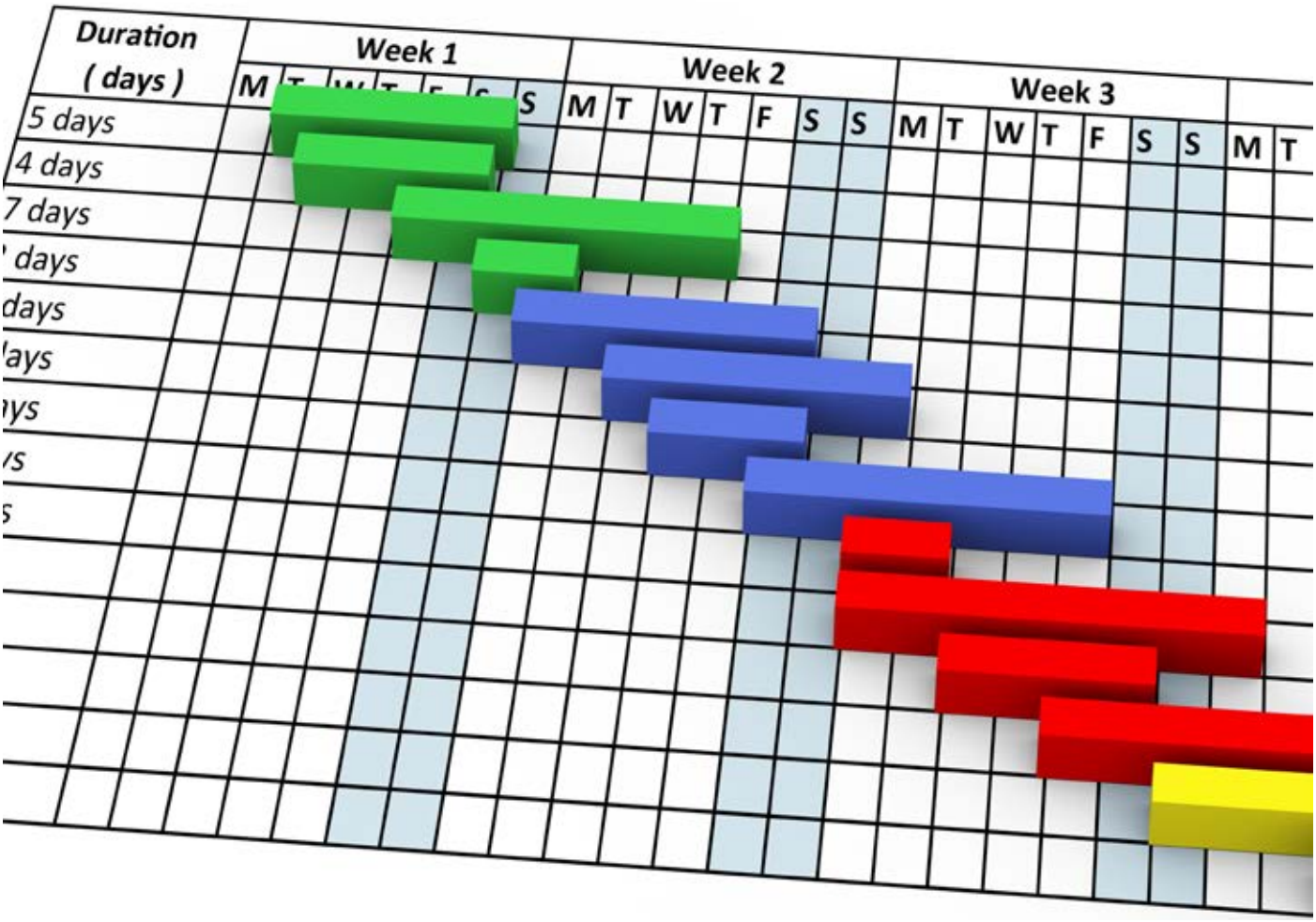

Concurrency in the United Arab Emirates (UAE)

CHRISTIAN MERRETT – DIRECTOR, DRIVER TRETT UAE EXPLORES THE CHALLENGES OF CONCURRENCY, ITS APPLICATION TO UK DISPUTES AND THE POTENTIAL PITFALLS FOR THE UAE CONSTRUCTION INDUSTRY.

