



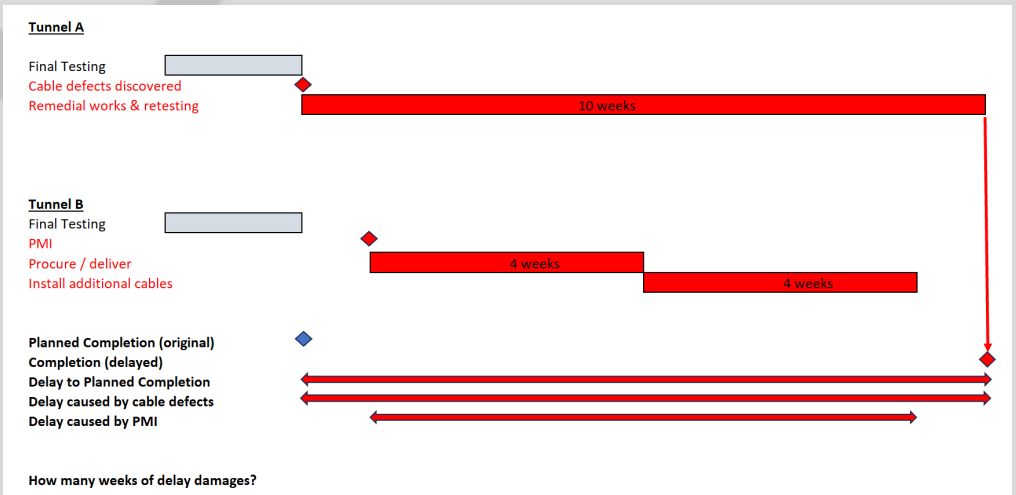
Concurrent delay and NEC ECC

Northern NEC People Conference
7 November 2023

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Concurrent delay and NEC ECC



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Concurrent delay and NEC ECC

Tunnel A
 Final Testing
 Cable defects discovered
 Remedial works & retesting
 10 weeks

Tunnel B
 Final Testing
 PMI
 Procure / deliver
 Install additional cables
 4 weeks
 4 weeks

Planned Completion (original)
Completion (delayed)
 Delay to Planned Completion
 Delay caused by cable defects
 Delay caused by PMI

How many weeks of delay damages?

What would be the fairer outcome:

- A. Contractor pays 10 weeks of liquidated damages?
- B. Contractor pays 2 weeks of liquidated damages?

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Concurrent delay and NEC ECC

What is concurrent delay?

Type 1: Events occur simultaneously

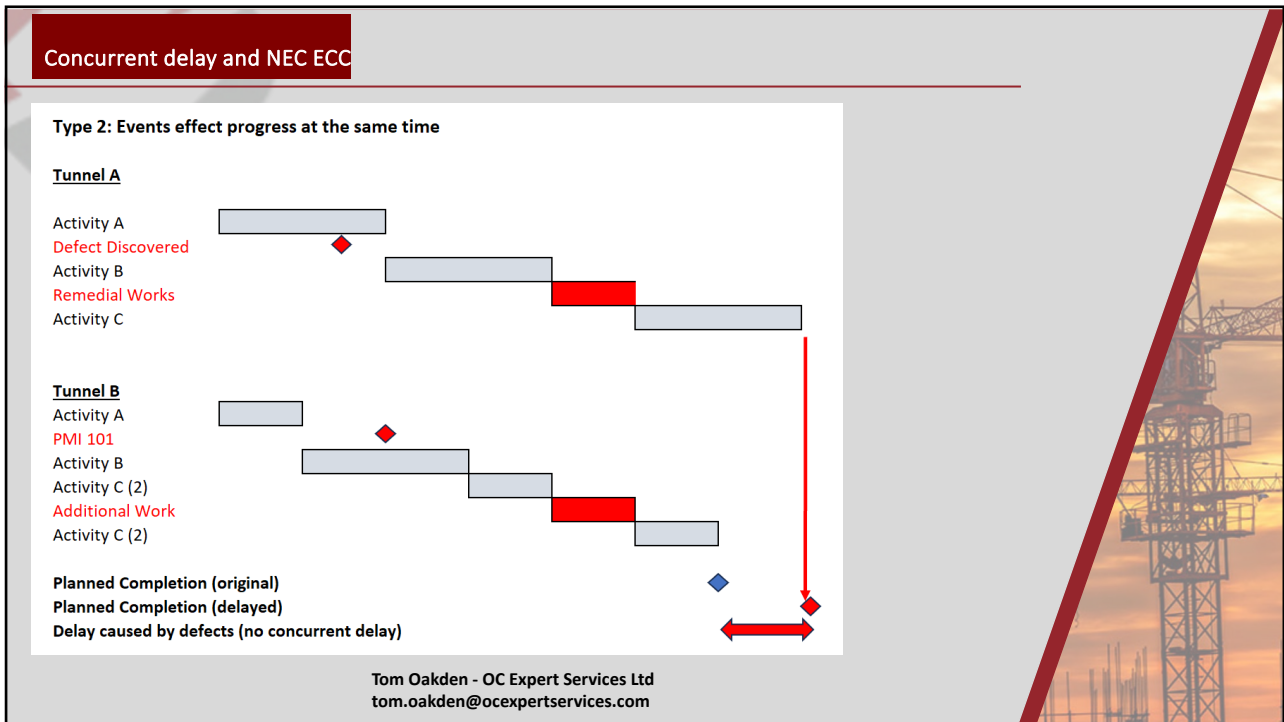
Tunnel A
 Activity A
 Defect Discovered
 Activity B
 Activity C

