

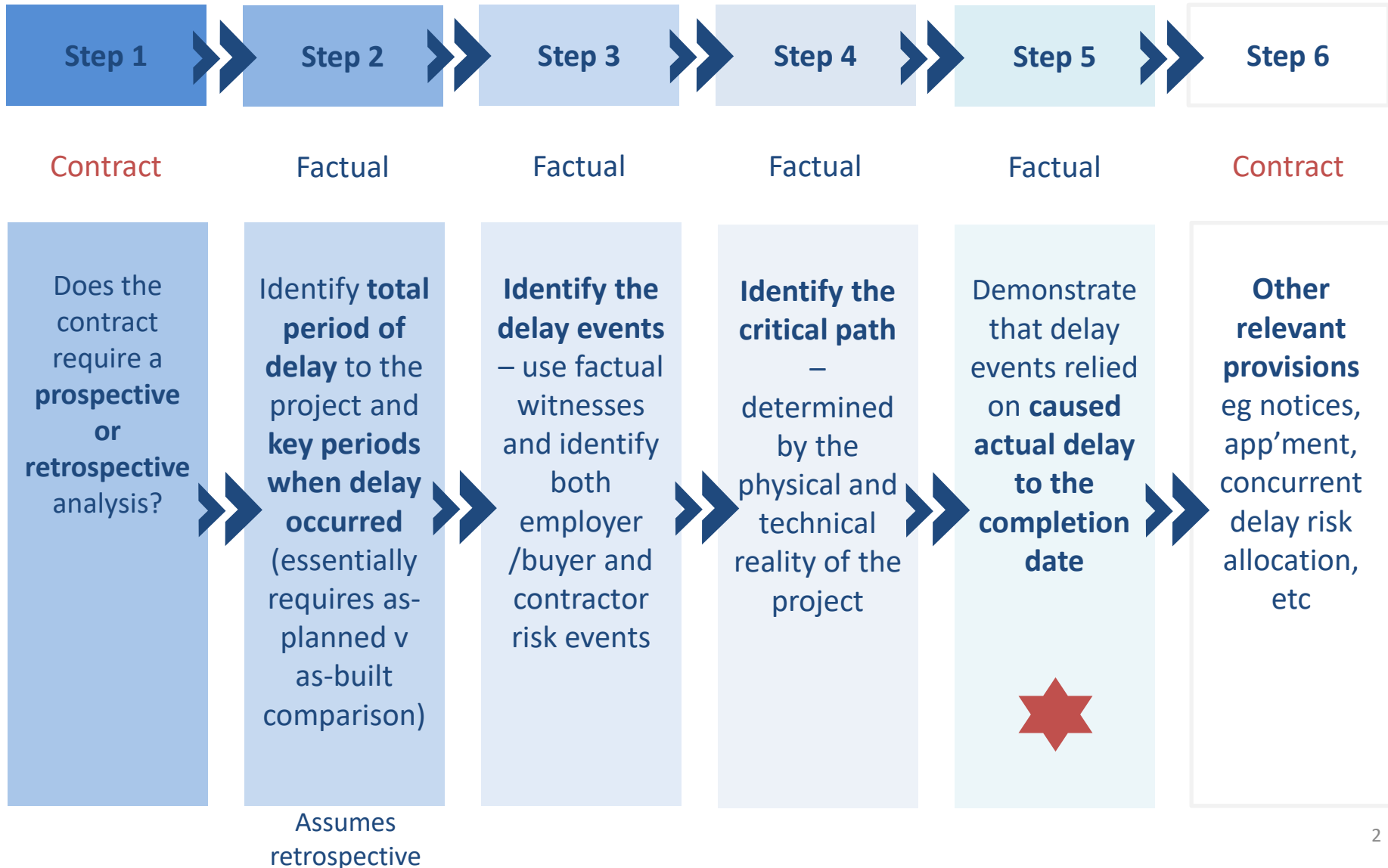
Hold the front page! An actual case on concurrent delay??

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How to prove a delay claim – summary

★ See subsequent slide





Demonstrating that delay events caused *actual delay* to the completion date

Explanation of how the delay event constrains an activity and the impact of the constraint **proves causation of delay to activity**

Repeating the process through chain of activities to completion date **proves causation of critical delay**

Delay event

CONSTRAINS

A specific work activity

which suffers specific **IMPACT**

Constraint is either:

- Physical
- Resource
- Contractor's preference

IMPACT that activity suffers:

- Delayed start
- Prolonged duration
- Both

Which **CONSTRAINS** next specific activity, which suffers specific **IMPACT**

All activities **must be on the critical path**

Continue until completion

Concurrent delay

“A period of project overrun which is caused by two or more effective causes of delay of approximately equal causative potency”

John Marrin KC (2002) 18(6)
Const LJ 436, now adopted in
multiple cases including by the
CA in *North Midland*

Causation
problem in
establishing
claim

On normal causation
principles, not possible to
pass the ‘but for’ test.
Delay would have
occurred in any event.