I frequently find myself meeting clients who are keen to brief me, profess their inner most concerns, and share their opinions in respect to the delay incurred on their projects.

Since working in the Middle East, and particularly in the UAE, I increasingly see clients who are keen to suggest that I, (the delay analyst) should focus on dealing with the issues of concurrent delay. When asked to discuss this subject, my immediate reaction is for my heart to sink. But my reticence on concurrency may be forgiven, as it is not necessarily the problem in identifying concurrent delay (although as we know can be interpreted differently by different delay analysts) but more a concern as to the risks associated with it and how, and in what way, the client feels they will benefit? They may be venturing into unchartered waters!

The subject of concurrent delay frequently arises under the laws of England and Wales, and Scotland. The perpetuating debate of concurrent delay still leaves the academics, lawyers, consultants, and even the judiciary arguing continually as to the correct approach to this issue.

As with all texts regarding concurrent delay, I feel it is fitting to start with a brief definition. In this instance, I refer to the definition provided by John Marrin QC, in which he states:

" ... the expression 'concurrent delay' is used to denote a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency."[1]

So why is it we are so concerned about concurrent delay? To start at the very beginning, it is important to look at the established legal doctrine of the 'prevention principle'. Originally from the tort and →

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To place concurrent delay into some perspective I take a starting point from the UK, in which the issue of concurrent delay has undergone various challenges by the judiciary and the legal profession.

The orthodox approach

Resulting from the conclusion of the Malmaison[3] case, and then soon followed by the 2012 case of Walter Lilly[4], the approach to dealing with concurrent delay by considering 'relevant events' was generally considered as the best approach so far.

Dyson J presiding over the Malmaison case summarised that, in cases of concurrent delay the contractor is entitled to an extension of time (which acts as a defence to the employer's claim for liquidated damages) but is not entitled to recover any time-related costs. He further stated:

"Thus, to take a simple example, 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 (non-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 if he considers it fair and reasonable to do so, 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."

This was also followed and refined in subsequent case law from Royal Brompton Hospital National Health Trust v Hammond and Ors[5], Adyard Abu Dhabi v SD Marine Services[6], and Walter Lilly & Co Ltd v Mackay[4].

However, just as we thought it was safe to get back into the water along came the 'apportionment approach' to the assessment of concurrent delay.

Further to that of Malmaison, the 2007 Scottish case of City Inn[7] took an entirely different approach in the assessment of concurrent delay and divided opinions between England and Scotland. It allocated the responsibility for concurrent delay by applying what some consider to be a 'fair and reasonable' approach of the culpability of delay. This was achieved by assessing the relative causative potency and the significance of the competing cause(s) of delay.

In many ways, apportionment is considered as contributory negligence in a contract. The apportionment approach has also attracted judicial criticism[6] who claim that it opposes the long established legal doctrine of the 'prevention principle'[8]. And so, the debate continues.

To bring this to up to date, the shipping case of Saga Cruises BDF Limited v Fincantieri SPA [2016] deals with delays that arose from contractual responsibilities for both the ship owner Saga (claimant) and the shipyard Fincantieri (respondent). With reliance on cases such as Malmaison and Adyard, the judge was mindful to distinguish that:

"to distinguish between (on the one hand) a delay which, had the contractor not already been delayed would have caused delay but, because of an existing delay, made no difference, and (on the other hand) a delay that is actually caused by the event relied on"[2].

The judge in Saga went further to quote from paragraphs 279 and 282 of Adyard:

"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... The act relied upon *must actually prevent the contractor from carrying out the works* within the contract period, or, in other words, must cause some delay." *[emphasis added].*

The court therefore held that:

- Events for which Fincantieri was responsible had delayed the completion date. This gave Saga a prima facie entitlement to liquidated damages.
- While a number of events for which Saga was responsible had occurred within that period which *might have been* capable of causing delay, they *did not operate to "cancel out" the delays Fincantieri caused. [emphasis added].*
- Fincantieri was not entitled to rely on delays for which Saga was responsible as stopping time running under the liquidated damages clause. Saga was entitled to liquidated damages.

It is interesting to see that the judge provided sound reasoning that they felt that the delaying events that the claimant was responsible for, were supervening[9] events that occurred against the existing delaying events by the respondent and was therefore not a case of true concurrent delay.

contract, this has a long and significant history in the UK and the Commonwealth. It basically states that a party to a contract could not benefit from a delay which a party had caused itself.

