

## CONSTRUCTION

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# CONCURRENT DELAY: FOCUS ON SOUTHEAST ASIA

## INTRODUCTION

### Background to the Research

The construction of major projects often involves complex interfaces, with the usual common aim that the project works are required to be completed within a set period of time. As projects become more and more complex and clients require faster completion, the likelihood of delays occurring is commonplace and the likelihood of two or more delays occurring 'concurrently' is, in theory at least, a possibility.

It is the authors' experience, having worked in both main contracting and dispute resolution, that the term 'concurrent delay' is frequently relied upon and discussed by parties in construction disputes. However, due to minimal availability of case law for guidance, which in some respect is testament to the efficiency and use of alternative forms of dispute resolution for determining construction disputes, the correct application and approach to assessing claimed concurrency of delay remains highly subjective and a matter of popular (or unpopular!) discussion between those in the industry.

Recent decisions in the English Courts such as *Adyard Abu Dhabi v SD Marine Services*<sup>1</sup> and in particular *Walter Lilly v Giles Mackay and DMW Developments*<sup>2</sup>, appear to have brought some fresh guidance on the subject of concurrency. However, as with all decisions that are made by the courts, each case is considered against the specific circumstances and facts relevant to the individual case.

Therefore, before the industry gets too excited that the seemingly never-ending 'concurrency' saga may finally be reaching its long awaited conclusion, it is important to understand both the historical precedence of similar case law and the particular circumstances and facts of the recent decisions in order to form an appreciation of the recent decisions in context.

“The question must be determined by applying common sense to the facts of each particular case.”<sup>3</sup>

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1. [2011] EWHC 848 (Comm)

2. [2012] EWHC 1773 (TCC)

3. *Stapley v Gypsum Mines* [1953] AC 663 (HL) 681

## WHAT IS DELAY/CONCURRENT DELAY?

### A Practical Perspective

The following section examines one of the construction industry's most commonly referenced guidance notes on the approach to delay analysis, 'The Society of Construction Law Delay and Disruption Protocol'<sup>4</sup> ('SCL Protocol').

The SCL Protocol contains various definitions and examples of how the analysis of delay events could be approached, including matters regarding 'delay' and 'concurrent delay'. As such, the SCL Protocol has become an often cited guidance relied upon by respective parties and legal professionals within construction disputes around the world.

It is to be noted that the SCL Protocol was originally developed with the intention of providing general guidance and methodology that could be applied when analysing delay events in construction and engineering projects. However, as noted above in reference to case law, each construction and engineering project will have its own unique variables and delay events, which may not be germane to the simplified models and procedures outlined within the SCL Protocol.

### The Practical Definition of a 'Delay Event'

The term 'delay event' in construction disputes can be defined as an event which impacts the progress of the works, the causation and responsibility of which is dependent on the particular terms and conditions of the contract adopted by the parties. Delay events are generally categorised within two broad classifications: Employer Risk Events<sup>5</sup>; and, Contractor Risk Events<sup>6</sup>.

#### *An Employer Delay Event*

An Employer delay event is an occurrence which, under the applicable conditions of contract, has been allocated as the responsibility and/or risk of the Employer.

An Employer delay event can cause either critical or noncritical delay to the agreed contract completion date of the works. A critical Employer delay event, which is also commonly referred to as an 'excusable delay event', is an event that has been

analysed to have caused a delay to the completion of the works. For example, the Employer may issue an instruction for the Contractor to carry out additional work that was not included within the original agreed scope of works.

The occurrence of critical Employer delay events would normally, depending on the contract conditions, entitle the Contractor to be awarded an extension to the originally contracted time for completion.

A non-critical Employer delay event is an event which causes delay to certain activities on site, but is assessed as not causing any impact to the contract completion date. For example, the event impacts a non-critical element of work or activities which contain positive float<sup>7</sup>.

#### *A Contractor Delay Event*

A Contractor delay event is also an event that can cause either critical or non-critical delay to the agreed contract completion date of the works. A critical Contractor delay event, which is commonly referred to as a 'non-excusable delay event', is an event that has been analysed to have caused a delay to the completion of the works. For example, a Contractor may suffer from an unavailability of labour, material or equipment which delays the progress of the works.

The occurrence of a critical Contractor delay event could potentially lead to the Contractor being held liable for the payment of liquidated and ascertained damages ('LADs') to the Employer at a predetermined rate, if it ultimately fails to mitigate the lost time, thus causing an actual delay to the time for completion<sup>8</sup>.

A non-critical Contractor delay event is an event which causes some delay to activities on site, but is assessed as not causing any impact to the agreed contract completion date.

### The Practical Definition of 'Concurrent Delay'

The term 'concurrent delay' within the SCL Protocol is described within two parts. Firstly, it describes what it considers to be 'true' concurrency:

4. Society of Construction Law, The Society of Construction Law Delay and Disruption Protocol (Society of Construction Law 2002, Reprint 2004)

5. Ibid., p. 56

6. Ibid., p. 54

7. Ibid., p. 56

8. Percy Bilton Ltd v Greater London Council [1982] 1 WLR 794

“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.”<sup>9</sup>

The above statement is usefully demonstrated within a working example at the back of the SCL Protocol. The working example indicates that the contractor should be entitled to an extension of time if ‘true’ concurrency occurs; it also indicates that the contractor is only entitled to recover direct costs associated with employer risk events and that it is not entitled to recover any prolongation costs.

The second part of the definition of ‘concurrency’ in the SCL Protocol describes the ‘concurrent effect of sequential delay’ as:

“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.”<sup>10</sup>

The SCL Protocol does not appear to provide a clear example of the above scenario within its appendices, therefore leaving the application of ‘concurrent effect’ open to interpretation.

## Summary and Findings

Based on the above it appears that the SCL Protocol provides a useful clarification of what is arguably the more obvious and simple concept of ‘true’ concurrency. However, the description of the more contentious concept of the ‘concurrent effect’ of employer and contractor delay events appears to be open to interpretation, which inadvertently could lead to additional areas of dispute between parties.

