

CONCURRENT DELAY REVISITED

ADYARD ABU DHABI -V- SD MARINE SERVICES

In 2010 we saw the landmark decision in *City Inn v Shepherd* which was much commented upon, mainly because the judges apportioned delays for extensions of time. It was suggested that although this was a Scottish case it would be used as guidance by the English courts.

However many considered that the position in *City Inn v Shepherd* was not the position in English law and a recent case supports that view.

Adyard Abu Dhabi v SD Marine Services [2011] was heard in the Commercial Courts, not the TCC, however the judgement is still, of course, of great importance. The case concerned the procurement of ships and centred around the method of measurement of delay where both buyer and contractor might have caused delays. The situation where both contracting parties have potentially caused a delay is all too familiar and therefore highly relevant in the construction industry.

The contractor claimed that variations to the contract given shortly before the original contract completion date would have caused delay.

It was claimed that further time was required to complete the variations and that this resulted in a completion date which was beyond the original contractual completion date. In simple terms the contractor claimed that it was entitled to the difference between the original and the actual completion date because of the variations.

The most appropriate method of establishing entitlement to delays is to consider as a matter of fact whether or not the alleged delays did affect the completion date. This means that the actual progress of the works has to be taken into account and the delaying event must affect completion which ordinarily will mean that it should fall on the critical path.

Adyard argued that its approach, that is by just considering the variations (design changes) in isolation was correct regardless of what other events might have been delaying the works and regardless of whether the variation would have any impact on actual progress. The judge disagreed saying that it was wrong both in principle, was not in accord with the authorities and was contra to common sense. The judge also said that *City Inn* did not reflect English law.

The judge found that as a matter of fact the project was already in critical delay well before the design changes occurred and that *Adyard* was not entitled to additional time simply because the events did not actually cause delay. He said that concurrent delay is "*a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency*".

This case again illustrates the difficulties with concurrent delay and follows the case of *DeBeers v Atos* [2010] which also supports the position that apportionment of concurrent delay is not appropriate in English law.

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On a practical point planned programmes are key evidence in delay claims but if no programmes are available to establish the planned completion date at the time of the delay then the likely completion date, with and without the effect of the delay considered, would have to be assessed by other means. This would involve consideration of the outstanding amount work and an analysis of contemporaneous records.

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