This was examined by Lord Denning MR in Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board. Whereby Lord Denning stated:

" ... It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if one party by his conduct – it may be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for the non-completion in that time."

> ...a party to a contract could not benefit from a delay which a party had caused itself.

"It is to avoid the consequences of the prevention principle that virtually all sophisticated construction contracts include an extension of time mechanism."[2]

Meanwhile, back in the UAE employers grow increasingly excited about the prospect of defeating the opposing contractor by relying on concurrent delay. But important and more fundamental questions remain unanswered.

- How much has concurrent delay been tested in the UAE or the Middle East?
- Does the UAE civil code acknowledge the principle of concurrent delay or, for that matter, the prevention principle?
- Are employers and contractors familiar with aspects of concurrent delay and how it can be interpreted?
- Would the current English or Scottish law be influential in assisting tribunals and the courts in ruling on issues of concurrent delay?

The above are typical questions that I have been unable to seek clear answers upon, regardless of whom I speak to or carry out research, therefore my options are reduced to rely on what little does exist on the subject.

Anecdotal evidence suggests that some foreign lawyers attempt to 'shoehorn' their legal principles into the UAE legal system. Concepts such as 'concurrent delay', 'extension of time', 'prevention principle' and 'time at large' are not expressly provided for in UAE law. However, the fact that they don't exist should not be of great concern as other provisions could provide a similar result[10].

However, there may be some glimmer of hope; whilst noting the contents of Article 246 relative to the doctrine of Good Faith I look towards Articles 290 and 291 of the UAE civil code which state: Article 290

"it shall be permissible for the judge to reduce the level by which an act has to be made good or to order that it need not be made good if the person suffering harm participated by his own act in bringing about or aggravating the damage". Article 291

"If a number of persons are responsible for a harmful act, each of them shall

"Today we are going to decide who to blame."

be liable in proportion to his share in it, and the judge may make an order against them in equal shares or by way of joint or several liability".

Does the above therefore infer that there is potential to apply apportionment? One possible interpretation is that it may allow a judge (or arbitrator) to 'apportion' liability for concurrent delay. Could this resemble the approach taken in the City Inn case?

Contractors in the UAE are frequently seeing the introduction of what are termed as 'anti-Malmaison clauses'. These clauses have been cunningly developed to defeat any claim of concurrent delay by the contractor, by extinguishing any entitlement for time or money in the instance of concurrent delay. In my experience the existence of these clauses is making contractors 'sit-up and think'!

Does the recent growth of the 'anti-Malmaison' clause just demonstrate an overreaction to something that appears to be relatively untested in this part of the world? Or, is it done in the anticipation that the floodgates to concurrent delay cases will change the face of construction claims in the UAE?

In my opinion, the issue of concurrent delay is far from settled, even when it is still being tested in the UK. So, what is the future looking like for places such as the UAE? Will they be influenced by judgments based on assessing relevant events or will they adopt the apportionment approach?

Who knows? But it will very be interesting to see what the future holds for the UAE in respect to concurrent delay to see if they suffer the growing pains that the UK are experiencing. ■

[1] John Marrin QC - 'Concurrent Delay', SCL paper 100 (February 2002)

[2] Harry Smith, Concurrent delay – the "Saga" continues, 22 August, 2016, Construction Blog, Practical Law, http://constructionblog.practicallaw.com/concurrent-delay-the-saga-continues/

[3] Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd 70 Con. L.R. 32(QBD(TCC))

[4] Walter Lilly & Co Ltd v Mackay [2012] EWHC 1773 (TCC); [2012] B.L.R 503 (QBD(TCC))

[5] [2001] EWCA CIV. 2006

[6] Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)

[7] City Inn Ltd v Shepherd Construction Ltd [2007] CSOH 190; [2008] B.L.R. 269 (OH)

[8] The meaning of the "prevention principle" arising from the established common law principle that a party to a contract could not benefit from a delay in which a party had caused itself. – Early case of Home v Guppy (1838) 2 M & W 387.

[9] Supervening - occur as an interruption or change to an existing situation.

[10] Dealing with concurrency in construction delay claims, Al Tamimi & Co. 2014

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