The following section provides a brief historical view of how case law in the United Kingdom has evolved when dealing with matters relating to delay and concurrency in construction and engineering contracts.

## THE HISTORY OF RELEVANT CASE LAW IN THE UNITED KINGDOM

### Introduction

As noted previously, there is limited key concurrency based case law in the United Kingdom. It also appears that one of the most discussed and considered cases in modern concurrent case law history is the prominent decision of the Scottish courts in the case of *City Inn v. Shepherd Construction*.<sup>11</sup>

The *City Inn* case has led to the subject of ‘concurrent delay’ being discussed and commented upon by industry practitioners and considered by the English courts in subsequent relevant cases.

The following section provides a brief overview of the particular facts and approaches adopted by the English and Scottish courts in prominent cases which considered and developed the law on concurrent delay.

Due to the interest surrounding the *City Inn* case and how the decision might influence common law decisions around the globe the following review of relevant case law has been split into four key periods: Extension of Time Case Law — First Principles, which established how the extension of time principles were developed and considered by the courts in the United Kingdom; Concurrent Delay Case Law — Pre-*City Inn*, which reviews how the various approaches to concurrency discussed in the previous section were developed by the courts in the United Kingdom; Concurrent Delay Case Law — The *City Inn* Case, which reviews the Scottish approach to concurrent delay in the *City Inn* case; and Concurrent Delay Case Law — Post-*City Inn*, which established the current approach to concurrency adopted by the English courts in light of the *City Inn* decision in Scotland.

### Extension of Time Case Law – First Principles

Early construction contract law cases such as *Holme v Guppy*<sup>12</sup>(1838), *Dodd v Churton*<sup>13</sup>(1897), and *Wells v Army & Navy Cooperative Society*<sup>14</sup>(1902), influenced the introduction of extension of time clauses in construction contracts. However, it

9. Society of Construction Law, *The Society of Construction Law Delay and Disruption Protocol* (Society of Construction Law 2002, Reprint 2004), p. 16

10. *Ibid.*

11. [2010] CSIH 68

12. [1838] 3 M&W 387

13. [1897] 1 QB 562

14. [1902] 86 LT 764

was not until 1970, in the case of *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*<sup>15</sup>, that one of the most significant judgments in respect of extension of time clauses was applied by the courts in England.

The courts examined the application of the extension of time and liquidated damages clauses contained within the contract, which were loosely based on the 1963 revision of the JCT standard form of building contract. The court held that a delay caused by a lack of approval of a subcontractor drawing by the employer did not fall within any of the relevant events potentially anticipated under the contract. Therefore, the court held that as the extension of time clause could not be activated, the employer could not deduct liquidated damages from the contractor and therefore the contractor could not seek damages from the sub-contractor.

In 1982 the House of Lords further examined the extension of time mechanism contained within the 1963 revision of the JCT standard form of building contract in the case of *Percy Bilton Ltd v Greater London Council*<sup>16</sup>, within which Lord Fraser of Tullybelton succinctly noted his agreement of the respondents' position in that:

“The general rule is that the main contractor is bound to complete the work by the date for completion stated in the contract. If he fails to do so, he will be liable for liquidated damages to the employer ... That is subject to the exception that the employer is not entitled to liquidated damages if by his acts or omissions he has prevented the main contractor from completing his work by completion date ... These general rules may be amended by the express terms of the contract...”

The above statement appears to have reinforced that the English courts, at the time of the Bilton case, accepted that the intent of the conditions of contract was to allocate the risks of delay between the parties, therefore allowing the employer to maintain

a right to deduct damages from the contractor if it failed to complete the works on time or within a date amended by employer defined delay event(s).

The acceptance by the English courts of the extension of time mechanism appears to have led to the introduction of complex delay analysis and approaches being presented to the courts as evidence on causation of delay and the allocation of risk events between parties.

In 1987 the courts examined how the application of the 'dominant cause' approach aligned with the relevant clauses contained within the 1963 revision of the JCT standard form of building contract in the case of *H Fairweather & Co v London Borough of Wandsworth*<sup>17</sup>.

The *Fairweather* case involved a claim by the contractor that it had suffered delay at the outset due to variations and instructions; which in turn purportedly entitled him to an extension of time under the contract. The contractor however also suffered a culpable delay due to a strike, which was claimed by the contractor to have been partially attributable to the actions of the employer. The contractor's claim was rejected in arbitration, as it was held that the strike was the dominant delay.

Judge Fox-Andrews allowed the contractor's appeal and in doing so rejected the dominant cause approach:

“‘Dominant’ has a number of meanings: ‘Ruling, prevailing, most influential’. On the assumption that condition 23 is not solely concerned with liquidated or ascertained damages but also triggers and conditions a right for a contractor to recover direct loss and expense where applicable under condition 24 then an architect and in his turn an arbitrator has the task of allocating, when the facts require it, the extension of time to the various heads. I do not consider that the dominant test is correct...”<sup>18</sup>

15. [1970] 1 BLR 111

16. [1982] 1 WLR 794

17. [1987] 39 BLR 106

18. [1987] 39 BLR 106 [120]

The position of Judge Fox-Andrews appears to have provided a position that the dominant cause approach was inappropriate under the confines of the JCT standard form of building contract. Unfortunately, he did not go on to provide his opinions on what the correct course of action should be in such circumstances. However, his statement that "... *an architect and in his turn an arbitrator has the task of allocating ...*", could loosely be interpreted by some as being an introduction to the concept of 'apportionment'.

The next prominent case to discuss the practical application of extensions of time was *Balfour Beatty Building Ltd v Chestermount Properties Ltd [1993]*<sup>19</sup>. The Chestermount case required two key issues to be considered by the court. Firstly, whether the JCT 1980 standard form of building contract allowed the architect to grant an extension of time for a relevant event that occurred during a period of culpable delay, and secondly, whether the extension of time should be awarded as 'gross' or 'net'.