Tunnel B
 Activity A
 PMI 101
 Activity B
 Activity C

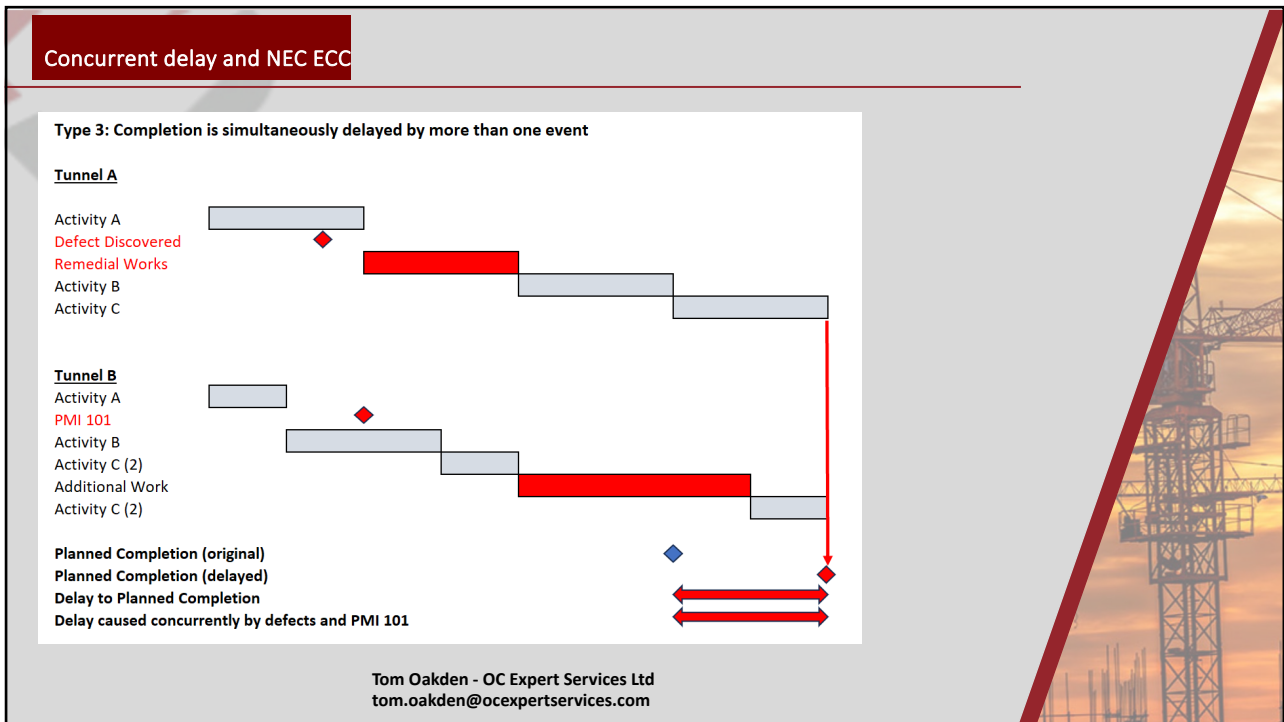
Planned Completion
 No delay, therefore no concurrent delay

