

Concurrent delay - the Saga continues

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

By Scott Milner
Regional Manager, Yorkshire & North East

Concurrent delay has been the subject of legal debate for many years - probably because standard form construction contracts do not expressly deal with the issue¹.

The courts of England and Wales² view on the issue was established in *Henry Boot Construction Ltd v Malmaison Hotel (Manchester) Ltd* (1999)³:

"If there are two concurrent causes of delay, one of which is a Relevant Event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the Relevant Event notwithstanding the concurrent effect of the other event"

It, therefore, followed from this in a number of cases concerning concurrent delay and damages that the contractor is not entitled to recover its time related delay costs; and the Employer is deprived of liquidated damages for the period of concurrent delay.

What is actually meant by concurrent or more precisely when does it truly exist?

However, a common question asked by many parties faced with concurrent delay is what is actually meant by 'concurrent' or more precisely when does it truly exist? This very issue arose in the Commercial Court in a matter between *Saga Cruises BDF Ltd & Anor v Fincantieri SPA* (2016) EWHC 1875.

Saga are owners of a cruise ship, the Saga Sapphire, and entered into a contract with Fincantieri for dry docking,

repair and refurbishment of that ship at Fincantieri's yard in Palermo.



The completion date for the works was 17 February 2012, but this was extended by agreement of the parties until 2 March 2012. Completion was actually achieved 14 days later on 16 March 2012. The delays were caused by:

- The creation of new cabins (for which Fincantieri were responsible). These were not completed until 16 March 2012;
- The creation of a new decking system (for which Fincantieri were responsible). This was not completed until 12 March 2012;
- The weight of the lifeboats (for which Saga were responsible for arranging). This was performed between 3 and 14 March 2012
- The installation of new insulation (which was subject to a Saga change order). This was performed between 2 and 10 March 2012

In light of the delay, Saga claimed liquidated damages up to a maximum of €770,000 in accordance with the agreement.

Fincantieri contended that it had been prevented in completing the works by 2 March 2012 due to the last two causes of delay or there was concurrent delay and,

contractor caused delay.

² Scottish law permits responsibility for concurrent delay to be apportioned between the parties *City Inn Ltd v Shepherd Construction Ltd* (2010),

³ 70 Con LR 33

¹ Albeit the absence of an expressed term dealing with concurrency was dealt with in the contractor's favour in *Walter Lilly & Co Ltd v Giles Patrick Cyril Mackay and DMW Developments Ltd* [2012] EWHC 1773. The JCT contract in that matter permitted an extension of time for a relevant event regardless of any concurrent

consequently, it was not liable to pay liquidated damages.

In dealing with the concurrency argument Judge Cockrill QC stated:

"...unless there is a concurrency actually affecting the completion date as then scheduled the contractor cannot claim the benefit of it. Causation in fact must be proved based on the situation at the time as regards delay."

The court, therefore, rejected Fincantieri's argument on the premise that Saga's delays had been subsumed by Fincantieri's delays which continued until 16 March 2012.

The Judge stated

"...the importance in concurrency arguments of distinguishing between a delay which, had the 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".

Put simply, it seems there is concurrency only if both events (contractor delay and non-contractor's risk event) in fact cause delay to the completion of the works and the delaying effect of the two events must be at the same time.

The Commercial Court's approach seems to consider the start and end date of each delay event. It also appears to mirror the position stated in the Consultation Draft of the SCL Delay and Disruption Protocol 2nd Edition:

"the Employer Delay will not result in the works being completed later than would otherwise have been the case because the works were already going to be delayed by a greater period because of the Contractor Delay to Completion. Thus, the only effective cause of the Delay to Completion is the Contractor Risk Event."

This is an area of law that continues to develop. It will be interesting to see if the Technology and Construction Court follow this commercial court decision.

If either our Contractor or Subcontractor readers are encountering delays on their project, please contact us to arrange a review.

ABOUT THE AUTHOR



Scott Milner

Scott is a Chartered Quantity Surveyor and Solicitor (non-practising) and has over 25 years' professional experience and is a Member of the Royal Institution of Chartered Surveyors, and Chartered Institute of Arbitrators.

He has worked in international private practice, for major building and civil engineering contractors, international contract advice and claims consultancies, solicitors and as a commercial director and as a practicing solicitor (legal counsel) for an international engineering and decommissioning contractor.

Scott provides contractual advice; training; calculation, review and assessment of quantum; representation in ADR (having acted in excess of 130 adjudications).