The case involved a claim by the contractor for a full extension of time, even though it had overshot the contracted completion date. The contractor's claimed position was based on an argument that the employer had issued a late instruction, just prior to the actual finish date. The court held that the contractor was only entitled to the time taken to carry out the instruction, which in turn should be added onto the contracted completion date, thereby awarding a 'net' delay to the contractor.

"The underlying objective is to arrive at the aggregate period of time within which the Contract Works as ultimately defined ought to have been completed having regard to the incidence of non-contractor's risk events and to calculate the excess time if any, over that period, which the Contractor took to complete the Works. In essence, the Architect is concerned to arrive at an aggregate period for completion of the contractual works, having regard to the occurrence of non-contractor's risks events and to calculate the extent to which the completion of the Works has exceeded that period ..."<sup>20</sup>

### **Summary and Findings**

The early extension of time cases under English law considered above did not expressly define the potential for concurrent delay. However, cases such as *Peak* provided an initial grounding that a failure to complete which is due to the fault of both the employer and contractor, removes the right of the employer to levy damages against the contractor.

However, the *Peak* case, although providing a straightforward approach and a basic guide to concurrency, left a plethora of

open questions such as: Would the criticality of an employer event alter the decision? ('prevention' principle, 'American' Approach); Does the timing of the events influence the ability to apply damages? ('First in-line' approach); Can the dominance of one of the delays influence the liability? ('Dominant cause' approach).

The *Bilton* case appeared to provide an indication that the courts were willing to accept the intent of extension of time clauses within construction contracts.

The *Fairweather* case indicated that the courts would not entertain the use of the 'dominant cause' approach. However, it is not apparent if this decision was made on a case involving concurrent delay, thus leaving it unclear if the approach would be applied in such a scenario. It could also be construed from the decision in *Fairweather* that the 'apportionment' approach may be applicable. However, this appears unclear and is one of many potential interpretations of the wording selected within the judgment.

The *Chestermount* case provides useful guidance on how the English courts would assess employer delays that occur after the contracted date for completion by the utilisation of the 'net' method of awarding an extension of time. It however appears unclear from the judgment if the employer delay considered in the *Chestermount* case was a critical or noncritical delay, therefore potentially leaving the door open to an interpretation that all employer delays that occur within a period of contractor delay beyond the contracted date for completion would entitle the contractor to 'net' time.

The above case law provides a historical background of how the English courts dealt with early construction related disputes involving extension of time claims. The judgments provide some important guidance on how delay analysis should be carried out. However, the open nature of some of the early definitions led to further clarifications being sort in subsequent case law, including a requirement to provide further clarification on scenarios such 'concurrent delay'.

### **Concurrent Delay Case Law - Prior to the Final Determination in City Inn**

One of the first prominent English cases that discussed the definition and application of concurrent contractor and employer risk delay events, within a construction dispute, was *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*<sup>21</sup>. In *Malmaison* Mr Justice Dyson accepted the parties' agreed position on concurrent delay.

19. [1993] 62 BLR 1

20. [1993] 62 BLR 1 [25]

21. [1999] 17 Con LR 32

The judgment by Mr Justice Dyson aligned with the judgment in *Peak*, which ensured that a contractor is not exposed to damages during a period that the employer was also preventing the completion of the works. However, *Malmaison* does not go on to provide a resolution as to whether the contractor is entitled to costs in such a scenario.

It is however to be noted that Mr Justice Dyson accepted an agreed position between the parties, therefore it is not entirely clear if his decision reflected his own opinions on the matter of concurrent delay. It is also unclear if he considered how the approach aligned with the express terms of contract.

The decision by the English courts in *Malmaison* was soon followed by the case of *Royal Brompton Hospital NHS Trust v Hammond and Others (No. 7)*<sup>22</sup>; within which Judge Seymour provided his opinion on the meaning and definition of concurrent delay.

It was held by Judge Seymour that it was necessary to distinguish between sequential causes of delay and true concurrency as recognised in the *Malmaison* case. The judgment also dismissed the relevance of delays that do not critically impact the time for completion.

In 2004 the Extra Division of the Inner House of the Court of Session in Scotland considered the case of *John Doyle Construction Ltd v Laing Management (Scotland) Ltd*<sup>23</sup>, which was governed by the Scottish Works Contract 1988.

The John Doyle case involved the submission of a ‘global claim’ by the contractor; which led to the court’s reassessing the applicable law to such claims, including a consideration of the approach to concurrent delays.

“A global claim is one in which the Contractor seeks compensation for a group of Employer Risk Events but does not or cannot demonstrate a direct link between the loss incurred and the individual Employer Risk Events.”<sup>24</sup>

The court reviewed the question of causation and held that it must be treated by “*the application of common sense to the logical principles of causation*”; in recognition of the approach adopted in a number of key cases<sup>25</sup>. The court paid particular attention to a test adopted in the House of Lords in an insurance case between *Leyland Shipping Company Ltd v Norwich Union Fire Insurance Society Ltd*<sup>26</sup>; within which the ‘dominant cause’ approach was adopted following two separable events that led to a ship sinking.

In the *Leyland* case it was held that the proximate cause was due to original damage caused to the ship by a torpedo, rather than the damage caused to the ship when it was moved to a berth and it hit ground. The Scottish courts held that the ‘dominant cause’ approach was also applicable in cases of concurrency in that one of two causes must be identifiable as being the proximate of dominant cause of the loss, which ultimately allows the party responsible for the loss to be identified.

The Scottish courts also considered a scenario where it was not possible to determine which of the two events caused the dominant delay, which in turn led to the consideration of apportionment between delays, therefore appearing to ignore the approaches to ‘concurrent delay’ that had been previously considered by the English courts in the *Fairweather*, *Malmaison* and *Brompton* cases.

### Summary and Findings

The above case law provided the initial discussions, applications and judgments by the courts in the United Kingdom on the subject of concurrent delay. The *Malmaison* case was one of the first prominent judgments to consider the approach to concurrency under both the JCT standard form and English law. It was held in *Malmaison* that if ‘true’ concurrency of delay is assessed, the contractor should be entitled to an extension of time.

