

DEALING WITH CONCURRENT DELAYS



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CONTRACTOR OBLIGATIONS

- Complete works by certain date or within specified period; possibly with stage or sectional completion
- Progress the works regularly and diligently
- Promptly give notice on specific probable future events or circumstances, which may adversely affect the work, increase the Contract Price or delay the execution of the Works
- Mitigate impacts of delay

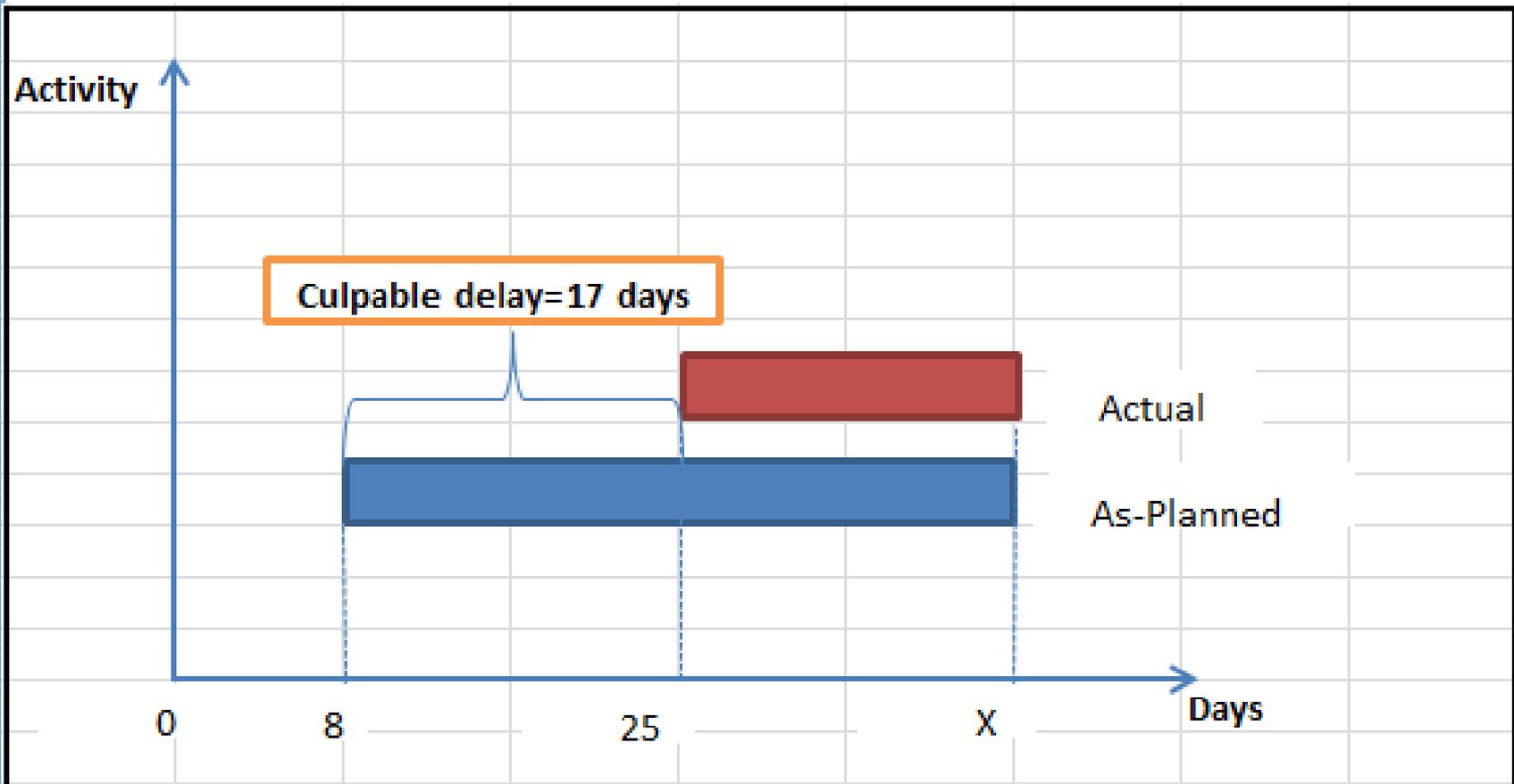
EMPLOYER OBLIGATIONS

- Completion of obligations specified in the contract
 - implied obligation not to hinder
 - implied obligation to cooperate

