

# Dealing with Concurrency in Construction Delay Claims

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One of the most problematic issues relating to construction delay claims is that of concurrency. Indeed, concurrency causes problems for many of those involved with construction claims, not only contract administrators (e.g., architects and engineers), but also for claims consultants, experts, lawyers and, apparently, even some members of the judiciary.<sup>[1]</sup> This article seeks to discuss the issue of concurrency in both an international and regional setting.<sup>[2]</sup>

The problems stem partly from the fact that there appears to be no agreed definition of what is meant by concurrency or how it should be interpreted and applied. Other problems arise when trying to determine whether concurrency applies to simultaneous or sequential<sup>[3]</sup> events and whether it is the event or its effect which is important.

The above problems are not helped by the lack of a single, definitive authority which deals with all of the above, and these problems are further compounded by a difference of approach in different legal jurisdictions.<sup>[4]</sup>

## What is concurrency?

In the 2010 Scottish case of *City Inn v Shepherd* (referred to below) the judge highlighted the problem of trying to define the meaning of 'concurrency'.<sup>[5]</sup> Indeed, it is probably easier to define what is meant by 'concurrent delay'. A definition of the latter, which is often used by English lawyers, is:

*'A period of project overrun which is caused by two or more effective causes of delay which are of equal causative potency.'*<sup>[6]</sup>

In other words, a concurrent delay occurs when competing delay events (occurring either simultaneously or sequentially) overlap in their consequences.<sup>[7]</sup> Therefore, it is the 'effect' of the event which is all important and this is inextricably linked to the issue of causation.

## Some Relevant Case Law

Whilst it is acknowledged that the reference below to common law authorities which deal with the subject of concurrency and other time related issues are not binding in the UAE (for example the prevention principle<sup>[8]</sup>), it is suggested that the principles laid down by these authorities may offer some guidance on how the international construction community may deal with the issue of delays in general and, in particular, concurrency. Similarly, reference has also been made to the SCL Delay Protocol,<sup>[9]</sup> which, whilst not a legal document (or statement of law) as such, may be considered to be informative (and, possibly, influential) as representing the general (or good) practice of dealing with delay claims in the construction industry. Readers will also be aware that many construction arbitrators in the UAE have common-law backgrounds, so parties (and their respective lawyers) appearing before them may wish to bear in mind how these arbitrators may themselves understand and deal with the issue of concurrency.<sup>[10]</sup>

**Trollope & Colls v North West [1973] 9 BLR 60** - If an employer causes a delay then it cannot insist upon strict adherence to the time for completion.

**Percy Bilton v GLC [1982] 20 BLR 1 (HL)** - Unless a contract provides otherwise, an employer cannot rely upon a liquidated damages clause if it has prevented the contractor from completing; instead, it would have to claim general damages from whenever the contractor should have completed, after allowing a reasonable time for completion. However, and most importantly, in order to be entitled to an extension of time a contractor must still demonstrate a causal link between the relevant event and the delay to completion.

**SMK Cabinets v Hilti [1984] VR 391**- This Australian case appears to have gone against the application of both the 'but for' and dominant cause tests. The case held that it does not matter if the contractor would not have been able to complete in time anyway, if the employer caused delay then it prevented the contractor from completing.

**H Fairweather v Borough of Wandsworth [1987] 39 BLR 106** - In this case the judge expressly disapproved the use of the dominant cause test when dealing with concurrent delays for claims for an extension of time. This view was subsequently agreed upon by an eminent construction lawyer.[\[11\]](#)

**Balfour Beatty v Chestermount [1993] 62 BLR 1** - This case dealt with relevant events occurring after the original completion date and when the contractor was in culpable delay. It was held that the contractor was entitled to an extension of time attributable to a (post-completion) variation/instruction, but that the period of the extension should only be 'dotted-on' to the original or extended completion date (colloquially known as the 'dot-on' or 'net' approach). However, and crucially, the relevant event must still be shown to cause a critical delay. It is not enough that a relevant event occurred; a causal link between cause and effect must still be established. It is suggested that the judge in this case caused some confusion when he commented that in some circumstances it may not be 'fair' to grant a contractor an extension of time if the relevant event was 'caused' by the contractor's own delay".[\[12\]](#)