The wording used in the *Malmaison* judgment was quickly clarified by the English courts in the *Brompton* case. The Brompton judgment provided guidance on what was termed ‘real’ concurrency of delays, which were noted to only be relevant in scenarios where two delays happen at the same time and cause the same impact to the time for completion.

22. [2001] EWCA Civ 206; 76 Con LR 148

23. [2004] SC 713

24. Society of Construction Law (n 4) 56

25. John Holland Construction & Engineering Pty Ltd v Kvaerner R J Brown Pty Ltd [1996] 82 BLR 81 (per Byrne J) [841]; Alexander v Cambridge Credit Corp Ltd [1987] 9 NSWLR 310; Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd [1918] AC 350 [362]

26. [1918] AC 350

The *Brompton* judgment also took the additional step to provide a definition of what is deemed a ‘relevant event’ in that it must be assessed as having caused actual critical delay to the works in order to activate the extension of time clause. Therefore indicating that if the contractor has already caused a critical delay and a relevant event occurs that causes no additional impact to the time for completion, the contractor is not entitled to an extension of time.

The discussion and approach to concurrent delay in the English courts, at least in terms of time, therefore appears to have been defined following the judgments in *Malmaison* and *Brompton*. It is also noteworthy that the SCL Protocol was published soon after these prominent judgments, which may have led to the SCL’s definition of concurrency and proposed approaches to delay analysis as a whole.

These persuasive judgments did not however appear to influence or be considered in one of the first prominent cases of concurrent delay in Scotland, the John Doyle case. The judgment in the *John Doyle* case introduced a combination of the ‘dominant cause’ and ‘apportionment’ approaches to truly concurrent events, which included an example that if it was not possible to determine dominance of delay, it would be acceptable to equally split the responsibility for the delay between the parties.

It is worthwhile noting that although the above approaches adopted by the English and Scottish courts are different, they appear to accept one common aspect, in that concurrent delays can only be in the form of ‘true’ concurrency, as was later further defined within the SCL Protocol.

### Concurrent Delay Case Law – The City Inn Case

In 2010 the Inner House of the Court of Session in Scotland made its final decision in the case of *City Inn v Shepherd Construction*<sup>27</sup>. The case involved a lengthy discussion and ultimate decision by the Scottish courts on its position on the correct application of delay analysis and the most appropriate approach to concurrency. As previously noted, the decision in the City Inn case became widely discussed by industry practitioners and has ultimately led to the decision made by the Scottish courts to be considered by the English courts.

The *City Inn* case involved a long-standing dispute on a project which was governed by an amended version of the 1980 edition of the JCT Standard Form of Contract (Private Edition with Quantities).

The final decision in the Inner House of the Court of Session involved the opinions and decisions of three judges. Lord Osborne, as with all three of the judges, placed great weight in his judgment on the words ‘fair and reasonable’ in determining extensions of time. It also appears that Lord Osborne was unimpressed with the confusion and debates regarding concurrency of delay.

Lord Osborne held, which was also followed by Lord Kingarthall, that the application of the ‘apportionment’ approach should be upheld. The third judge, Lord Carloway, however rejected the concept of apportionment, although he concurred that the result was correct.

Lord Carloway’s judgment provided an alternative view on how relevant events should be analysed and how the extension of time mechanism was intended to be construed when assessing relevant events:

“... The architect then has to decide whether he considers that the completion of the Works is likely to be delayed by a Relevant Event beyond the Completion Date ... This provision is designed to allow the contractor sufficient time to complete the Works, having regard to matters which are not his fault (i.e. Relevant Events). This does not, at least strictly, involve any analysis of competing causes of delay or an assessment of how far other events have, or might have, caused delay beyond the Completion Date.”<sup>28</sup>

From the above extracted statement it appears that Lord Carloway consciously avoided the phrase ‘concurrent delay’ and instead utilised the phrase ‘competing causes of delay’. The use of this phrase by Lord Carloway indicates that he may have been of the opinion that ‘concurrent delays’ had not actually occurred within the strict definition of the phrase.

27. [2010] CSIH 68

28. *ibid* [104]

It is to be noted that it also appears from the above that Lord Carloway was of the opinion that it was only necessary to analyse employer related events and that a detailed analysis of potential contractor events was unnecessary. Lord Carloway, having opined on his view of delay analysis, went on to provide his opinion on the approaches adopted under English case law, which included Wells, Peak, *Chestermount*, *Malmaison*, and *Brompton*. He surmised that apportionment was not applicable and that should a relevant delay be causative of critical delay, that a contractor should be entitled to an extension to the agreed contract completion date.

“Where there are potentially two operative causes of delay, the architect does not engage in an apportionment exercise. Where the contractor can show that an operative cause of delay was a Relevant Event, he is entitled to an extension to such new date as would have allowed him to complete the Works in terms of the contract. The words ‘fair and reasonable’ in the clause are not related to the determination of whether a Relevant Event has caused the delay in the Completion Date, but to the exercise of fixing a new date once causation is already determined.”<sup>29</sup>

### Summary and Findings

The Scottish decision in *City Inn*, due to its rejection of the English approaches, led to eager anticipation of how the English courts would approach the subject of concurrency and whether the Scottish approach would be persuasive.

It is worthwhile noting that the apparent fascination with the application of ‘apportionment’ appears to have overshadowed the fact that Lord Carloway indicated within his judgment that

‘concurrent delay’ may have not even occurred due to his use of the phrase ‘competing causes of delay’. It therefore appears that the case may have involved the secondary definition in the SCL Protocol, the ‘concurrent effect of sequential delay’ rather than ‘true concurrency’.

### Concurrent Delay Case Law – Post-City Inn

Since the final determination in the City Inn case there have been two subsequent key cases in the English courts, *Adyard Abu Dhabi v SD Marine Services*<sup>30</sup> in 2011, and *Walter Lilly & Company Limited v Giles Patrick Cyril Mackay, DMW Developments Limited*<sup>31</sup> in 2012, which considered the decision made by the Scottish courts.

