

Delay and quantum - practical tips

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Issues:

- Does the event fall within the contractual grounds?
- Delay analysis
- Causation
- Concurrent delay

Typical grounds for an extension of time:

- Employer instruction
- Weather/ground risk
- Possession of the site

- Exercise by government of statutory power affecting the progress of the works
- Force majeure
- “any impediment, prevention or default” by Employer or similar wording

Delay analysis:

- What sort of delay analysis?
- Prospective or retrospective analysis?
- What does the contract say?

Retrospective analysis:

- Seeks to ascertain the actual effect of a delay event, based on what in fact happened on the project
- Can only be carried out once the project is completed, or once the effect of the delay event is past
- If the effect of a delay event is potentially ongoing as at the date of the analysis, then the assessment would be retrospective up to that date, then of necessity prospective
- Involves detailed factual investigation

Doing a retrospective analysis:

- Identify total period of delay to the project and key periods when delay occurred (essentially requires as planned v as-built comparison)
- Identify the delay events – use factual witnesses and identify both employer and contractor risk events
- Identify the critical path – determined by the physical and technical reality of the project

- Demonstrate that delay events relied on caused actual delay to the completion date
- Consider other relevant contract provisions e.g. notices, apportionment, concurrent delay risk allocation

Prospective analysis:

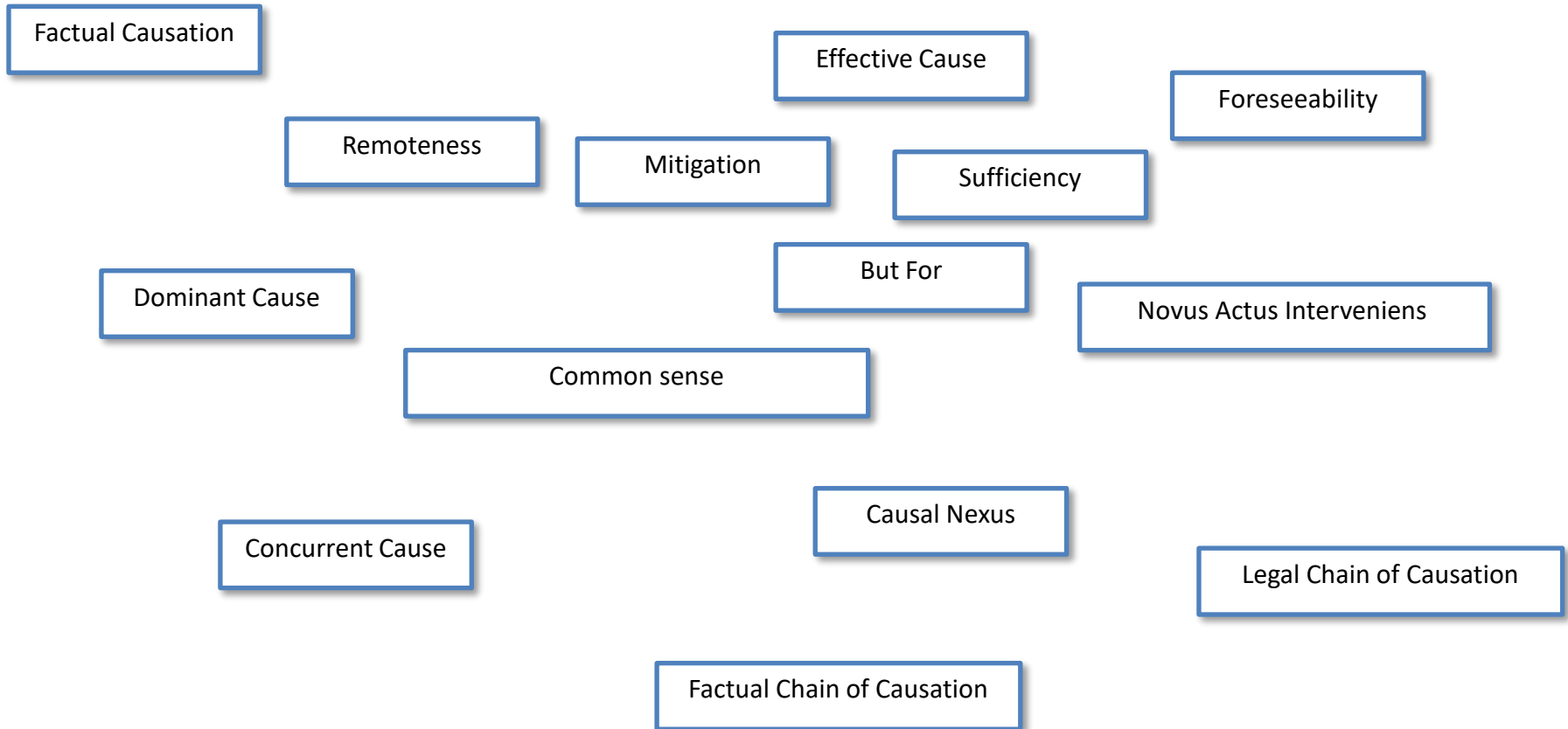
- Seeks to ascertain the probable future effect of a delay event, as at the time that it occurred
- If a claim for EOT made during a project, contract usually requires and CA will of necessity have to carry out a prospective analysis
- Often wrong when judged against what actually happened (always known by the time claim reaches the hearing)
- May not suffice as basis for a claim for prolongation costs – causation issues under many contracts