Peak Construction v McKinney Foundations (1970) 1 BLR 111

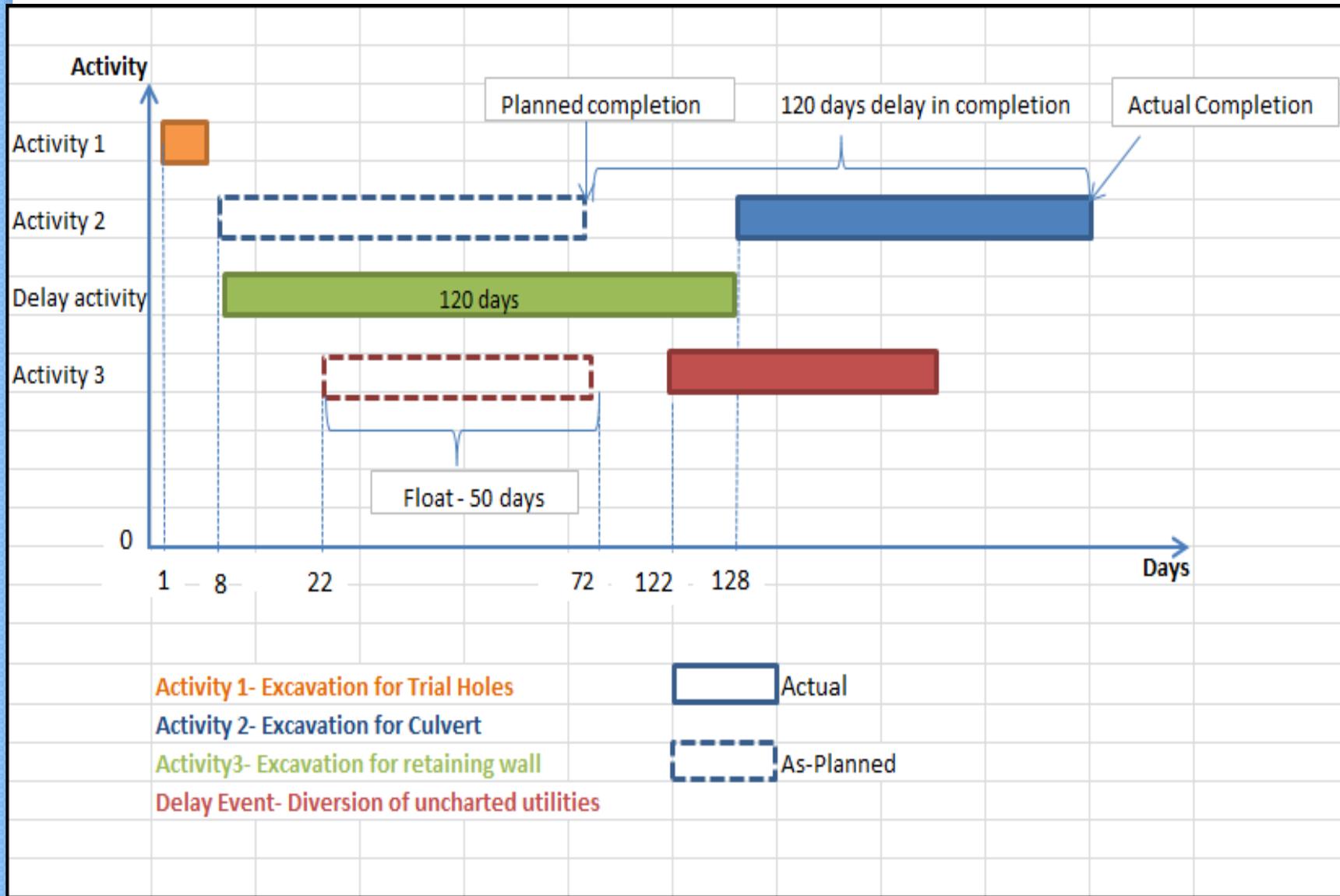
“If the failure to complete on time is due to the fault of both the employer and the contractor, in my view the clause does not bite. I cannot see how, in the ordinary course, the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled...”

