

Concurrent Delays

UK High Court Decision Supports SCL Protocol



A Our White Paper *Independent, Serial and Concurrent Delays* sets out the basic framework for considering this complex area of contract law¹. We are pleased to note a recent decision by the English and Wales High Court in *Thomas Barnes & Sons PLC v Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC)*², supports this paper and brings a breath of common sense to the consideration of EOTs and the associated delay costs when the delays occurring in parallel.

This dispute arose out of a contract between Blackburn with Darwen Borough Council (Council) and Thomas Barnes & Sons Plc (TB) to construct a new bus terminal in Blackburn (Project). The Project suffered significant cost increases and delay overruns for which TB claimed extensions of time. The Council denied TB's claims, terminated the construction contract for delay and appointed a replacement contractor to complete the works. TB subsequently commenced proceedings against the Council for monies said to be due under the contract on a proper valuation of the works done at termination (including delay costs due to prolongation) as well as damages for wrongful termination.

Concurrent Delay

The concurrent delay in this case revolved around two competing causes of delay to the Project. The first, which supported TB's EOT claim and for which the Council was responsible, was caused by deflection issues within the steelwork that required investigation and remediation which ultimately delayed subsequent activities on the critical path. The second, for which TB was responsible, arose out of delays to TB's roof covering works, which the Council alleged caused concurrent delay to the critical path at the same time as the steel deflection delay.

¹ Download *Independent, Serial and Concurrent Delays*:
https://mosaicprojects.com.au/WhitePapers/WP1064_Concurrent-Delays.pdf

² Download *Thomas Barnes & Sons PLC v Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC)*:
https://mosaicprojects.com.au/PDF-Gen/Thomas_Barnes_&_Sons_PLC_v_Blackburn_with_Darwen_Borough_Council.pdf

Both parties relied on expert delay evidence and each expert adopted methodologies in the Society of Construction Law Delay and Disruption Protocol to undertake their respective analyses³. The judge, in assessing the methods of the opposing experts, stated that '[109] irrespective of which method of delay analysis is deployed, there is an overriding objective of ensuring that the conclusions derived from that analysis are sound from a common-sense perspective'. As a consequence of the experts' diverging opinions⁴, the judge stated that the court would need to come to its own conclusion as to whether the steel deflection delay and the roof covering delay were concurrent.

Despite the fact that the roof covering delay started after the steel delay, and was resolved while the steel deflection delay was ongoing (and did not cause any independent delay to the critical path), the court determined that the delays were in fact concurrent, stating:

'[140] In my judgment this is a case where these causes were concurrent over the period of delay caused by the roof coverings. That is because completion of the remedial works to the hub structural steelwork was essential to allow the concrete topping to be poured and the hub SFS to be installed, without which the hub finishes could not be meaningfully started, but completion of the roof coverings was also essential for the hub finishes to be meaningfully started as well. It is not enough for the claimant to say that the works to the roof coverings were irrelevant from a delay perspective because the specification and execution of the remedial works to the hub structural steelwork were continuing both before and after that period of delay. Conversely, it is not enough for the defendant to say that the remedial works to the hub structural steelwork were irrelevant from a delay perspective because the roof coverings were on the critical path. The plain fact is that both of the work items were on the critical path as regards the hub finishes and both were causing delay over the same period.' Further, the court stated that TB could not seek to use the steel deflection delay as 'a convenient hook on which to seek to hang all of the delay to the works'. To do so ignored the fact that there was also a problem caused by the delays TB suffered to the roof coverings, which was itself a cause of delay to the critical path.

When considering concurrency, the **Society of Construction Law Delay and Disruption Protocol, 2nd edition**⁵ (SLC Protocol) simply requires the delays and their effects (or parts of the delays and their effects) to be experienced at the same time for concurrency to exist. It has two relevant sections which appear to have been followed by the Judge:

10. Concurrent delay – effect on entitlement to EOT

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. For concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event must be an effective cause of Delay to Completion (i.e. the delays must both affect the critical path). Where Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due.

