



# Concurrent Delay In Force Majeure Cases: A Delay Expert's Perspective

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## Defining Concurrent Delay

Concurrent delay is one of the most contested concepts in construction disputes, yet its definition varies considerably across industry guidance. The Society of Construction Law (SCL) Delay and Disruption Protocol provides a definition of true concurrency. According to the Protocol, 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. The SCL Protocol distinguishes this rare phenomenon from the more common situation of the "concurrent effect" of sequential delay events, where events occur at different times but their effects are felt at the same time.[2]

AACE International Recommended Practice 29R-03 (Forensic Schedule Analysis) offers a broader, more technical perspective. AACE defines concurrent delay as two or more delays that occur or overlap within the same time period, each of which, occurring alone, would have impacted the ultimate completion date of the project. AACE further categorises concurrency into "literal" (delays happening precisely at the same time) and "functional" (delays happening within the same analysis period, such as a month or an update cycle).[3]

## The Ambiguity of Concurrency in Construction Contracts

Most standard form contracts do not define concurrent delay or clearly allocate the associated risk. Pickavance underlines that where a contract expressly allocates concurrent delay risk, that allocation prevails over industry guidance or case law.[4] In *North Midland Building Ltd v Cyden Homes Ltd*, the court enforced an amended JCT clause stating that "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".[5] As a result, the contractor was not entitled to any extension of time. In the absence of express contract provisions, concurrent delay claims are frequently based on an assumed, often incorrect, understanding of what concurrency requires.[6] Hence, resolving the resulting ambiguity is left to legal teams, arbitrators, and the courts.

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[1] Note: This article is written from the perspective of a delay expert. References to legal cases, statutes, and legal principles are included for contextual awareness only. They reflect the author's general understanding and should not be treated as legal advice. Readers are strongly encouraged to seek independent legal counsel on any matter of contractual entitlement.

[2] Society of Construction Law, Delay and Disruption Protocol, 2<sup>nd</sup> Edition, February 2017, Core Principle 10.

[3] AACE, International Recommended Practice No. 29R-03, April 2011, pages 102, 104 and 105 of 134.

[4] Pickavance J., Clarity on Concurrency, Eversheds Sutherland (2017), page 6.

[5] [2017] EWHC 2414 (TCC), [4], [6].



### Scenario 1 - Force Majeure and Employer Risk Event: Entitlement to EOT and Prolongation Costs

Typically, under most standard form contracts, a Force Majeure event is categorized as an excusable but non-compensable delay. It grants the contractor an Extension of Time (EOT) to avoid liquidated damages but does not provide entitlement to prolongation costs, as the event is neutral and outside the control of both parties. Conversely, an Employer Risk event is usually excusable and compensable, theoretically granting both an EOT and prolongation costs.

Where a force majeure event and an employer risk event occur concurrently, the contractor's position on extension of time is generally stronger, while the question of prolongation costs is considerably more complex and less settled. In *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [1999], the court held that concurrent delays do not extinguish a contractor's right to an extension of time where an employer-caused event is an effective cause of delay. In the same case, Lord Justice Dyson originated the famous principle in regard to concurrent delay, i.e. "Malmaison Approach" where he stated:[7]

"... 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."

Dyson J provided a simple example to explain how the above description works:[8]

"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 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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[6] Pickavance J., *Clarity on Concurrency*, Eversheds Sutherland (2017), page 4.

[7] *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [1999] 70 Con LR 32 (TCC), [12].

[8] *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [1999] 70 Con LR 32 (TCC), [13].



It should be noted, however, that Henry Boot concerned employer and contractor concurrent delays, not a force majeure event running concurrent with an employer risk event. Its direct application to that combination has not been definitively confirmed by a court.

It is likely that, where both a force majeure event (such as a pandemic, war, or natural disaster) and an employer design delay are simultaneously affecting the critical path, the contractor would be entitled to an extension of time for the full concurrent period. This is broadly consistent with the approach taken in *Walter Lilly & Company Ltd v Giles Patrick Cyril Mackay* [2012], where Akenhead J followed the Malmaison Approach and held that the contractor is entitled to a full extension of time if the employer caused event is at least one of the causes of delay, regardless of other concurrent causes.[9] However, it remains unsettled whether this reasoning would be applied with equal force to a force majeure event.

The complexity arises in the assessment of prolongation costs. It is likely that the contractor will face significant difficulties in recovering time-related costs for the exact period of true concurrency. Under UK common law a claimant must satisfy the "but-for" test. The employer will argue that "but-for" the Employer Risk event, the contractor would still have been delayed due to the Force Majeure event, and therefore the Employer's breach did not actually cause the contractor to incur additional time-related costs. Unless the contract explicitly dictates the apportionment of costs during concurrent delays, tribunals will likely decline to award prolongation costs during periods where a compensable event runs concurrent with a non-compensable Force Majeure event.

### **Scenario 2 - Force Majeure and Contractor Risk Event: Entitlement to EOT and Exposure to Liquidated Damages**

In this scenario, a Force Majeure event occurs concurrently with a Contractor Risk event (e.g., contractor resource shortages, poor workmanship requiring rework, or equipment failure). Here, an excusable, non-compensable event overlaps with an inexcusable, culpable event.

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[9] *Walter Lilly & Company Ltd v Giles Patrick Cyril Mackay* [2012] EWHC 1773 (TCC), per Akenhead J at [370].



The central question is whether the contractor is entitled to an EOT and the Employer can levy liquidated damages in this circumstance?

Under UK case law, contractual EOT mechanisms are explicitly designed to relieve the contractor from liquidated damages during neutral events outside their control. Therefore, following the Malmaison Approach as explained above, if the Force Majeure event independently delays the critical path, the contractor is entitled to an EOT. This effectively shields the Contractor from liquidated damages, regardless of their own concurrent culpable delay. The fact that the contractor was also in delay does not negate the excusable nature of the Force Majeure.

The SCL Protocol reinforces this position where an Employer Risk Event (or, in this context, a neutral excusable event such as Force Majeure) and a Contractor Risk Event run concurrently, the Contractor is typically entitled to an EOT. Since a Force Majeure event legally excuses the Contractor from meeting the contractual completion date for the duration of its impact, it is unlikely that the Employer can successfully levy liquidated damages for the concurrent contractor delay.

### Practical Recommendations

To manage concurrent delays involving Force Majeure, the Contractor must strictly comply with the contract's administrative procedures. Contractors must ensure that daily reports are detailed, explicitly noting the impacts of the Force Majeure event. Instead of a generic entry stating "site closed due to weather or "delay due to COVID 19" the records should specify exactly which critical activities were halted, the status of the resources on site, and any specific areas of the project affected. In addition, daily reports shall include progress photographs and/or videos, including aerial images where possible, all with visible date and time stamps. The reports shall also include resource logs showing the number of labourers, the specific work areas, and the activities performed. Any issues encountered during the day shall be clearly described, with sufficient detail to explain their impact on the works. Furthermore, contractors must strictly adhere to the contractual notice provisions. Force Majeure clauses often impose strict mandatory notice requirements, requiring notice to be served within a specified number of days from the start of the event. Failing to provide this notice can undermine a valid EOT claim, regardless of how obvious the Force Majeure event might have been. Finally, contractors should keep the project schedule up to date. The programme must reflect actual progress, including any changes to activity logic, both immediately before and throughout the Force Majeure event. Every programme update should be accompanied by a narrative explaining changes to activity sequencing and logic. In summary, the most effective course of action available to a contractor during a force majeure event is the maintenance of robust contemporaneous records, which form the foundation of any subsequent claim and are essential in rebutting allegations of concurrent delay.