**Henry Boot v Malmaison [1999] 70 ConLR 32**- It was agreed between the parties in this case that if there are two concurrent causes of delay, one of which is a relevant event, then the contractor is entitled to an extension of time for the delay caused by the relevant event, provided it can be shown to have caused a critical delay. Notwithstanding the *Royal Bromptom* case (see below), an eminent construction lawyer takes the view that *Malmaison* represents how English law should deal with concurrency and that the dominant cause test is not applicable to extension of time claims.[\[13\]](#)<sup>[14]</sup>

Arguably, when considering whether to grant an extension of time an engineer should (unless the contract provides otherwise) consider other events, and not just the relevant events relied upon by the contractor, to see if the contractor's progress has been affected.[\[15\]](#)

**Royal Bromptom v Hammond [2001] 76 ConLR 148** - In order to obtain an extension of time a contractor must show that the relevant event caused a delay to completion, it is not enough that it is a relevant event. In the author's experience, this crucial requirement is often overlooked by contractors and it comes down to a detailed analysis of factual events and a consideration of the critical path to determine when the event occurred and if completion was actually affected, and if so, by how much.

In this case the judge sought to distinguish between simultaneous and sequential concurrency. The judge said that the case of *Malmaison* was concerned only with simultaneous concurrency. However, a reading of the judgment in *Malmaison* discerns that the judge appeared to make no such distinction.

The judge in *City Inn* (referred to below), along with an eminent construction lawyer,[\[16\]](#) took the view that the judge in *Royal Bromptom* case was wrong to distinguish between simultaneous and sequential concurrency.

**Multiplex v Honeywell [2007] BLR 195** - An employer cannot hold a contractor to a completion date if

the employer has caused the contractor to miss that date, i.e., time becomes at large.[\[17\]](#) [\[18\]](#)

**City Inn v Shepherd [2008] 8 BLR 269 (CSOH); [2010] BLR 473 (CSIH)** - In this Scottish case the judge went against *Royal Brompton* and instead chose not to distinguish between simultaneous and sequential concurrent delays, but also went further by adopting the “apportionment approach”. The judge’s interpretation of the *Malmaison* case and disagreement with the *Royal Brompton* case (i.e., there should be no difference between simultaneous and sequential delays) has since been supported by an eminent construction lawyer.[\[19\]](#)

**De Beers UK v Atos [2010] EWHC 3276**- This case followed the *Malmaison* approach, i.e., where there is concurrent delay then a contractor should get time but not its costs.

**Adyard v SD Marine [2011] BLR 384** - This shipbuilding case appears to have used the dominant cause test to deal with delays, i.e. it was decided that variations were instructed by the employer when the contractor was already in culpable delay and so these variations had no effect on the already delayed completion date. The authorities referred to above suggest that the judge in this case was wrong to have applied the dominant cause test approach and failed to have proper regard to the prevention principle.

**Jerram v Fenice [2011] BLR 644** - In this case the judge not only followed the judge in *Adyard* but appeared to go even further and suggest that when a relevant event occurs and the contractor is already in culpable delay, then the prevention principle will not apply. The judge in this case also appeared to apply the dominant cause test. At least one legal commentator has suggested that the judgment in *Jerram* was wrong.[\[20\]](#)

**Walter Lilly v MacKay [2012] BLR 503** - In his judgment the judge confirmed that there was a difference of approach in England and Scotland when dealing with concurrency. The judge confirmed that the ‘apportionment approach’ was not applicable in England. The English approach may be stated thus: if there are two events causing concurrent delay, one of which is caused by the employer, then the contractor is entitled to an extension of time and there is no reason (or legal basis in England) to apportion delay.[\[21\]](#)

### **SCL Delay and Disruption Protocol**

The SCL Delay Protocol appears to mirror the English law (*Malmaison*) position where it talks about concurrency because at Core Principle No.9 it provides that if there is both a contractor and employer caused delay then the contractor’s entitlement to an extension of time should not be reduced. The SCL Delay Protocol explains the basis of its position in this respect at Sections 1.4.5 and 1.4.7.

### **UAE laws dealing with late completion and delay damages**

Whilst the above may demonstrate what concurrent delay is and how it is applied in the English courts at least, how is it dealt with under UAE law?

It will be appreciated by those familiar with construction law in the UAE that principles and concepts which are fairly well developed in other legal jurisdictions may not be so easily found within the laws of the UAE.[\[22\]](#) Experience suggests that it is not uncommon for some foreign lawyers who are new to the region try and shoehorn their own legal principles into the provisions of UAE law in an attempt to deal with some of the legal issues they encounter here in the UAE.

