A QUICK IDEA

IDEA's Snippet No. 1 - By Walied Abdeldayem

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Contact

Walied Abdeldayem
Managing Director
walied.abdeldayem@consultidea.net

Visit our website:
www.consultidea.net

Concurrent Delays - A Halloween Perspective, Trick or EoT!

The topic of concurrent delays in construction disputes is one of the most, perhaps fiercely, argued topics between practitioners and parties in a construction dispute. Almost always, where there is a delay claim, there is an argument related to concurrent delays advanced by the contractor, the owner or both. An assertion, positively or negatively, of a concurrent delays situation is one of the most used (and abused) defences in delay related disputes.

With almost every delay claim involves a concurrency argument, it is not surprising to find out that the vast majority of these arguments are without any merit. The overuse, perhaps in many situations spuriously, of concurrency arguments in delay related claims and disputes leaves many thinking that concurrency is as scary (or unreal) as a Halloween monster.

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How to approach a concurrency situation?

This Snippet does not intend to give a detailed explanation of the issue. Rather, it is a quick reflection on the current situation and an attempt to understand where things are heading. There are overwhelming articles and papers that tackle the issue of concurrency, a quick Google search will probably result on a few hundreds of relevant hits. Despite the numerous hits, keen readers will probably be turned away more confused than before they started their endless quest.

Here is a tip for the keen reader, when trying to digest all those articles you encountered about concurrency, always bear in mind that the issue of concurrency has two distinct aspects, or elements. Each element has its own distinguished analysis and special considerations.

First, there is a technical (or you may call it a scheduling) element, which concerns with identifying the causes of the critical delays and, in the context of concurrency, attempts to establish a causation link between the delay events under consideration and the delays realized to the project or milestones under study.

The second element is a legal component, and it concerns with how causation is dealt with as a matter of law in the jurisdiction overseeing the dispute, and in particular where there are multiple causes involved. For instance, whether there can be only one cause for the damage incurred or the delay realized, or whether causation can be split between multiple causes, giving rise to an apportionment approach, which may be dealt with differently in different jurisdictions.

Putting one and two together, a technical (or scheduling) analysis would determine the critical path of the project and would identify which delay events affected said critical path. When considering the legal aspect of the situation, certain jurisdictions may decide that there is no concurrency between these causes and consider single delay event as the dominant cause of the critical delay, other jurisdictions may find differently. Unfortunately, parties may get dragged into arguing their respective positions at cross purposes, which of course minimizes the chance of reaching useful outcome. It is crucial to consider each element separately first, to fully understand the situation and be able to identify where the differences are coming from.

So where are we going!

Now lets shift gears to where the issue of concurrent delays appear to be heading. Two fairly recent judgements may give us a hint or two. This Snippet does not intend to go in depth into analyzing these judgements, just seeking to take a sneak peek on the future of concurrent delays.

The first judgement is the Saga Cruises BDF Limited v Fincantieri SPA [2016], Judge Cockerill QC decided that the works had already been delayed by contractor's own delays to the extent that the owner's delay had no actual impact. He found that the owner's delay was subsumed by the already ongoing contractor's delays, impact of which persisted beyond the owner's delay. The judge did not adopt a theoretical approach that attempts to consider the owner's delays in isolation from the actual progress of the works. He distinguished between *"a delay which, had the*

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contractor not been delayed would have caused delay, but because of an existing delay made no difference and those where further delay is actually caused by the event relied on". Perhaps the main observation one can draw from this judgement is that the court moved towards simplification and adopted a more straight forward approach.

The second judgement is North Midland Building Ltd v Cyden Homes Ltd [2017], which involved a concurrent delay exclusion clause in the contract which stated: *"any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account"*. The judgement in this case is very interesting and may have surprised many followers, who thought such clause goes against the established common law doctrine known as the Prevention Principle. The argument advanced by North Midland Building Ltd was that the exclusion clause resulted in having a contract that does not provide a mechanism by which an Extension of Time (EoT) can be awarded for acts of prevention by the owner, consequently, this failure in the contract sets time at large, as the argument was advanced. The judgement ruled in favour of the validity of the exclusion clause and found said clause to be operative.

Stepping back and having a bird's eye view at the trajectory of these two judgements, one may wonder whether the courts, at least the English courts, are growing impatient with the concurrency arguments altogether. No doubt the decision in the North Midland Building Ltd case gives solace to owners who seek to rely on a similar exclusion clause to have more certainty and control in concurrency situations, allowing owners to apply liquidated damages despite being responsible for some delays, and stripping contractors from a very useful fallback defence.

More positively, the decision unlocks the door for owners and contractors to agree up-front on how to deal with concurrency situations before they arise. If said decision found acceptance globally and other jurisdictions followed a similar approach, the current sporadic and inconsistent way of dealing with concurrency will be a thing of the past. If more and more owners decided to include a concurrency exclusion clause (of course assuming they managed to get contractors to agree on that), arguments of concurrent delays issue will become irrelevant, and parties in a delay related dispute would have more certainty about the possible outcome of the dispute.

In closing, the fierce arguments, and confusion, about what constitute a concurrent delays situation and how said situation should be dealt with is far from being over. While the future may hold some silent promises for simpler, more practical and more straight forward solutions, at the moment, having concurrency arguments in delay disputes is like running from a house to another in Halloween, wondering whether at the end, it will be a Trick or EoT!

References

Saga Cruises BDF Ltd & Anor v Fincantieri SPA [2016] EWHC 1875 (Comm)

North Midland Building Ltd v Cyden Homes Ltd [2017] EWHC 2414 (TCC)

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