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Concurrent delay and NEC ECC

Concurrent Causation

Financial Conduct Authority v Arch Insurance (UK) Ltd and Others (2021)

Business Insurance policies – business interruption losses caused by Covid

Policies covered risk of disease outbreak within 25 mile radius of business

Insurers : *“The basic, fundamental, threshold test for any factual causation inquiry is the ‘but for’ test. X cannot be a cause of Y if Y would in any event have occurred irrespective of - but for - X.”*

‘Concurrent’ appears 37 times in the judgement. All covid cases were concurrent cause of business interruption and therefore claims against the policies were valid

There is no requirement for events to occur at the same time for them to be concurrent causes of a loss – e.g. boat sinks because of build defects and rough sea conditions, a death is caused by a combination of a road accident & medical negligence etc etc.

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Prevention Principle

A party may not enforce a contractual obligation against the other party where it has prevented the other party from performing that obligation

Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board (1973)

Lord Denning:

“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 non-completion in that time.”

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Prevention Principle

Wells v Army & Navy Cooperative Society (1902)

The builder “*did not get on as fast as he might have got on*”
 But the delays by the Employer
 “*were such as even in the absence of the other causes of delay would have prevented completion in due time*”.

“*In law, I wholly deny the proposition Mr Bray put forward, which was really in effect: “Never mind how much delay there may be caused by the conduct of the building owner, the builder will not be relieved from penalties if he too has been guilty of delay in the execution of the works”. I do not accept that proposition in law*”.

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Concurrent delay and NEC ECC

The rise of the first in time approach

Balfour Beatty Ltd v Chestermount Properties Ltd (1993)




Contract Completion Date
 Balfour Beatty delay to shell & core delays (9 months)
 Variation to add fit out works
 BB carry out fit out works (8 months)
 Completion
 Delay to completion

Chestermount:
 Award 8 months EOT and deducted £3.84m LADs for the remaining 9 months

Balfour Beatty:
 Time at large, or alternatively 17 months EOT (date of variation + 8 months)

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Concurrent delay and NEC ECC

The rise of the first in time approach

Balfour Beatty Ltd v Chestermount Properties Ltd (1993)

"...his [the Architect's] objective must be the same: to assess whether any of the relevant events has caused delay to the progress of the Works and, if so, how much. He must then apply the result of his assessment of the amount of delay caused by the relevant event by extending the contract period for completion of the works by a like amount and this he does by means of postponing the completion date"

The 'dot on' / 'net approach' principle is preferred over the 'gross basis' approach

Would the variation have been issued earlier but for BB delay?

Should the dotting on approach apply when the Employer's delay is independent to the contractor's progress?

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Concurrent delay and NEC ECC

Dominant cause approach to concurrent delay

Keating in the 1990s

"If there are two causes, one the contractual responsibility of the Defendant and the other the contractual responsibility of the Plaintiff, the Plaintiff succeeds if he establishes that the cause for which the Defendant is responsible is the effective, dominant cause. Which cause is dominant is a question of fact, which is not solved by the mere point of order in time, but is to be decided by applying common sense standards"

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Concurrent delay and NEC ECC

Malmaison approach to concurrent delay

Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999)

"...it is agreed that 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. 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 (not a relevant event), and if the failure to work during that week is a 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."

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Malmaison approach to concurrent delay

Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999)

*"It seems to me that it is a question of fact in any given case whether a relevant event has caused or is likely to cause **delay to the works beyond the completion date in the sense described by Colman J in the Balfour Beatty case**. In the present case, the respondent has what Miss O'Farrell claims both a negative and positive defence to the EOT/1 claim. The negative defence amounts to saying that the variations and later information etc relied on by the claimant did not cause any delay because the activities were **not on the critical path**, and on that account did not cause delay. The positive defence is that the true cause of the delay was other matters, which were not relevant events, and for which the respondent was responsible...In my judgement it is incorrect to say that, as a matter of construction of clause 25, when deciding whether a relevant event is likely to cause or has caused delay, the architect may not consider the impact on progress and completion of other events"*

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Concurrent delay and NEC ECC

Malmaison approach – narrowed - ‘first in time’

Royal Brompton Hospital NHS Trust v Hammond (2000)

“However, it is, I think, necessary to be clear what one means by events operating concurrently. It does not mean, in my judgement, a situation in which, work already being delayed, let it be supposed, 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 on the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, 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 a real concurrency case of delay”.

