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Concurrent Delay – Clear, Cloudy, or just downright sneaky!?!

Mr Giles Mackay has been '*angry for a long time*' according to Mr Justice Akenhead [1]. One thing is for certain his words [2], actions and more importantly the decision have brought a wry smile and feeling of Karma to many a Construction Lawyer and Contractor alike; as there's finally proof that a bullying client doesn't always win!!

More importantly the significant case of *Walter Lilly v Giles Mackay* from last year has finally brought some clarity to a previously cloudy subject of **concurrent delay**. I've always been an advocate of the *Henry Boot v Malmaison* [3] approach to concurrency where the Contractor gets its **extension of time**, but does not necessarily get any **loss and expense**; which it has to prove separately. This approach is supported by the **Society of Construction Law's Delay and Disruption Protocol**.

This method was thrown into some confusion in 2010, when after the Inner House case of *City Inn v Shepherd* [4], there was suddenly a new method on the street for assessing concurrent delay called Apportionment. I left a seminar on the very subject feeling somewhat bewildered, thinking all that I thought was fair and simple to understand, was now somewhat perplexing. I just clung onto the parting words, that this was a Scottish case and may not necessarily be English Law.

I was relieved then, last year, when Mr Justice Akenhead clarified, albeit Obiter, that *City Inn v Shepherd* was not applicable in England, and that the English law on concurrency reverts back to that under *Henry Boot v Malmaison*. This view is supported by John Marrin QC; who has both written and presented numerous papers [5] on the subject over the years. His premise is that if a client levies any LDs at all in a situation where the employer has caused the delay, even if only in part, then you potentially contravene the **prevention principle**; as would be the case under apportionment.

The prevention principle stops a client from holding a contractor to a contractual**completion date**, when the client has itself prevented performance. Further, if a client causes a contractor to complete late, but the contract fails for the completion date to be extended in those circumstances, **time becomes 'at large'**. As such, the completion date will fall away and the contractor need only complete the work within a reasonable time.

So, we finally have some clarity on **concurrent delay**, which has been endorsed by the courts; then guess what? I start seeing terms for new tenders coming across my desk that remove any entitlement to time for concurrent delays!! Now, these types of clauses sometimes known as **"anti-malmaison" clauses** have been around some time, albeit never tested in the courts and to be fair under the freedom of contract the parties are free to negotiate whatever terms they like.

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My concern is that some Contractor's are desperate for work and will agree to terms such as this without realising the potential impact it could have on their finances. Should there be a concurrent delay, the Contractor would **not be able to claim for an extension of time**; yet the Client could **levy liquidated damages for the full period of delay**. On large engineering projects where liquidated damages run into tens of thousands of pounds per day, the margin can soon be eroded, and the client will be benefitting from his own delays. Surely this goes against the prevention principle as he has prevented performance.

Contractors should therefore be mindful to look out for the 'anti-malmaison' clauses and try and negotiate them out of the Contract. If this isn't possible, then ensure the programme is managed to mitigate the risk of concurrent delay – rather than what might usually happen, where the contractor thinks that as the employer is in delay he can ignore his own default and has a temporary respite to concentrate on other areas of performance.

At the end of the day, the position on concurrent delay will depend upon, as ever, what the terms of the contract are. I would argue that Malmaison / Walter Lilly has been endorsed for good reasons; so why change it.

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[1] Walter Lilly & Co Ltd v Mackay [2012] EWHC 1773 TCC

[2] **http://tinyurl.com/dygd9d6**

[3]Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR 32 (TCC)

[4] City Inn Ltd v Shepherd Construction Ltd [2010] CSIH 68 (Court of Session, Inner House), 2011 SC 127, 2011 SCLR 70, [2010] BLR 473, 136 Con LR 51, [2010] CILL 2889.

[5] John Marrin QC, 'Concurrent Delay', SCL Paper 100 (February 2002) and 'Concurrent Delay Revisited', SCL Paper 179 (February 2013)