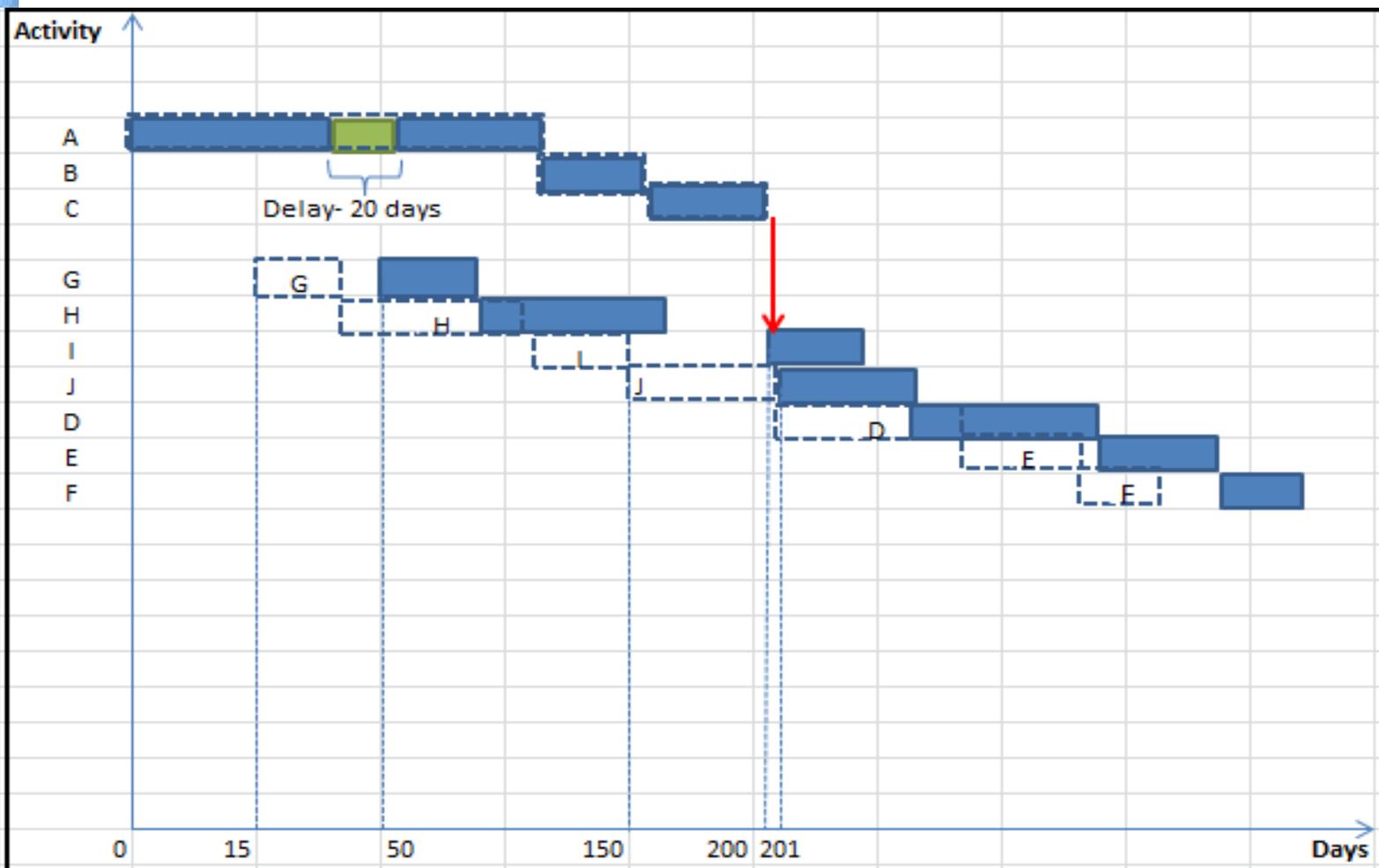
The rationale behind this decision is that it is not equitable for an employer to retain the benefit of liquidated damages if by its own act it has caused the delay.