The obverse
problem

If ‘but for’ test dropped,
contractor recovers time-
related costs AND
employer recovers
liquidated damages –
illogical & unlikely to be
parties’ intention

Concurrent delay – time claims, prevention principle & express drafting

Time claims under the contract (for extension of time)



UK: Contractor recovers extension of time but no time-related cost: *Henry Boot v Malmaison (1999) 70 ConLR 33*



Applied in:

- *Royal Brompton v Hammond (No.7) EWCA Civ 296; 76 ConLR 148*
- *Adyard v SDMS [2011] BLR 384 (Comm)*
- *De Beers v Atos [2010] EWHC 3276*
- *Walter Lilly v Mackay [2012]*
- *Saga Cruises v Fincantieri SpA [2016] EWHC 1875 (Comm)*

Defence to liquidated damages claim based on prevention principle ★



Contractor can recover neither time nor money as act of prevention must cause (on 'but for' basis) actual delay [?]



Held in:

- *Adyard v SDMS [2011] BLR 384 (Comm)*
- *Jerram Falkus Construction Limited v Fenice Investments Incorporated (No. 4) [2011] EWHC 1935 (TCC)*
- **Not discussed in *North Midland v Cyden [2018] EWCA Civ 1744***

It is lawful to contract out of the prevention principle by providing expressly for the consequence of concurrent delay: ***North Midland in the CA***

★ Must be no applicable EOT clause



Thomas Barnes & Sons v Blackburn BC [2022] EWHC 2598

A bus station, but not as you know it...





Thomas Barnes & Sons v Blackburn BC [2022] EWHC 2598

General points

- Delay claim in which concurrent delay found on the facts; legal consequence (as set out in Keating para 9-105) that this entitled the contractor to time but not money agreed
- Contractor statements “*replete with commentary and opinion*” including comments on documents not seen by the witness at the time & comments on Council’s disclosure – taken into account when assessing credibility
- “Necessary to have firmly in mind” the fallibility of human memory and the importance of the contemporary documents as a means of getting at the truth. Balanced against reliability of documents as records and taking into account witness evidence where relevant.

Approach to delay analysis

- Wrong to attach too much importance to a close analysis of whether experts have “properly chosen” or “loyally followed” particular SCL Protocol method but do accept if method is “manifestly inappropriate” or “deviates materially” without proper explanation, will affect weight to be placed on opinions.
- Guidance in *Walter Lilly v Mackay* followed:
 - Court not compelled to choose between the experts. Causation is a factual issue for the court.
 - In ascertaining causes of delay, generally have regard to the item with the longest path to complete
 - Not necessarily the last item of work which causes the delay
 - A contemporaneous concern/complaint is irrelevant to a delay analysis if it was never agreed upon, established or implemented.



Blackburn concurrent delay

The Claim and the Facts

- **Barnes case:** Structural steel once erected required remedial works due to a deflection issue occurring in a limited area. Remedial works were employer risk and delayed the concrete topping to the PCC units, which delayed the steel framed section (SFS) enclosing the hub, which delayed the hub internal finishes. Barnes entitled to EOT for full period of the remedial works.
- **Blackburn case:** At the same time as the deflection issue remained unresolved, there was a separate (contractor culpable) delay to the roof coverings lasting 57 days, after which conceded that remedial works became operative cause of delay.
- Common ground on oral expert evidence at trial that without the roof coverings could not start the hub internal finishes.

The decision on delay at [140ff]

“Completion of the remedial works to the 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... 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... were irrelevant... because the roof coverings were on the critical path. **The plain fact is that both of the works items were on the critical path as regards the hub finishes and both were causing delay over the same period.”**



Commentary on *Blackburn*

- **Primary area of debate concerns the “definition of concurrent delay.”** When are two delays sufficiently significant that they can both be said to have caused concurrent delay to completion? Is it sufficient merely that each would have caused delay to completion in the absence of the other? Or must they both be on the critical path or of roughly equal impact on the project?
- **Said to be three schools of thought:**
 - “Traditionally popular view” (“consensus view” or “dominant cause approach”) required two delaying events to be of equal causative potency. Even events which both impact the critical path may not, on analysis, be shown to be of equal causative potency. Question of common sense.
 - Broader test (“reverse “but for” test). Would the delay event for which EOT claimed have delayed completion in the absence of the delay event for which contractor responsible. No need to ask whether of equal causative potency.
 - Narrower test focusing on point in time at which events occur (the “first in time approach”). Where an existing event has caused delay to completion, subsequent delay events are treated as not being a cause of delay to completion at all unless and to the extent that they increase the delay already caused by the existing event.
- **Support may be found to varying degrees for each of the above approaches in the cases, but recent Commercial Court cases, as well as the 2nd Edition of the SCL Protocol, have favoured the “first-in-time” approach.**
- **Blackburn a significant decision of the TCC. “Although not directly addressed in the judgment, the Court’s reasoning as to concurrent delay appears contrary to the “first-in-time approach favoured by recent Commercial Court decisions...”**



