

BRIEFING NOTE

Concurrent Delays in Construction Projects – Issues of Contractual Rights and Remedies for Pandemic Related Delays

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Introduction

Globally, the construction industry has been disrupted by the onset of the pandemic and the responses of various governments to this pandemic. For many construction sites, the past few months have been characterised by zero, or slow, progress as sites were forced to remain closed to combat the transmission of the virus.

As construction sites re-open, one of the burning questions of contractors and employers alike would be that of delays. Of particular interest is the question of concurrent delays – if the contractor was already delayed in progressing the works and the employer (or the circumstance) adds to this delay concurrently, what are the associated rights and remedies?

Concurrent Delays in these Pandemic Times

Concurrent delay refers to the situation where the critical path of construction works is delayed by two events at the same time: one event due to the contractor and the other event due to the employer (or the circumstance).

In normal situations, typical examples of concurrent delays include instances where the contractor had insufficient manpower and the employer had not provided timely access to site. In these pandemic times, on top of contractor delays, there may be concurrent delays by for example: (a) employers issuing variations to sequence of working (to take into account additional safety precautions); or (b) circumstances due to the virus (for e.g., shutdown of construction sites ordered by public authorities).

What would be the rights and remedies associated with claims for additional cost or extensions of time?

Allocating the Risks in the Contract

Parties are free to include express provisions in their contracts to allocate the risks of concurrent delays.

Under the common law, parties may agree to whatever terms they wish to agree (unless there are statutory restrictions to be adhered to). This means that parties could have contractually agreed for the contractor to bear the full burden of the risk in the event of a concurrent delays

by the employer or even by the circumstance: see *North Midland Building Limited v Cyden Homes Limited* [2017] EWHC 2414 (TCC).

Allocating the Risks in Common Law

Where parties had not allocated the risks in their contracts, and the contracts are governed by the common law, common law principles will apply to determine the rights and remedies of the parties.

Under the common law, the general rule is that where both the contractor and the employer are responsible for concurrent delays, the contractor may be entitled to extensions of time but not additional costs: see *De Beers UK Limited (Formerly: The Diamond Trading Company Limited) v Atos Origin It Services UK Limited* [2010] EWHC 3276 (TCC).

- The reason for granting extensions of time is because where delays are (concurrently) attributed to the employer, the contractor should be granted a reasonable time to complete the project.
- The reason for not granting additional costs is because where delays are (concurrently) attributed to the contractor, the contractor would have suffered the same loss as a result of his delay.

At this juncture, it is worth noting the prevention principle. If the employer has prevented the contractor from progressing the works (for e.g., by issuing variation orders to change or slow down the sequence of works in order to take into account additional safety precautions), then the employer cannot hold the contractor to the specified completion date: see *Multiplex Construction (UK) Limited v Honeywell Control Systems Limited (No. 2)*[2007] EWHC 447 (TCC).

What about the situation where delays are attributed to the contractor and the circumstance (for e.g., the pandemic)? In this situation, if the circumstance entitles the contractor to an extension of time (for e.g., pandemic or government-ordered site closure falls within the definition of force majeure events), it is likely that the contractor may be entitled to an extension of time: see *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [1999] 70 Con. LR 32A. However, the issue of claiming for additional costs may be contentious, requiring further exploration.

Concluding Remarks

The issue of concurrent delays is not straightforward. Expert assistance is required to establish concurrent delays. Legal assistance is necessary to determine the allocation of risk and liability having established concurrent delays. Given the unique set of circumstances presented by the pandemic, it is likely that certain issues – especially those relating to the allocation of additional cost burdens – will be a major point of contention in the weeks and months ahead.

To safeguard their positions, both contractors and employers are encouraged to engage delay and legal experts early in the process to determine the causes of delay and the liability associated with each delay event (or concurrent delay events). As dispute management practitioners in the construction industry, our lawyers frequently work with teams of multi-disciplinary professionals with decades of experience and knowledge to assist our clients in advancing their case.

For more information on how we may assist you through this difficult situation, feel free to contact any of our lawyers.

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