³ For more on the SCL methods, see **Assessing Delay – the SCL Options**:
https://mosaicprojects.com.au/PDF_Papers/P216_Assessing_Delay_The_SCL_Options.pdf

⁴ For a discussion on the legal constraints on expert evidence see **Delivering Expert Evidence is Becoming Harder**:
https://mosaicprojects.com.au/Mag_Articles/AA028_Delivering_Expert_Evidence.pdf

⁵ For more on the **SCL Protocol and concurrent delays** see:
<https://mosaicprojects.com.au/PMKI-ITC-020.php#Concurrent>



14. Concurrent delay – effect on entitlement to compensation for prolongation

Where Employer Delay to Completion and Contractor Delay to Completion are concurrent and, as a result of that delay the Contractor incurs additional costs, then the Contractor should only recover compensation if it is able to separate the additional costs caused by the Employer Delay from those caused by the Contractor Delay. If it would have incurred the additional costs in any event as a result of Contractor Delay, the Contractor will not be entitled to recover those additional costs.

Applying the fundamental principals in the SLC Protocol that separate disruption and delay costs from the consideration of EOTs, the court held that:

(n) EOT and prolongation – conclusion [157]. The claimant is entitled to an additional EOT of 119 days (or 17 weeks), but to prolongation of only 27 days. After allowing for the EOTs already granted and agreed, which take the completion date to 13 April 2015, that would entitle the claimant to a revised completion date of 10 August 2015.

Pacing of work

The overall period of the roof covering delay included a 31-day delay in starting the roof covering work and an increased duration of the roof works of 26 days compared to the original plan.

In considering these contractor delays, the judgement seems to imply ‘pacing’ is not a valid basis for not considering (or reducing) concurrent contractor delays that are in parallel with client delays. TBs expert said that: “[133] there may have been some works to the externals that could be progressed, however this would not change my opinion that the [steel] works were critical in delay and that it was within TBS’s gift to pace any non-critical works”.

The Judge in considering this opinion stated: “[133] If by this [the expert] meant to suggest that the roof coverings could have been progressed but they were non-critical and could have been performed in a more leisurely manner as a result, this seems to me to ignore the fundamental fact that throughout the crucial period from October 2014 through to January 2015 the claimant could not have known how long the remedial works to the hub steelworks would take and could not therefore reasonably have proceeded on the basis that there was no need to worry about the roof coverings until the hub steel deflection issue was completely resolved’. This clearly sets a high bar for any ‘pacing’ claim to be successful.

First in Time and Dominant Cause considerations

Implicit in the court's reasoning is a rejection of both the ‘first in time’ and the ‘dominant cause’ approach to assessing concurrent delay in favour of the pragmatic approach in the SCL Protocol that does not allow either party to benefit from a fault on its part. The steel delay was clearly both the dominant cause of delay and was the first in time to start. These approaches appear to be no longer valid in the UK and presumably other jurisdictions that prefer the SCL Protocol.



Conclusions

This decision is likely to be significant in the UK, Australia, and most Commonwealth Jurisdictions where the processes in the SCL Protocol appear to be the preferred approach to assessing delay and disruption:

1. The Courts expect expert assessment and analysis to be founded in common sense.
2. The Courts are not bound to follow any particular expert, and can make up their own mind.
3. The SCL approach to EOTs and prolongation costs for concurrent delays is preferred.

Another aspect of this, and several other, judgements dealing with the way expert evidence is being treated by the courts is discussed in ***Delivering Expert Evidence is Becoming Harder***⁶.

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For more on assessing concurrent and parallel delays see:
<https://mosaicprojects.com.au/PMKI-ITC-020.php#Concurrent>.

⁶ Download ***Delivering Expert Evidence is Becoming Harder*** from:
<https://mosaicprojects.com.au/PMKI-ITC-020.php#Process2>