Adyard Abu Dhabi v SDMS [2011] EWHC 848 (Comm)

The Claim and the Facts

- Sea Trials dates 30 Sep and 30 November 2009 – common ground not met and Adyard was in extensive culpable delay. By mid-2010 ships only 50% complete.
- Adyard case: design changes imposed/instructed by the UK MCA: (a) change from hinged to sliding watertight doors at certain bulkheads – instructed **15 July 2009** and (b) watertight valves at one frame – instructed **June 2009**. Both **long lead time items – several months to procure**.
- Adyard's case was that **“causation is established by showing that the duration of the relevant event or act of prevention extended over the original sea trials date”**
- Disclosure showed that Adyard had carried out internal investigations which concluded delay due to multiple internal failures

The decision on delay

- Adyard approach wrong:
 - As a matter of principle – involves assertion there is no need to prove **causation in fact**. Essential to prove event in question causes **actual delay to the progress of the works**.
 - As a matter of authority – “gross entitlement” approach rejected by Colman J in *Balfour Beatty*.
 - As a matter of common sense - example.
- **Example:** Contractor many months in culpable delay. Employer decides a week before the (original unextended) completion date that he wishes a wall to be painted blue instead of contractually required red
- At the time of the instruction, due to contractor delays, wall not even built
- Paint takes 5 weeks to procure but will still arrive before needed by contractor to progress
- No actual delay caused



Adyard: discussion of *Malmaison*

Dyson J in *Malmaison* at [13]

- “... if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then... the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour.”

Hamblen J in *Adyard* at [277]

- “It is to be noted that this example involves a relevant event which caused a period of **actual delay to the progress of the works** — no work could be done for a week due to the weather. If that is established then the contractor is entitled to his extension of time even if there is another concurrent cause of that same delay.”



Adyard: discussion of *Royal Brompton*

HHJ Seymour in *Royal Brompton* at [31]

“[This] does not mean, in my judgment, a situation in which, work already being delayed... because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a relevant event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, **by reason of the existing delay, made no difference.** In such a situation although there is a relevant event, ‘the completion of the works is [not] likely to be delayed thereby beyond the completion date.’

The relevant event simply has no effect upon the completion date. This situation obviously needs to be **distinguished from a situation** in which... the works are proceeding in a regular fashion and on programme, **when two things happen, either of which, had it happened on its own, would have caused delay, and one is a relevant event, while the other is not.** In such circumstances there is **real concurrency of causes of the delay.**”

Hamblen J in *Adyard* at [279]

“This makes it clear that there is only concurrency if both events in fact cause delay to the progress of the works **and the delaying effect of the two events is felt at the same time.** In HHJ Seymour QC’s first example, the relevant event **did not in fact cause any delay to the progress of the works.** His first example is consistent with Colman J’s comments as to the situation in which a variation is instructed during a period of culpable delay at pages 30 and 31 of the report in *Balfour Beatty.*”

Balfour: “If the variation works can reasonably be conducted simultaneously with the original works **without interfering with their progress** and are unlikely to prolong practical completion, the architect might... conclude no [EOT].”



Bluewater Energy Services v Mercon [2014] EWHC 2132 (TCC)

The Claim and the Facts

Contract included series of milestone dates which attracted liquidated damages if missed, including milestones up to C9

- **Milestone C6** completion of structure “Ready for Load-Out”: 14 Sep 2008
- **Milestone C9** “Load-Out”: 15 Sep 2008

Bluewater responsible for providing barge required for load out. On **17 Jan 2008**, Bluewater informs Mercon of decision to **defer load out** & not to provide barge until **1 June 2009**. **Termination on 3 Feb 2009**.

Mercon case: **“the operative and only cause of the delay to C9 was [the] decision that no vessel would be provided for final load out until June 2009... Mercon submits that Milestone C9 would not be achieved until June 2009 through no fault of Mercon and so any delay to Milestone C6 would have no causative effect.”**

The decision on delay at [310] – [312]

“...Milestone C9 was dependent on the completion of Milestone C6. In order to load out the [structure] under Milestone C9 it was necessary for the [structure] to be “ready for Load-Out” under Milestone C6. **Once there was a [structure] ready for load out then it would only be at that stage that an instruction to store the [structure] [pending vessel provision] would cause a delay to... load out... under Milestone C9.**

Equally in the absence of a vessel to load out there would **then** be a delay to load out. However, **unless and until there was a [structure] ready for load out there would be no delay to... Milestone C9 caused by the absence of a load out vessel or the need for storage in the meantime.** Until the time had come for load out by having a [structure], any operations which might then affect load out... would not be an operative cause of delay... whilst they may be **predicted to cause delay to Milestone C9 they would not actually do so until the time when it was possible to commence Milestone C9 had arrived... it was only when the need for storage or the absence of a vessel impacted can it be said that delay is caused.”**

THANK YOU

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