Concepts such as ‘concurrent delay’, ‘extension of time’, ‘prevention principle’ and ‘time at large’ are not expressly provided for within UAE law.[\[23\]](#) However, the fact that they do not exist as such should not cause too much concern because there are provisions to be found which may provide for a similar result.

It is trite, according to English law anyway, that a time delay does not necessarily give rise to financial recompense. What this means is that whilst a contractor may be entitled to an extension of time under a

contract, this does not necessarily mean it will receive compensation for that delay, i.e. it must prove a causal link between the delay and its loss. To distinguish between time and money, experts and lawyers often refer to excusable and compensable delays. However, it is suggested that when considering these issues under UAE law, one should look at both the bigger picture and the end result to see how concurrent delay can be dealt with under UAE law.

Whilst UAE law does not allow for a contract to be extended without agreement,[\[24\]](#) Articles 247, 249, 414 and 472 of the UAE Civil Code may, in some (possibly exceptional) cases, be relied upon to give a contractor a release from strict performance in terms of time.

Where a completion date cannot be extended (either pursuant to the contract or law), a contractor is, by default (under FIDIC), liable for liquidated damages. However, Article 878 of the UAE Civil Code may assist a contractor because it provides that a contractor will only be liable for any loss or damage insofar as the loss does not arise from an event which the contractor could not prevent (e.g. an employer caused delay).[\[25\]](#) Similarly, Article 290 of the UAE Civil Code provides that a judge (or tribunal) may take into account the level of involvement of the other party (i.e. the employer) when assessing compensation.[\[26\]](#) One possible interpretation of Article 291 of the UAE Civil Code is that it may allow a judge (or arbitrator) to 'apportion' liability for concurrent delay. Of course, conversely, an employer can rely upon these same provisions insofar as a contractor may be claiming an extension of time or prolongation costs during a period of concurrent delay.

One of the provisions of UAE law which is most often cited in construction disputes is the duty of 'good faith', which can be found at Article 246(1) of the UAE Civil Code. This provision is often relied upon by contractors when making allegations of unlawful acts (or inaction) by engineers or employers. In addition to this provision of good faith, Article 106 of the UAE Civil Code prohibits the unlawful exercise of a right. Hence, if an employer causes delay and the engineer subsequently fails to grant an extension of time for the same (or the contract does not allow an extension of time to be granted) then an employer's subsequent attempt to levy liquidated damages for the contractor's late completion could possibly fall foul of the Articles 106 and 246(1). Alternatively, a contractor may argue that in circumstances where the employer caused delay the employer would be unjustly enriched if it were to recover liquidated damages for this period. Again, these are all provisions which could also be relied upon by the employer if the contractor's concurrent delay can be proven.

Notwithstanding the above, if a contractor believes that it has not been properly granted an extension of time (or if the contract does not allow for an extension) it may, amongst other things, seek to challenge an employer's deduction of liquidated damages by way of Article 390(2) of the UAE Civil Code. The decision whether to adjust the amount of liquidated damages will be at the discretion of the judge (or tribunal). At first glance, Article 390(2) may seem like a contractor's trump card insofar as it may make life difficult for an employer because the employer would then have to prove its actual loss. However, contractors would do well to remember that the UAE Courts have consistently held that it is the contractor who has the burden of proving that the pre-agreed liquidated damages do not represent the employer's actual loss.[\[27\]](#) Of course, an employer may also apply to lift the capping of liability if it believes (and can prove) its actual losses are far greater than the pre-agreed liquidated damages.

When exercising its discretion under Article 390(2) a court (or tribunal) will likely consider the UAE's hierarchy of laws and the underlying theme of freedom to contract and *pacta sunt servanda* ('agreements must be kept').[\[28\]](#)<sup>[29]</sup> It is widely recognized that clear words cannot be easily departed from.[\[30\]](#) Therefore, it may not be as easy as first thought for a party to simply turn round when later in dispute and cry 'foul' because it no longer likes the consequence of what it had previously agreed as acceptable as liquidated damages.

## **Dealing with Concurrency in the UAE**

In light of the above, what principles can be drawn when faced with arguments of concurrent delay in a

construction dispute in the UAE?

As with any construction claim, careful consideration should first be had to the terms of the contract.