#### The Adyard Case

The *Adyard* case involved a dispute concerning the right of the employer to rescind two shipbuilding contracts due to the purported failure of the contractor to complete the vessels as per the required Sea Trial Dates.

Following a detailed review of the conditions of contract, historical correspondence and factual issues the judge, the Honourable Mr Justice Hamblen, considered the contractual issues in relation to the prevention principle and reviewed case law on causation and concurrency, by reference to cases such as *Chestermount*, *Malmaison*, *Brompton* and *City Inn*.

From his review of the *Chestermount*, *Malmaison* and *Brompton* cases it was held that “...there is only concurrency if both events in fact cause delay to the progress of the works and the delaying effect of the two events is felt at the same time.”<sup>32</sup> It was also further noted that the “...act relied on must actually prevent the contractor from carrying out the works within the contract period or, in other words, must cause some actual delay.”<sup>33</sup>

He went on to consider both the decision made by the Scottish courts in *City Inn* and the relevance of the SCL Protocol. It was noted that the contractor had relied upon its interpretation of the dissenting judgment of Lord Carloway in the *City Inn* case to support its argument that an extension of time for relevant events should be awarded irrespective of its own delays<sup>34</sup>.

Having considered the approach adopted by Lord Carloway in *City Inn* and the relevance of the SCL Protocol it was held that

29. *ibid* [114]

30. [2011] EWHC 848 (Comm)

31. [2012] EWHC 1773 (TCC)

32. [2011] EWHC 848 (Comm) [279]

33. *ibid* [282]

34. *ibid* [283]

35. *ibid* [286]



the judgment by Lord Carlway “...does not reflect English law” and that the SCL Protocol “...is not in general use in contracts in the construction industry and nor has it been approved in any reported case.”<sup>36</sup>

Based on his examination of case law and the facts of the case it was held that the contractor was not entitled to any time; based on the application of ‘common sense’ in that the project was already in irretrievable delay and therefore the events relied upon by the contractor did not cause any actual delay, whether assessed prospectively or retrospectively. As such he found in favour of the employer<sup>37</sup>.

### **The Walter Lilly Case**

The most recent case to discuss and pass judgment on the question of concurrency in the English courts was the *Walter Lilly*<sup>38</sup> case. Mr Justice Akenhead within his judgment provided a detailed review of relevant case law on the subject of ‘concurrency’<sup>39</sup> due to ‘substantial debates’ on the matter by the parties<sup>40</sup>.

Prior to his examination of the subject on concurrency Mr Justice Akenhead examined case law to establish the basic principles of delay analysis to be applied when assessing a relevant event that occurs during a period of culpable delay. He concluded, having reviewed the *Chestermount* case, that the accepted approach under English law was to adopt the ‘net’ method.

Mr Justice Akenhead, having established the above principle, set out his assessment of the debate on concurrency; which he qualified was “...only germane where at least one of the causes of delay is a Relevant Event and the other is not.” and “...where a period of delay is found to have been caused by two factors.”<sup>41</sup> He went on to provide a brief review of what he opined were the ‘two schools of thought’ on the approach to concurrency.

“The two schools of thought, which currently might be described as the English and the Scottish schools, are the English approach that the Contractor is entitled to a full extension

of time for the delay caused by the two or more events (provided that one of them is a Relevant Event) and the Scottish approach which is that the Contractor only gets a reasonably apportioned part of the concurrently caused delay.”

The Scottish ‘school of thought’ was stated as having been established in *City Inn*; whereas, the English approach was established in *Malmaison*, *Adyard* and, the nonconstruction related case of *De Beers v Atos Origin IT Services UK Ltd*<sup>42</sup>.

Mr Justice Akenhead commenced his review of applicable case law by discussing key elements of the decisions made in *Malmaison*; *De Beers*; and, *Adyard*. His review of the relevant English case law accepted that the scenario of concurrent delay provided in the *Malmaison* case provided clear guidance on the correct approach to concurrency; therefore, he adopted the position that the contractor is entitled to a full extension of time where concurrency of employer and contractor delay occurs. Mr Justice Akenhead further held that:

“... there is a straight contractual interpretation of Clause 25 which points very strongly in favour of the view that, provided that the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question.”<sup>43</sup>

A detailed review of the decision by the Scottish courts in *City Inn* was not noted; however, it was opined that the wording ‘fair and reasonable’, which provided the basis of the decision in *City*

36. *ibid* [289]

37. *ibid* [304]

38. [2012] EWHC 1773 (TCC)

39. *ibid* [366]-[370]

40. *ibid* [366]

41. *ibid* [366]

42. [2010] EWHC 3276 (TCC); [2011] BLR 274

43. 43. *Walter Lilly (n 2)* [370]

Inn, "... does not imply that there should be some apportionment in the case of concurrent delays ...", as such the apportionment approach adopted by the Scottish courts, although persuasive, "... is inapplicable within this jurisdiction."<sup>44</sup>

In his concluding judgment it was held that the contractor was entitled to a full extension of time. It was also noted that although the debate on concurrency had been prevalent between the parties; there were not any actual periods of delay where culpable delay and relevant events occurred concurrently.

### **Summary and Findings**

It appears from the above that the Honourable Mr Justice Hamblen in *Adyard* considered that 'true' concurrency only occurs as defined within the first part of the SCL Protocol; therefore, it was held that concurrency, in the strict definition, had not in fact occurred.

The judgment in *Adyard*, although discussed under the heading of concurrency, may have therefore been better discussed under the overall approach to delay analysis. It appears that the judgment relies heavily on adopting the approach from *Brompton* as being applicable; in that a relevant event can be dismissed if it does not impact on the date for completion.

It appears from the *Walter Lilly* case that Mr Justice Akenhead was required to comment upon the approach to concurrency due to a debate between the parties, which in turn provided an opportunity to comment on the decision in *City Inn*. As noted above it was later held that concurrency of delay, in terms of concurrency of a contractor and employer event, had not actually occurred in *Walter Lilly*; therefore indicating that the subject of concurrency was being utilised by the parties as a legal argument that was causing confusion and contention.

