportionment, they will be exposed to delay damages in circumstances where they have been prevented from completing the works on time.

Malmaison approach

26 Under this approach, the contractor is entitled to an EOT for the full period of concurrent delay. The approach comes from the English case of *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*,¹⁷ which has subsequently been approved in other English decisions.¹⁸

¹⁴ Skelton above n 2 at [31] – [32]; Marrin above n 7 at p 14

¹⁵ See N Gillies *We need to talk about the Engineer* (2018) BCL 36.3 – for a discussion of the Engineer's inherent conflict of interest

¹⁶ *City Inn Ltd v Shepard Construction Ltd* [2008] BLR 269

¹⁷ (1999) 70 Con LR 32

¹⁸ For example: *Royal Brompton Hospital NHS Trust v Hammond (No 7)* (2001) 76 Con LR 148; *Adyard Abu Dhabi v SD Marine Services* [2011] BLR 384; *Steria Ltd v Sigma Wireless Communications Ltd* [2008] BLR 79; *De Beers UK Ltd v Atos Origin IT Services UK Ltd* [2011] BLR 274; and *Walter Lilly & Co Ltd v Mackay* [2012] BLR 503

- 27 The rationale seems to be that, by expressly allowing an EOT for a Principal Risk event, the parties must have intended that the contractor would receive an EOT for the whole period of delay regardless of any other concurrent cause.
- 28 The *Malmaison* approach has the advantage of not invoking the prevention principle. However, depending on the circumstances, it may be seen as unfairly providing a contractor with relief from delay damages (a sort of 'get out of jail free card') in circumstances where they have also caused delay.
- 29 One of the leading construction law texts, *Keating*, has added a twist by suggesting the causes of delay "*must have at least equal "causative potency"*" before the contractor will receive a full EOT. This can be traced to a definition of concurrent delay proposed by John Marrin QC, which seems to have then morphed into a possible threshold requirement to the *Malmaison* approach.¹⁹ This is unhelpful because:
- a The proviso did not feature in the *Malmaison* decision.
 - b It has the practical problem of requiring a factual assessment of whether each event has "equal causative potency".
 - c The phrase is of uncertain meaning. An event has either caused critical delay or it has not. If not, there is no concurrency and so the issue does not arise. Alternatively, if it involves an assessment of whether one cause of delay was more proximate or prevailing than another, this is really just the "dominant cause" test by another name – an approach that has already been rejected.

For these reasons, it is doubtful this proviso is (or should be) a requirement of the *Malmaison* approach and this paper assumes that it is not.

What is the correct approach?

- 30 As noted above, the New Zealand courts have not addressed the issue of concurrent delay. Therefore, it is necessary to look at other common law countries as a guide.

Scotland

- 31 The Scottish courts seem to have approved *both* the dominant cause and apportionment methods in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd*²⁰ and *City Inn Ltd v Shepard Construction Ltd*.²¹ In other words, where there is a dominant cause, that will prevail, and if neither cause is dominant, the concurrent delay is to be apportioned. The apportionment approach was justified on the basis that the EOT clause in the JCT 1980 Standard Form Building Contract used the words "*fair and reasonable*".
- 32 *John Doyle* and *City Inn* have been criticised in English cases for the reasons given above and have not been followed in that jurisdiction.²²

England

- 33 The dominant cause method was generally considered the correct approach in England until at least the 1980s and possibly the 1990s.²³ It was expressly rejected in 1987 in *Fairweather v London Borough of Wandsworth*,²⁴ unfortunately without the court saying what the correct method was. *Malmaison* came along 12 years later.

¹⁹ Marrin above n 4 at p 13, and see for example *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744 per Coulson LJ at [16].

²⁰ [2004] BLR 295

²¹ [2008] BLR 269 (Outer House) and [2010] BLR 473 (Inner House)

²² See, for example, *Keating on Construction Contracts 10th Edition* at [8-027], *Hudson's Building and Engineering Contracts 13th Edition* at [6-059]-[6-061], Marrin above n 4 at p 12

34 Since 1999 the *Malmaison* approach has been approved in successive decisions as reflecting the law in England. It is also supported by *Keating* and *Hudson*, and the Society of Construction Law Delay and Disruption Protocol (“**Protocol**”). Regrettably, however, some recent decisions have seeded doubt about this by suggesting the prevention principle may not apply to concurrent delay.²⁵

Australia

35 There is currently no coherent position in Australia, with conflicting decisions. Two NSW cases from the 1990s adopted an apportionment approach,²⁶ whereas a Northern Territory decision²⁷ (admittedly not exactly on point as it concerned a notification requirement for EOTs and subsequently doubted) was arguably consistent with the *Malmaison* approach. Other commentators have suggested that *Malmaison* would be followed because it does not offend the prevention principle.²⁸

United States

36 The United States has a different regime altogether, although it is understood to be broadly consistent with the *Malmaison* approach.²⁹

Conclusion

37 Although the issue is yet to be determined, the prevailing view is that *Malmaison* is the correct approach and is likely to be approved by the New Zealand courts for the following reasons:

- a In the absence of local jurisprudence, the New Zealand courts tend to be guided by England, where the *Malmaison* approach has been approved, and the dominant cause and apportionment methods have been rejected. It is noted that England has its specialist and renowned Technology and Construction Court.
- b This would arguably be consistent with the expected approach in Australia, which New Zealand also looks to for guidance.
- c It is consistent with the Protocol.
- d It does not engage the prevention principle, albeit the relevance of that principal to concurrent delay has recently been questioned.
- e It avoids the factual assessments otherwise required with the dominant cause and apportionment methods, which create practical difficulties and uncertainty.
- f Any perceived unfairness from granting a contractor a full extension where they were themselves in delay is balanced by the fact that the contractor is unlikely to receive prolongation costs for the concurrent delay period (see next).

²³ *Leyland Shipping v Norwich Union* [1918] AC 350; *Wells v Army and Navy Co-operative Society* (1902) 86 LT 764; and Skelton above n 2 at [31] – [32]

²⁴ (1987) 39 BLR 106

²⁵ *Jerram Falkus Construction Ltd v Venice Investments Inc (No 4)* [2011] EWHC 1935 at [77] and *North Midland* above n19 at [17]

²⁶ *Turner v Austel* (1995) 11 BCL 202 and (1997) BCL 378

²⁷ *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] NTSC 143; (2005) 21 Construction Law Journal 71

²⁸ For example, *Hudson* above n 19 at [6062]; P Tobin *Concurrent and Sequential Causes of Delay* [2007] 24 ICLR 142

²⁹ *Hudson* above n 19 at [6-062]

38 That outcome is considered more likely where concurrency is being considered against New Zealand's most common standard form contract, NZS3910. The EOT clause in NZS3910 ("*fairly entitled to an extension*") is broadly similar to the JCT 1980 clause in *Malmaison* ("*fair and reasonable*").

39 Having said this, the New Zealand courts have been willing to depart from other common law countries (eg negligence law). It is possible therefore that the dominant purpose/apportionment methods would be preferred in an appropriate case, especially if on the particular facts the contractor's conduct would make a full EOT seem unjust.

ARE PROLONGATION COSTS RECOVERABLE FOR CONCURRENT DELAY?

40 Prolongation costs are the additional costs a contractor incurs from a project being delayed beyond the completion date (eg equipment hire, supervision, off-site overheads, etc). Typically, a contractor will be unable to recover prolongation costs for concurrent delay, even if they receive an extension of time for the delay period.³⁰

41 Although connected, a prolongation claim is different to an EOT claim. The latter is about relieving the contractor of liability for delay damages, whereas the former is about obtaining monetary compensation. As a result, the contractor has the onus of proving the principal caused the contractor to incur prolongation costs (ie the "but for" test applies). To do that, practically speaking, the contractor must be able to separate out the costs caused by the principal delay and those caused by their own delay. In practice, that will be difficult to do.

42 At first glance, this might appear inconsistent with the granting of a full or partial EOT for a concurrent delay. However, if the contractor was reimbursed they would arguably receive a windfall as they would have incurred those costs regardless.

CAN PARTIES AGREE WHO WILL TAKE THE RISK OF CONCURRENT DELAY?

43 The English courts have very recently confirmed that (a) contracting parties can agree in their terms who bears the risk of concurrent delay; and (b) if the contractor bears the risk, the prevention principle will not apply (ie freedom of contract will trump acts of prevention).³¹ This was reasoned on the basis that the prevention principle only applies where the principal is responsible for delay (which it is not where the contractor bears this risk) and the contractor is not otherwise entitled to an EOT. The New South Wales courts have expressed a similar view.³² Accordingly, this approach is likely to be followed in New Zealand where, once again, the issue has not been determined.

CONCLUSION

44 Concurrent delay is where the principal and contractor each cause overlapping critical delay to a project. Each delay must affect the completion date, otherwise there is no concurrency.

45 If there is concurrency, the contractor should receive an EOT for the full period of delay based on the *Malmaison* approach. While that is the prevailing view, it is yet to be confirmed by the New Zealand courts.

46 A contractor will, nevertheless, be unable to recover prolongation costs, even where they receive an EOT, unless they can separate the costs arising from each of the concurrent delays. That will usually be difficult to do.

47 In each case, the position remains subject to the particular contract terms.

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³⁰ For example, the Protocol above n 2 at section 14, Skelton above n 2 at [76]-[81], Marrin above n 4 at p 17, and *De Beers* above n 17 at [178]

³¹ *North Midland Building Ltd v Cyden Homes Ltd* [2017] EWHC 2414 (TCC) and [2018] EWCA Civ 1744. The contractor argued unsuccessfully that because they were unable to receive an EOT in circumstances where there was concurrent delay by the principal, time was put at large. The Technology and Construction Court and then the Court of Appeal in England rejected that argument, saying the parties had agreed on concurrency and were fixed with that.

³² *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NZWSC 151

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