- Different methodologies:
 - Impacted as-planned
 - Collapsed as-built
 - Windows analysis
 - Time impact analysis
 - Longest path analysis

- Keep it simple

- Test it with common sense

Causation – crystal clear?



Reference to “common sense” does not always help.....“

“The common law tradition is that what was the cause of a particular occurrence is a question of fact which “must be determined by applying common sense to the facts of each particular case” ...”

Glidewell L.J. in *Galoo v Bright Grahame Murray* [1994] 1
WLR 1360

“...One decides, as a matter of law, what causal connection the law requires and one then decides, as a question of fact, whether the claimant has satisfied the requirements of the law. There is, in my opinion, nothing more to be said.”

Lord Hoffmann *“Causation”* (2005) LQR, Vol.121, p592 at
603

Concurrent delay?



Definition :

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

John Marrin Q.C.,
adopted in *Adyard Abu Dhabi v SD Marine Services* [2011] BLR 384

Need for “equal causative potency” (John Marrin Q.C.):

“...where there are two competing causes of delay, they often differ in terms of their causative potency. Even where both competing causes are effective causes of delay, in the sense that each taken on its own would be regarded as the cause of the whole delay, the two may be of unequal causative potency. It is commonplace to find that during the course of the factual enquiry, it becomes obvious as a matter of common sense that the two supposed causes of delay are of markedly different causative potency. One is then regarded [by the tribunal] as the effective cause and the other as ineffective. In other words, the minor cause is treated as if it is not effective at all.”

Potential answers to concurrent delay:

- The “but for” test
- The “dominant cause” approach
- Apportionment
- The *Malmaison* approach
- The *De Beers* approach

Typical claims:

- Increased preliminaries
- Loss of contribution to overheads
- Disruption/loss of productivity
- Loss of profit
- Acceleration

Issues/difficulties:

- Contractual grounds
- Use of formulae
- Proof of disruption
- Proof of actual costs
- Use of sampling
- Risk of double recovery

- Take care with :
 - Contract drafting
 - Factual evidence
 - Choice of experts

***Riva Properties Ltd v Foster and Partners Ltd* [2017] EWHC 2574 (TCC) – architects**

D's expert QS:

- Refused to carry out pricing exercise agreed in Joint Statement
- Had fundamental misconception about scheme to be priced
- Used price per room which was “wildly out”
- Refused to make assumptions - approach had “no intellectual justification whatsoever”, “verging on nonsense”
- Obstinacy meant the only evidence available on scheme was from C's expert

D's factual evidence:

- Witnesses entirely shifted their position under moderate cross-examination and simply accepted the claimants' case (on budget)
- Written evidence was entirely self-serving and seemed to have been drafted regardless of the facts
- Lengthy, rambling answers, entirely off the point

***Bank of Ireland v Watts Group Ltd* [2017] EWHC 1667 TCC**

- Not independent
- Attempted to mislead court by omitting part of quote
- Thoroughly unreasonable approach at experts' meeting

Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd
[2018] EWHC 1577 (TCC)

- Experts should have access to same material
- Experts should not identify version of facts they prefer
- Expert meetings are to be constructive and co-operative
- Notice of further analysis should be given to opposite number asap

***Castle Trustee Ltd v Bombay Palace Restaurant Ltd* [2018] EWHC 1602**

“In a case of fairly remarkable reports, this was the most extraordinary”

The delay expert:

- Adopted another report
- Did not see the pleadings or disclosure
- Had not given a moment’s thought to a realistic baseline programme

***SPE International Ltd v PPC (UK) Ltd* [2002] EWHC 881 (Ch)**

Expert in shot-blasting :

- No relevant expertise
- Wife wrote report
- Had never heard of the rules of court governing expert evidence
- No note of instructions

Thank you for listening

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