Assumption

The completion date of the pre-drilling for bored piles has been scheduled on X day





Path 1		Path 2	
A	Construct the structure	G	Appoint the curtain walling nominated subcontractor
B	Install the permanent lifts	H	Design development, submissions and approvals
C	Remove the temporary hoists	I	Procurement, fabrication, delivery
D	Curtain walling infill	J	Erect curtain walling
E	FSD and BD inspections	D	Curtain walling infills
F	Finish fitting-out	E	FSD and BD inspections
		F	Finish fitting-out

Actual
 As-Planned

SCL PROTOCOL

- Published in 2002
- Not a contract document
- Not to take precedence over express contract terms
- Not a statement of law
- A guidance only
- No absolute answers for all matters
- Not a benchmark
- Apply rules with common sense
- No liability taken
- Take advice where necessary

SCL DEFINES CONCURRENT DELAY

“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”.

(a situation where two or more delay events arise at different times, but the effects of them are felt (in whole or in part) at the same time).

SCL RULING

- If in the occurrence of 'overlapped' delay, the contractor shall be entitled to the entire days of extension of time without any reduction
- It is wrong for the employer to deduct liquidated damages from the contractor in an event which is contributed by the employer themselves
- An employer should not be allowed to prevent the contractor to complete his obligation to complete the work on time

SCL RULING

- By awarding extension of time for the total period of the employer's caused delay the employer will avoid the contract completion date to be 'at large'
- Literally illustrates that the SCL protocol is not supporting the idea of apportioning the liability
- The SCL recommends proactive action in pursuing delay events. The contractor should not delay in making claim and the Contract Administrator in assessing entitlement

SCL RULING

- Do a separate assessment on the contractor's entitlement for an extension of time and entitlement for cost related due to the delay
- Granting extension of time as suggested by the SCL Protocol is difficult unless the contractor is ready to come clean and plead guilty for every delay caused by them

FIRST IN LINE

- Where there are two events causing a delay, the event that took place first in time, irrespective of who caused it, is the cause of the whole delay
- This approach assumes that the first event is the cause of the whole delay and the liability is decided merely on the order of time
- Accordingly, if the event is a ground for extension of time the contractor gets the extension even if his subsequent actions compounded the delays
- By operating on all-or-nothing basis, this approach clearly fails to take into account the circumstances of which party was largely responsible for the delay

DEVLIN APPROACH

Heskell v Continental Express Limited (1950) | All England 1033

- If a breach of contract is one of two causes of a loss, both co-operating and of approximately equal efficacies, the breach are sufficient to carry judgment for the loss
- When there are two competing events, one caused by the employer and the other caused by the contractor, each causing a delay - concurrently - then the contractor is entitled to an extension of time to the extent of the delay caused by the employer caused event
- For example there were two competing causes of delay which entitled a contractor to an extension of time, one a neutral event such as excessively adverse weather and the other being a breach such as late issue of instruction by the architect. Applying this approach the contractor would be entitled to an extension of time and also the recovery of additional cost

MALMAISON TEST

Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR 32

“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 work 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”

DOMINANT CAUSE

- If there are two causes, one the contractual responsibility of the defendant and the other the claimant, the claimant succeeds if he establishes that the cause for which the defendant is responsible is the 'dominant' cause
- If the dominant cause is the contractual responsibility of the employer, the contractor is entitled for time extension. If the dominant cause is the contractual responsibility of the contractor, his claim for loss and expense fails and he must pay liquidated damages for the period of delay