Pursuant to Sub-Clause 43.1 of FIDIC 4<sup>th</sup> Ed.,[\[31\]](#) one of the contractor's primary obligations is to complete on time[\[32\]](#) and this obligation is reinforced by Articles 243, 246(1), 874 and 877 of the UAE Civil Code.[\[33\]](#) Particular regard should be had to how the parties have agreed to apportion risk for delay under the terms of the contract, e.g. Sub-Clause 44.1 of FIDIC 4<sup>th</sup> Ed.[\[34\]](#)

Because of the serious financial consequences arising from the late completion of a construction project, a contractor will often seek to excuse its delayed completion by laying some (if not all) of the fault at the door of the employer (or engineer). Conversely, an employer will likely argue that there was concurrent delay on the part of the contractor. Specifically in terms of concurrency:

1. A contractor will likely argue that if the employer has caused a critical delay then the contractor is entitled to an extension of time, even if the contractor was in culpable (i.e. concurrent) delay itself.[\[35\]](#)[\[36\]](#)
2. An employer will likely argue that by reason of the contractor's culpable delay the contractor would have been late anyway; hence, there is no entitlement to an extension of time.[\[37\]](#)

To determine whether there has been a concurrent delay when faced with a contractor's claim for an extension of time it is suggested that one approach would be for the engineer to first carry out a comprehensive review of the facts against the relevant and most recently updated programme (i.e. the programme which shows the latest critical path prior to the events occurring) to determine whether an employer and/or contractor risk event actually caused a critical delay to the overall completion date.[\[38\]](#)

As part of such a review it would be imperative for the engineer to have regard to the apportionment of risk for delay events under the contract. A perusal of most standard form contracts used in the UAE discerns that if a relevant event occurs *and* causes (or, is likely to cause) delay to completion then a contractor should be awarded an extension of time.

In the context of concurrent delay, this raises the question: can an extension of time clause be interpreted in such a way that the intention of the parties was that if an employer risk event caused (or is likely to cause) a critical delay when a contractor was in concurrent delay then the contractor is not entitled to an extension of time? A possible answer to this question is that, based on an interpretation of the FIDIC forms of contract at least, it appears that if there is concurrency then, provided the contract allows for the award of an extension of time, the contractor should still get an extension of time and the financial consequences would flow as laid down in the UAE laws referred to above.

## Summary

Leaving aside possible time bar and condition precedent issues, when faced with a claim from a contractor for an extension of time based upon an employer risk event an engineer should firstly determine whether the alleged event occurred in the manner described by the contractor and, secondly, determine whether the event actually caused a critical delay or not.[\[39\]](#) If it did, then the next stage is to consider by how much. Ordinarily, if there was no concurrent delay the engineer would then likely grant an appropriate extension of time. However, if upon reviewing the facts the engineer determines that a concurrent delay did occur the engineer will (as best he can) need to review the as-built information for the period when the concurrent delay event occurred and determine whether this concurrent delay event also affected the completion date and will, no doubt, make a decision as to the extension of time entitlement based on one of the approaches referred to above.

Whilst the award of an extension of time will negate a contractor's liability for liquidated damages, if the contractor was in concurrent delay then UAE law will likely protect an employer from a contractor's claims for prolongation costs.

The views expressed in this article are the author's own and should in no way be taken as those of the firm.

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[1] Winter J., *How Should Delay be Analysed – Dominant Cause and its Relevance to Concurrent Delay*, SCL Paper 153, January 2009, p.20.

[2] This article does not seek to deal with other construction delay related topics such as the ownership of float or pacing delays.

[3] Sequential in this context means events which do not start and finish at the same time but which involve a degree of overlap; whereas, simultaneous events are those which start and finish together and give rise to the term 'true concurrency'.

[4] Some of the more notable cases on the issue of concurrency are referred to below. However, this article is not intended to be an exhaustive review of the case law on the subject.

[5] 'One of the problems in using such expressions as "concurrent delay" or "concurrent delaying events" is that they may refer to a number of different situations.' Per Lord Osborne *City Inn v. Shepherd* [2010] BLR 473.

[6] John Marrin QC, *Concurrent Delay*, SCL Paper, February 2002.

[7] It should be said at the outset that upon a forensic investigation of the facts there is often found to be no 'true concurrency'.

[8] The meaning of the "prevention principle" was succinctly stated by Jackson J (as he then was) in *Multiplex v Honeywell* [2007] BLR 195; namely "the essence of the prevention principle is that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing ..."