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Concurrent delay and NEC ECC

Malmaison approach – narrowed - ‘true concurrent delay’

SCL Delay & Disruption Protocol (2nd Edition) 2017

*“True concurrent delay is the **occurrence of two or more delay events at the same time**, one an Employer Risk Event, the other a Contractor Risk Event, **and the effects of which are felt at the same time**. For concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event must be an **effective cause of Delay to Completion (i.e. the delays must both affect the critical path)**. Where Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor’s concurrent delay should not reduce any EOT due.”*

Type 1 + Type 2 + Type 3?

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Concurrent delay and NEC ECC

“Malmaison approach – narrowed - ‘true concurrent delay’”

SCL Delay & Disruption Protocol (2nd Edition) 2017

“a more common usage of the term ‘concurrent delay’ concerns the situation where two or more delay events arise at different times, but the effects of them are felt at the same time.”

The protocol provides an example. Type 3, not dissimilar in principle to the cable tunnel

“from a legal perspective there are two competing views as to whether an Employer Delay is an effective cause of Delay to Completion where this occurs after the commencement of the Contractor Delay to Completion.”

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Concurrent delay and NEC ECC

“True Concurrent Delay”

SCL Delay & Disruption Protocol (2nd Edition) 2017

SCL recommends no EOT (therefore LDs apply) when the Employer delay occurs after the Contractor delay so that the Employer delay causes no further critical delay to completion

SCL recommendation is based on recent lower court decisions prevailing over older Court of Appeal decisions because critical path delay analysis did not exist when the older cases were decided

The Protocol cautions that this recommendation would have to be re-considered were an appeal court to take a different approach to this issue

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Concurrent delay and NEC ECC

Is the SCL “True Concurrent Delay” correct?

North Midland Building Ltd v Cyden Homes (2018)

Anti-Concurrency Clause:

“any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account”

Court of Appeal adopted the following definition for concurrent delay:

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

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Concurrent delay and NEC ECC

Is the SCL “True Concurrent Delay” correct?

John Marrin KC paper “Concurrent Delay” SCL paper 100 (February 2002)

“[t]his paper is not concerned with the point in time at which the event which gives rise to a competing cause of delay occurs.”

What is “causative potency”

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

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Concurrent delay and NEC ECC

Keating on Construction Contracts 11th Edition (2021)

Meaning of concurrency

“Concurrent delay has been defined as a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency. The phrase “causative potency” is intended to refer to the dominance of the event as the cause of delay. However, the SCL Delay and Disruption Protocol (2nd edn) avoids the potentially vexed question of “causative potency” or dominance in its definition and instead considers that: “For concurrent delay to exist, each [event] must be an effective cause of Delay to Completion (i.e. the delays must both affect the critical path).” There is only true concurrency in this sense where both events cause delay to the progress of the works and the delaying effect of the two events is felt at the same time and each is critical to completion.”

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Concurrent delay and NEC ECC

Keating on Construction Contracts 11th Edition (2021)

Concurrent delay events and extension of time entitlement

*“It is now generally accepted that under the Standard Form of Building Contract and similar contracts, a contractor is entitled to an extension of time where delay is caused by matters falling within the clause, notwithstanding the matter relied upon by the contractor is not the sole or dominant cause of delay, provided only that it is an **effective** cause of delay. ... In De Beers UK Ltd v Atos Origin IT Services UK Ltd it was said that the contractor: “... is entitled to have the time within which to complete which the contract allows or which the employer’s conduct has made reasonably necessary...” notwithstanding that the contractor would have been unable to complete absent any breaches of contract on the part of the employer. ...”*

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Concurrent delay and NEC ECC

Keating on Construction Contracts 11th Edition (2021)

Associated loss and expense

“As summarised above, where there are concurrent causes of delay (one the responsibility of the contractor and the other of the employer) the contractor may be entitled to an extension of time. In contrast, a contractor will normally not be entitled to receive payment for loss and expense in respect of a relevant matter in such circumstances. The fact that the works would have been delayed in any event by the concurrent delay event which is the contractor’s responsibility probably does not deprive it of an extension of time entitlement. However, the fact that the “but for” test of causation cannot be satisfied in these circumstances is normally taken to deprive the contractor of a loss and expense claim in respect of the relevant matter ...”