The judgment in *Walter Lilly* however appears to reaffirm the straight forward approach to concurrency under English law, in that the correct approach simply aligns with the principles of establishing if the relevant event in question caused a critical delay, followed by applying the approach defined within *Malmaison* where there is concurrency and clarifying the use of the 'net' method of awarding an extension of time for relevant events that occur in a period of contractor delay after the completion date. Mr Justice Akenhead concluded that the 'apportionment' approach adopted in *City Inn* was inapplicable under English law.

The review of historical and current case law in the England and Scotland sets out the history behind the current '*two schools of*

*thought*' described in *Walter Lilly*. However, as with all aspects of contract law, the relevance of the recent approaches by the courts in dealing with 'concurrent delay', notwithstanding whether 'concurrency' of delay actually occurred in fact, is dependent on the express contractual terms agreed by contracting parties.

The following section reviews the varying 'Extensions of Time' and/or 'Concurrency' express provisions contained within a sample of commonly used standard forms of contract in Singapore in order to consider whether the '*two schools of thought*' in England and Scotland could be persuasive.

## **RELEVANT PROVISIONS CONTAINED WITHIN COMMONLY ADOPTED STANDARD FORMS OF CONTRACT WITHIN SINGAPORE**

### **Introduction**

The common law legal system in Singapore originated from English law and has evolved into its own distinctive jurisprudence. As noted above, decisions made by the courts in the United Kingdom could be influential should disputes regarding 'concurrent delay' arise in alternative common law jurisdictions. However, as also noted above, the relevance of any potential influence will be dependent on the express contractual terms commonly agreed by contracting parties.

The United Kingdom case law reviewed above was mainly based upon the courts consideration of the express terms contained within the various incarnations of the JCT suite of contracts, which are a common form of contract adopted for construction and engineering projects in the United Kingdom.

Singapore has various unique forms of commonly adopted standardised contracts, such as the 'SIA Building Contract 9th Edition (2010)' and the 'BCA PSSCOC Construction Works (2008)'.

Each of the above sample standardised contracts are reviewed in turn below in order to consider if either of the '*two schools of thought*' could be considered relevant should disputes regarding 'concurrent' delay arise.

### **Singapore's 'SIA Building Contract 9th Edition (2010)'**

Singapore's 'SIA Building Contract 9th Edition (2010)' appears to contain three relevant clauses which deal with time and delay, Clause 22 [Time for Completion], Clause 23 [Extension of Time], and Clause 24 [Completion Delay and Liquidated Damages].

44. *Walter Lilly* (n 2) [370]

The contract states within Clause 22 [Time for Completion] at 22.(1) that:

“The Contractor shall complete the Works on or before the Date for Completion ..., or by such Date or modified Date as further extended pursuant to the next following clause of these Conditions, whichever is the latest.”

The contract states within Clause 23 [Extension of Time] at 23.(1) that:

“The Contract Period and the Date of Completion may be extended and recalculated, subject to compliance by the Contractor with the requirements of the next following sub-clause, by such further periods and until such further dates as may reasonably reflect any delay in completion which, notwithstanding due diligence and the taking of all reasonable steps by the Contractor to avoid or reduce the same ...”

The contract states within Clause 24 [Completion Delay and Liquidated Damages], at 24.(1) that:

“After the latest Date for Completion of the Works pursuant to Clause 22.(1) of these Conditions has passed, then if at the said date there are no other matters entitling the Contractor to an extension of time and the Works nevertheless remain incomplete, the Architect may at any time thereafter up to and including the issue of the Final

Certificate give a certificate setting out the Contract Completion Date (if necessary modified or re-calculated under Clause 10.(1) of these conditions); the total period of extension of time (if any); the consequential extended Contract Completion Date (if any); and certifying that the Contractor is in default in not having completed the Works by the stated Contract Completion Date or Extended Completion Date (as the case may be). Such certificate shall be issued to the Employer with a copy to the Contractor, and is hereinafter called a ‘Delay Certificate’.

The contract states within Clause 24 [Completion Delay and Liquidated Damages], at 24.(3)(a) that:

“If while the Contractor is continuing to work subsequent to the issue of a Delay Certificate, the Architect gives instructions or matters occur which would entitle the Contractor to an extension of time under ... these Conditions, and if such matters would have entitled the Contractor to an extension of time regardless of the Contractor’s own delay and were not caused by any breach of contract by the Contractor, the Architect shall as soon as possible grant to the Contractor the appropriate further extension of time in a certificate known as a ‘Termination of Delay Certificate’.

The contract states within Clause 24 [Completion Delay and Liquidated Damages], at 24.(3)(b) that:

“Such further extension of time granted shall have no immediate effect nor shall it prevent the deduction or recovery of liquidated damages by the Employer until the issuance of the Termination of Delay Certificate. The Termination of Delay Certificate shall be issued to the Employer with a copy to the Contractor and while not preventing the deduction or recovery of the liquidated damages accrued up to its issuance, shall prevent the accumulation of liquidated damages during the period of the further extension of time granted.”

It is evident from the above that a clear definition or expressed intent for circumstances of potential ‘concurrency’ does not exist within Singapore’s ‘SIA Building Contract 9th Edition (2010)’.

Therefore, as within the JCT suite of contracts, it is left open to the parties and legal professionals to examine the above clauses to establish how an occurrence of ‘concurrent delay’ should be dealt with under the contract. It is to be noted that Clause 24.(3) (a) appears to align with the judgment in *Chestermount* in the use of the ‘net’ method of awarding an extension of time for *relevant* events that occur in a period of contractor delay after the completion date.

### **Singapore’s ‘BCA PSSCOC Construction Works (2008)’**

Singapore’s ‘BCA PSSCOC Construction Works (2008)’ appears to contain two relevant clauses which deal with time and delay, Clause 14 [Time for Completion], and Clause 16 [Liquidated Damages].