H Fairweather & Co Ltd v London Borough of Wandsworth (1987)

This case resulted from a contract to construct 478 dwellings employing a JCT 63 contract. Work was delayed by strikes, late instructions on the part of the Architect and variations. The Architect granted 81 weeks extension in respect of strikes. It was argued before the arbitrator by the contractor that 18 of those weeks should have been allocated to late instructions and variations. The arbitrator disagreed and accepted the Architects decision on the basis that the delay caused by the strikes was the dominant one. On appeal the court overruled the decision of the arbitrator in rejecting the dominant cause approach where it was said:

“Dominant has a number of meanings: Ruling, prevailing, most influential. On the assumption that condition 23 is not solely concerned with liquidated or ascertained damages but also triggers and conditions a right for a contractor to recover direct loss and expense where applicable under condition 24 then an architect and in his turn an arbitrator has the task of allocating where the facts require it the extension of time to the various heads. I do not consider that the dominant test is correct”.

APPORTIONMENT OF LIABILITIES

The Jefferson Hotel Co. v. Burmbaugh, 168 F.2d 867 (4th Cir. 1909) is another landmark

- At the end of the contractor's work, the employer imposed liquidated damages at the rate of \$150 per day. In contrast, the contractor argued that its work was largely dependent upon the material suppliers and independent contractors of the employer and they were the source of delay. In turn, the employer argued the "Contractor was responsible for the longest period of delay and the employer for only a few of the days, and that the Courts, under circumstances, should attempt to 'apportion' the blame between the two and hold the contractor liable in penalty for those days that it, in its judgment, deems he may be chargeable with." In essence, the employer sought apportionment of damages

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- The Jefferson Courts stated that this is just what the Courts cannot do with any degree of precision. It needs a more practical approach on site operations to realize the eventualities that took place. Courts declined the request for apportionment of delays whenever the causes have been mutual

City Inn v Shepherd Construction

- Works completed over 11 weeks late
- Architect awarded an extension of time of only two weeks
- Employer wanted to levy more than 9 weeks of liquidated damages at £30,000 per week
- Contractor wanted the full extension of time plus loss and expense at £11,519 per week
- City Inn Ltd v Shepherd Construction Ltd [2007] CSOH 190

City Inn v Shepherd Construction

- **Contractor**-late variations or instructions issued by the architect; and
- **Employer**-late or defective work to two areas of work
- Not possible to do a critical path analysis of the delay as there was not an appropriate initial program
- To what extent had the gross delay been caused by the delays of the employer and the contractor?
- All delays identified by the parties were concurrent causes of the gross delay
- Court apportioned the delays by reference to common sense and a consideration of what was “*fair and reasonable*”

Laing Management (Scotland) Ltd v John Doyle Construction Ltd

- Laing claimed a 22 week extension of time and £4.8 million in loss and expense
- Court held:

Where the loss was caused both the employer and by the contractor, then the contractor must establish the employer's delays are the “**dominant cause** “ of the loss –similar to position in tort

- Followed in ***Maersk Oil UK Ltd v Dresser-Rand UK Ltd***

“if an apportionment, based on the evidence is possible, albeit difficult, it would be manifestly unjust to deny a remedy, where there are plain contractual breaches by the defendant/employer.”

PROLONGATION COSTS

- Float absorption
- Extended preliminaries
- Unabsorbed Head office overhead
- Global claims
- Employer risks affected early completion
- Apportionment of damages

- It is the time that the delay is **suffered**, and not the time that the event **occurs**, that is the key factor in determining concurrency
- Contractors will be generally entitled to an extension of time where there are concurrent delays, even if one of those delays is due to his breach



CONCLUSION



- If the claim has a continuing effect on the contract, it would be evaluated on interim basis followed by a final claim once the effects cease
- The Scottish *City Inn* and *John Doyle* cases have opened the door to apportionment where there are concurrent delays but only for loss and expense claims, **not** for extensions of time claims

CONCLUSION