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Concurrent delay and NEC ECC

Is the SCL “True Concurrent Delay” correct?

Thomas Barnes & Sons Plc (in administration) v Blackburn with Darwen Borough Council (2022)

2 competing delays

Employer delay: design defect to steel frame systems (SFS)

Contractor delay: Roof coverings

SFS remedials & roof coverings both needed to be carried out before internal finishes could commence

Expert evidence of Employer was that the roof covering delays impacted critical path before SFS remedials

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Concurrent delay and NEC ECC

Is the SCL “True Concurrent Delay” correct?

[Thomas Barnes & Sons Plc \(in administration\) v Blackburn with Darwen Borough Council \(2022\)](#)

“If this analysis was good, then it might be said that the two causes were not concurrent.”

“Whilst I am prepared to accept this evidence from a theoretical delay analysis viewpoint..... it does not seem to me to be a sufficient answer to the point on causation ... Even if there had been no delay to the roof coverings the hub finishes, which it is agreed were on the critical path, could not have started earlier because of the delay to the remedial works to the hub structural steelwork ...It follows on an application of established principles as noted above that the claimant is entitled to an EOT for this period of time. It follows in my judgment that the claimant is entitled to an EOT of 119 days However, it also follows that the claimant is only entitled to recover for prolongation for the lesser period of 27 days net of the concurrent delay due to the steel frame deflection..”

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Concurrent delay and NEC ECC

Is the SCL “True Concurrent Delay” correct?

[Thomas Barnes & Sons Plc \(in administration\) v Blackburn with Darwen Borough Council \(2022\)](#)

“Even if there had been no delay to the roof coverings the hub finishes, which it is agreed were on the critical path, could not have started earlier because of the delay to the remedial works to the hub structural steelwork”

*Similarity to Wells v Army & Navy Co-operative Society (1902) where delays by the Employer “**were such as even in the absence of the other causes of delay would have prevented completion in due time**”.*

The ‘reverse but for test’: But for the contractor delay would the works have completed earlier

If SCL Protocol recommended ‘true’ concurrency / first in time approach had been followed, the EOT decided by the court would have been 27 days, considerably less than 119 days

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Concurrent delay and NEC ECC

NEC ECC

Clause 63.1

“The change to the Prices is assessed as the effect of the compensation event upon

- the actual Defined Cost of the work done by the dividing date,*
- the forecast Defined Cost of the work not done by the dividing date and*
- the resulting fee.*

For a compensation event that arises from the Project Manager or the Supervisor giving an instruction or notification, issuing a certificate or changing an earlier decision, the dividing date is the date of that communication.

For other compensation event, the dividing date is the date of the notification of the compensation event.”

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Concurrent delay and NEC ECC

NEC ECC

Clause 63.5

“A delay to the Completion Date is assessed as the length of time that, due to the compensation event, planned Completion is later than planned Completion as shown on the Accepted Programme current at the dividing date.

A delay to a Key Date is assessed as the length of time that, due to the compensation event, the planned date when the Condition stated for a Key Date will be met is later than the date shown on the Accepted Programme current at the dividing date.