The contract states within Clause 14 [Time for Completion] at 14.2 that:

“The time within which the Works or any phase or part of the Works is to be completed may be extended

by the Superintending Officer either prospectively or retrospectively and before or after the Time for Completion by such further period or periods of time as may reasonably reflect delay in completion of the Works which, notwithstanding due diligence and the taking of all reasonable steps by the Contractor to avoid or reduce such delay ...

Provided always that the Contractor shall not be entitled to any extension of time where the instructions, or acts of the Employer or the Superintending Officer are necessitated by or intended to cure any default of or breach of Contract by the Contractor and such disentitlement shall not set the Time for Completion at large.”

The contract states within Clause 14 [Time for Completion] at 14.3(3) that:

“When the Superintending Officer has received sufficient information to enable him to decide the Contractor’s application, he shall, within a reasonable time, make in writing to the Contractor such extension of time, if any, of the whole or any phase or part of the Works (as the case may be) as may in his opinion be fair, reasonable and necessary for the completion of the Works. The Superintending Officer shall take into account the effect, or extent, of any work omitted under

the Contract and shall also take into account whether the event in question is one which will delay completion of the Works. The Superintending Officer shall also take into account any delays which may operate concurrently with the delay due to the event or events in question and which are due to acts or default on the part of the Contractor.”

The contract states within Clause 16 [Liquidated Damages] at 16.4 that:

“For the avoidance of doubt, if the Contractor shall have failed to complete the Works or any phase or part of the Works by the Time for Completion and the execution of the Works thereafter is delayed by any of the events set out in Clause 14.2(g) to (q) inclusive, the Employer’s right to liquidated damages shall not be affected thereby but, subject to compliance by the Contractor with Clause 14, the Superintending Officer shall grant an extension of time pursuant to Clause 14. Such extension of time shall be added to the Time for Completion of the Works (or of the relevant phase or part).”

It is evident from the above that the term ‘concurrently’ does appear within Clause 14.3(3) of Singapore’s ‘BCA PSSCOC Construction Works (2008)’. However, it appears that the meaning of the term has not been clearly defined; therefore, as within the ‘JCT suite of contracts’ and ‘SIA Building Contract 9th Edition (2010)’, it is left open to interpretation.

It is to be noted that Clause 16.4 of the ‘BCA PSSCOC Construction Works (2008)’, as with Clause 24.(3)(a) of the ‘SIA Building Contract 9th Edition (2010)’, also appears to align with the ‘net’ approach described in the judgment of *Chestermount*.

## Summary and Findings

The above examination of two of the prominently used standardised forms of contract in Singapore indicates that, should purported ‘concurrent’ delay occur, an interpretation of the parties intent would need to be presented, which in turn could lead to a formal dispute between the parties.

The following section reviews a recent judgment in the Court of Appeal in Singapore which considered what it referred to as ‘concurrent delays’.

## RELEVANT CASE LAW IN SINGAPORE

### Introduction

As with the United Kingdom, there is limited key concurrency based case law in Singapore. The following section provides a brief overview of the particular facts and approaches adopted by the Singapore courts in cases which considered the approach to purported occurrences of concurrent delay.

It appears that an early case in the Singapore courts to consider ‘concurrent delay’ was *Aoki Corp v Lippoland (Singapore) Pte Ltd*<sup>45</sup> in 1995. It was stated by the learned Warren LH Khoo J that:

“...in assessing the question of delay, one has to consider whether the alleged event relied on by the contractor falls on the critical path. Briefly, the critical path comprises the sequence of activities in a construction programme in which a delay would have the effect of prolonging the overall completion period of the project. Delay to activities falling outside the critical path may be

45. [1995] 2 SLR 609; [1995] SGHC 50

absorbed by the ‘float time’ allowed in the programme so that the activity will not affect the completion date. There may be further complications where there are concurrent delays or multi-event delays attributable to different factors in which case the architect has to assess the critical cause of the delay and make due allowances, if any, when evaluating the length of extension to be granted.”

The above statement appears to acknowledge ‘concurrent delay’ as being a factor which may need to be considered when assessing critical causes of delay. However, the approach to such a scenario is not discussed, nor is the definition of the term ‘concurrent delays’ expanded upon.

In 2005 the Singapore courts once again briefly considered ‘concurrent delay’ in *Multiplex Constructions Pty Ltd v Sintel Enterprise Pte Ltd*<sup>46</sup>. The judgment states that Sintel had claimed that there had been ‘overlapping periods of delay’ and as such Multiplex “... *should have apportioned the loss between the two.*”<sup>47</sup>

The judgment further noted that in response Multiplex had forwarded its position that:

“...the delay which was the subject of the set-off notices was solely attributable to Sintel ... Multiplex also submitted that even if there was concurrent delay by other subcontractors and therefore the delay was not solely attributable to Sintel, the issue of the effect of concurrent delay (if any) ought to be determined in accordance with the

parties’ agreement by an arbitrator. We agree. We also agree that because there is a substantive dispute on concurrent delay, it cannot be said to be indisputable that the set-off notices are not reasonably accurate. This is an issue to be determined by the arbitrator.”<sup>48</sup>

It appears to be evident from the above statement that the learned Judith Prakash J considered matters regarding potential occurrences of the ‘*effect of concurrent delay*’ to be an issue to be determined by the arbitrator. Therefore, the approach to such a scenario was again not discussed, nor was the definition of the term ‘*concurrent delays*’ or ‘*effect of concurrent delays*’ expanded upon.

It is also to be noted that the ‘*apportionment*’ approach appears to have been favoured by Sintel for occurrences of ‘*overlapping periods of delay*’. However, as with the subject of ‘concurrency’ the learned Judith Prakash J appears to have not provided any opinion.

One of the latest cases to have considered ‘concurrent delay’ in the Singapore courts appears to be *PPG Industries (Singapore) Pte Ltd v Compact Metal Industries Ltd*, which was decided in 2013 in the Court of Appeal following an appeal to the previous judgment in 2012<sup>50</sup> by the High Court.