[9] *The Society of Construction Law Delay and Disruption Protocol*, SCL, October 2002.

[10] Some of these authorities may prove useful in the DIFC Courts.

[11] Winter J., *How Should Delay be Analysed – Dominant Cause and its Relevance to Concurrent Delay*, SCL Paper 153, January 2009, p.14.

[12] With this confusion in mind, it should be noted that Sub-Clause 44.1 of FIDIC 4th Ed refers to the extension of time to which a contractor is *fairly* entitled.

[13] Winter J., *How Should Delay be Analysed – Dominant Cause and its Relevance to Concurrent Delay*, SCL Paper 153, January 2009, p.20. It is suggested that the cases of *SMK Cabinets* and *Fairweather* support the view that the dominant cause approach should not be used in extension of time claims (i.e., it is only applicable to damages claims arising therefrom).

[14] This also appears to be the view of another eminent construction lawyer: Corbett E., *FIDIC 4<sup>th</sup> A Practical Legal Guide*, Sweet & Maxwell, 1991, pp. 254-257; and of a leading delay analyst: Pickervance K., *Delay and Disruption in Construction Contracts*, LLP, 3<sup>rd</sup> Ed, 2005, p.624.

[15] FIDIC 4<sup>th</sup> Ed: Sub-Clause 44.1 refers to what a contractor is 'fairly' entitled to and Sub-Clause 2.6 refers to the Engineer taking in 'all the circumstances'. Sub-Clause 3.5 of FIDIC 1999 Red Book refers to the Engineer 'taking due regard of all relevant circumstances'.

[16] Winter J., *et al*, 'One step forward, two steps back', *Civil Engineering Surveyor*, November 2011. p.36.

[17] *Time at large* is a common law concept which is not found within UAE law.

[18] Of course, the concept of 'time at large' does not exist per se in the UAE.

[19] Winter J., 'How Should Delay be Analysed – Dominant Cause and its Relevance to Concurrent Delay', SCL Paper 153, January 2009, p.16.

[20] Winter J., *et al*, 'One step forward, two steps back', *Civil Engineering Surveyor*, November 2011. p.38.

[21] *Walter Lilly & Co. Ltd v. GPC MacKay and DMW Developments Ltd* [2012] EWHC 1773 (TCC) per Mr. Justice Akenhead at [370]. It may be said that the English courts apply the test of causation more strictly than in Scotland in this context.

[22] Many of the UAE's larger construction projects have adopted either the FIDIC 1987 or 1999 forms of contract, both of which post-date the UAE's Civil Code of 1985. This dilemma is compounded by reason of the fact that the FIDIC 1987 form can be traced back to the English ICE standard form which was drafted with common law principles in mind.

[23] By 'UAE law' regard here is had to Federal Law No.5 of 1985 (the Civil Code), unless stated otherwise.

[24] Article 877 of the Civil Code provides that a contractor must complete in accordance with the conditions of contract, which, some would argue, means it must complete by the agreed time for completion.

[25] Article 386 of the UAE Civil Code may have a similar effect.

[26] Articles 287 and 291 of the UAE Civil Code may have a similar effect.

[27] There are ways whereby a contractor can possibly overcome this evidential burden.

[28] Article 257 - UAE Civil Code, i.e., the contract (and terms thereof) is what the parties freely consented to.

[29] See also, Articles 389 and 390(1) of the UAE Civil Code which expressly refer to the compensation fixed by the contract.

[30] Article 265(1) - UAE Civil Code.

[31] Sub-Clause 8.2 FIDIC 1999 Red Book.

[32] This includes any extended time for completion.

[33] As intimated above, some might argue that Article 877 does not extend to obligations such as progress and completion.

[34] Sub-Clauses 8.4 and 8.5 FIDIC 1999 Red Book.

[35] This is the *Malmaison* approach of the English courts.

[36] Contractors will often argue that its own delay was not a concurrent delay but merely a pacing delay.

[37] This is dominant cause approach and the *Royal Brompton* approach if there was no true concurrency.

[38] If the records are not available and/or the programmes have not been properly updated then a critical path analysis may not be possible. Moreover, a critical path analysis may sometimes be seen as too theoretical. This issue arose in one of the cases referred to above.

[39] Under the FIDIC forms of contract issues relating to timely notice (i.e., conditions precedent and time bars) and the level of detailed particulars provided would also be considered at this stage, but the legal status of the same is outside the scope of this article.