The assessment takes into account

- any delay caused by the compensation event already in the Accepted Programme and*
- events which have happened between the date of the Accepted Programme and the dividing date.”*

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Concurrent delay and NEC ECC

NEC ECC

Scenario 1: No contractor delay between last Accepted Programme and dividing date

NEC ECC: Accepted Programme

Tunnel A
Activity A
Activity B
Activity C

Tunnel B
Activity A
Activity B
Activity C

Planned Completion
Completion Date

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Concurrent delay and NEC ECC

NEC ECC

Scenario 1: No contractor delay between last Accepted Programme and dividing date

Step 1: Update Accepted Programme so current at the dividing date

dividing date

Tunnel A
Activity A
Activity B
Activity C

Tunnel B
Activity A
PMI 101
Activity B
Activity C

Planned Completion (original)
Planned Completion at the dividing date

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Concurrent delay and NEC ECC

NEC ECC

Scenario 1: No contractor delay between last Accepted Programme and dividing date

Step 2: Assess delay to planned Completion due to the Compensation Event

Tunnel A
Activity A
Activity B
Activity C

Tunnel B
Activity A
PMI 101
Activity B
Activity C (2)
Additional Work
Activity C (2)

dividing date

Planned Completion (original)
Planned Completion at the dividing date
Planned Completion due to the Compensation Event
Delay caused by the Compensation Event
Completion Date (new)

NEC4 ECC - Practice Note 1.1 "The objective is to assess the effect due only to the compensation event and not due to other events."

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Concurrent delay and NEC ECC

NEC ECC: A compensation event and a Contractor delay event both cause concurrent delay to completion, but the Contractor delay event occurs on or after the dividing date

Delay is assessed as if the Contractor delay event had not occurred. This is broadly the same result as standard approach from Malmaison etc.

The change to the prices is assessed as if the Contractor delay event had not occurred. This is more favourable to Contractor than the standard approach, where financial recovery is subject to satisfying the "but for test".

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Concurrent delay and NEC ECC

NEC ECC

Scenario 2: Contractor delay occurs before dividing date (assume PMI issued one week later than previous illustration)

NEC ECC: Accepted Programme

Tunnel A
 Activity A
 Activity B
 Activity C

Tunnel B
 Activity A
 Activity B
 Activity C

Planned Completion
 Completion Date

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Concurrent delay and NEC ECC

NEC ECC

Scenario 2: Contractor delay occurs before dividing date (assume PMI issued one week later than previous illustration)

Step 1: Update Accepted Programme so current at the dividing date

dividing date

Tunnel A
 Activity A
 Defect Discovered
 Remedial Works
 Activity B
 Activity C

Tunnel B
 Activity A
 PMI 101
 Activity B
 Activity C

Planned Completion (original)
 Planned Completion at the dividing date
 Delay caused by defects
 Completion Date
 Liability to Delay Damages

NEC ECC Clause 63.5 "The assessment takes into account...events which have happened between the date of the Accepted Programme and the dividing date"

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Concurrent delay and NEC ECC

NEC ECC

Scenario 2: Contractor delay occurs before dividing date (assume PMI issued one week later than previous illustration)

Step 2: Assess delay to planned Completion due to the Compensation Event

Tunnel A
 Activity A
 Defect Discovered Remedial Works
 Activity B
 Activity C

Tunnel B
 Activity A
 PMI 101
 Activity B
 Additional Work
 Activity C (2)

Planned Completion (original)
 Planned Completion at the dividing date
 Planned Completion due to the Compensation Event
 Delay caused by the Compensation Event
 Completion Date
 Liability to Delay Damages

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Concurrent delay and NEC ECC

NEC ECC: A compensation event and a Contractor delay event both cause concurrent delay to completion, but the Contractor delay event occurs before the dividing date

Delay is assessed only for the further critical delay to planned completion caused by the compensation event. This may be less favourable to the Contractor compared to the standard approach if the reverse but for test as per *Barnes v Blackburn* were applied (rather than the 'true' concurrency/ first in time / SCL recommended approach).

The Contractor can mitigate this risk by (a) not causing delay (obviously) and (b) by notifying compensation events as soon as it possibly can.

The change to the prices will take into account the Contractor delay. This is broadly the same as the standard approach, where financial recovery is subject to satisfying the "but for test".

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Concurrent delay and NEC ECC

NEC ECC: A compensation event and a Contractor delay event both cause concurrent delay to completion, and they both occur before the dividing date

Delay is assessed as if the Contractor delay event had not occurred. This is broadly the same result as standard approach from Malmaison etc.

The change to the prices will take into account the Contractor delay. This is broadly the same as the standard approach, where financial recovery is subject to satisfying the “but for test”.

It is in the Contractor’s commercial interest to notify compensation events as early as possible to increase likelihood of dividing date occurring before any delay for which it is responsible.

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THANK YOU

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