The 2012 High Court judgment noted that the case had been initially tried in two tranches in 2006 after which the court awarded interlocutory judgment in favour of Compact and that the damages were then assessed by an Assistant Registrar (“the AR”).

It was noted in the judgment that the AR had found that “... *no concurrent causes of delay*”<sup>51</sup> had occurred, based on the expert testimony of Compact’s delay expert.

In the 2013 Court of Appeal judgment the expert testimony of the delay experts was re-examined which in turn led to further consideration of potential ‘concurrent delays’. The learned Chao Hick Tin JA and Andrew Phang Boon Leong JA rejected Compact’s delay expert’s view that concurrency of delay had not occurred as it did not “... *accord with either logic or common sense*”.<sup>52</sup>

46. [2005] 2 SLR 530; [2005] SGCA 10

47. *ibid* [32]

48. *ibid* [36]

49. [2013] SGCA 23

50. [2012] SGHC 91

51. *ibid* [113(c)]

52. [2013] SGCA 23; para.9

“We do not find [the delay expert’s] explanation to the effect that the two delaying events did not cause concurrent delay to the completion of the project persuasive. In particular, in so far as the adverse weather conditions were concerned, [the delay expert’s] explanation that it could only have reduced the degree of acceleration works done and could not have caused delays is plainly contrary to the ordinary course of nature and common sense. If inclement weather could have caused acceleration works to be delayed, then, a fortiori, it should naturally follow that the works for the project would have been delayed as well.”<sup>53</sup>

It appears to be evident from the above statement that the learned Chao Hick Tin JA and Andrew Phang Boon Leong JA had utilised the phrase ‘concurrent delay’, but did not provide a definition of the term. Furthermore, it appears from the scenario described above that use of the term ‘concurrent delay’ may have been technically incorrect as the true matter in debate appears to have been due to the rejection of the approach adopted by the delay expert in ignoring events that had compounded an ongoing delay event.

### Summary and Findings

It appears from the above review of case law in Singapore that the courts have not yet considered a case within which one or both of the parties have relied upon purported occurrences of ‘concurrent delay’. It is however to be noted that this does not necessarily mean that purported claims of ‘concurrency’ are not prevalent in Singapore disputes. An example being that arbitrators dealing with Singapore disputes may be determining such purported claims in cases such as *Multiplex*.

## OVERALL SUMMARY

The first objective of this paper was to review the current legal position on concurrent delay in the United Kingdom following the recent prominent cases of *City Inn*, *Adyard* and *Walter Lilly* in order to consider whether those decisions could influence the approach to concurrent delay within Singapore.

From the observations it appears that the recent decision in the *Walter Lilly* case has provided a clearer picture on how the courts will determine liability in the case of concurrent delay, and that the Scottish decision in the *City Inn*, although not applicable under English Law, provides a secondary approach that could equally be deemed as being applicable under alternative jurisdictions.

Having reviewed the United Kingdom case law it appears that ‘true concurrency’, as described in the SCL Protocol, has not been a matter of determination for the courts, which is unsurprising considering the likelihood of it occurring appears to be minimal! Therefore it appears that the decisions made by the courts in the United Kingdom have been on how the ‘concurrent effect of sequential delay’ should be approached.

The ‘concurrent effect of sequential delay’ appears to be based on a theoretical scenario that two delays that occur at different times cause an equal delay effect to the contract completion date. As such, the analysis of the ‘concurrent effect of sequential delay’ becomes one which is highly subjective, which in turn will inevitably lead to disagreement and potentially disputes between parties.

As such the debate on ‘concurrent delay’ is unfortunately one that is unlikely to subside, as it will continue to be relied upon by parties, delay experts and legal professionals within construction disputes. However, it appears that although the technical argument is likely to rumble on for eternity, at least the courts, whether considered right or wrong, have set out how such arguments will be considered and more importantly how the related costs should be calculated!

A particular further emphasis of this paper was the consideration of whether the recent court decisions in the United Kingdom could be applicable within an alternative jurisdiction such as Singapore.

Based on the review in this paper of some of the commonly utilised standard forms of contract in Singapore it appears that much akin to the JCT suite of contracts commonly utilised in the United Kingdom that disputes of ‘concurrency’ could arise between parties.

53. *ibid*

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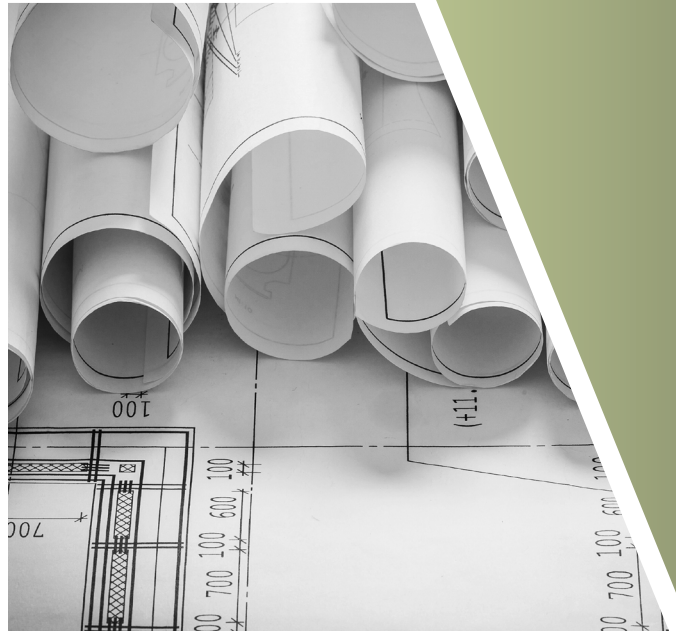
In the few instances where 'concurrent delay' has been raised in the Singapore courts it appears that they have not been drawn into a detailed debate or, as in the relatively recent judgment in *PPG Industries*, that the technical use of the term appears to have been used inappropriately.

It is therefore yet to be seen which approach the courts in Singapore will adopt should what appears to be the theoretical arguments of 'concurrent delay' ever become a matter to be determined by courts!

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