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**SPECIAL POINTS OF INTEREST:**

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**RESULTS OF THE PMICOS ANNUAL CONFERENCE**

The PMI College of Scheduling held its first Annual Conference in Montreal, Quebec on April 25-28, 2004. This conference was without a doubt, "...the most successful conference of PMICOS history," said PMICOS President, Stu Ockman. From the industry experts who attended and participated, to the agenda, seminars, conference materials and location, the conference was a definite victory in large part due to the diligence of all the board members and volunteers who were instrumental in its organization and success.



**NOTE FROM THE EDITOR**

Note from the Editor: This is the third edition of *Schedule Update*. We have two articles in this edition. Each article discusses issues that are relevant to today's scheduling environment. The first article entitled, *Update on CPM Proof of Delay Claims* written by Jon M. Wickwire and Mark J. Groff of Wickwire and Gavin. This article is focused on CPM analysis and proof of delay claims (page 3). The second article entitled, *Concurrent Delay Under English Law* is written by Anthony Wil-



**MARK YOUR CALENDARS...**

Registration for PMI Global Congress 2004-North America "officially" opens on 20 July. In an effort to bring you the best presenters and relevant subject matter, the North American Congress Project Action Team (CoPAT) is in the final stages of selecting educational presentations for delivery in Anaheim, this October. Consequently, the Global Congress Web site will be live and registration will open on Tuesday, 20 July.

**Anaheim, California, USA welcomes...**

**PMI Global Congress 2004-North America**

## SCHEDULE UPDATE

### HOW TO BECOME A MEMBER

For members of PMI, the annual membership fee is \$20. If you are not a member of PMI a fee of \$149 covers a one-year membership to both PMI and the College of Scheduling. For more information, please visit: [http://www.pmi.org/prod/groups/public/documents/info/gmc\\_collegeofscheduling.asp](http://www.pmi.org/prod/groups/public/documents/info/gmc_collegeofscheduling.asp).

### MEMBERSHIP UPDATE

College of  
Scheduling  
Membership

**850 Members**

Representing over  
**45 Countries**

### COLLEGE OF SCHEDULING ORGANIZATIONAL STRUCTURE

Functional Title	Individual	Functional Title	Individual
Chairman	Jon Wickwire	Director of Government Relations	Becky Andert
President	Stuart Ockman	Director of Employment Opportunities	Tom Fertitta
Vice President of Finance	J. Gordon Davis	Director of Best Practices	Murray Woolf
Vice President of Communications	Derek Mason	Director of Global Services	Dominic Greensmith
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Director of Membership/Volunteers	Pradip Mehta		
Director of Risk Management	David Hulett		

### NOTE FROM THE EDITOR (CONT'D.)

Wilson of Sherman and Sterling. This article examines how English law deals with issues of concurrent delay i.e. delay to completion of a project caused by multiple sources (page 10).

Finally, we had the recent pleasure of speaking with the PMICOS President, Stuart Ockman regarding his personal views on the current state of College of Scheduling and strides the College has made in our industry (page 15).

If you are interested in writing an article for the CoS newsletter please send me an email at [donald.t.harvey@marsh.com](mailto:donald.t.harvey@marsh.com).

Don Harvey

### UPCOMING EVENTS

PMI Global  
Congress 2004-  
North America  
23-26 October

Anaheim,  
California

## SCHEDULE UPDATE

### UPDATE ON CPM PROOF OF DELAY CLAIMS

**N**etwork analysis techniques were introduced into the construction field in the early 1960s. Since that time, government specification of the use of network analysis techniques for major projects is now commonplace. There is also now a perception by contractors (after a period of initial resistance) that network analysis techniques can be extremely important tools for project management. Accordingly, the use of CPM to plan and schedule work has become the accepted standard in the construction industry. Further, boards of contract appeals and the courts have shown their willingness to utilize network analysis techniques to identify delays and disruptions on projects, as well as the causes of delays and disruptions.

#### THE “CLASSIC TECHNIQUE” WHICH UNDERLIES CPM ANALYSIS OF TIME RELATED CLAIMS

The basic technique used in evaluating contract claims with CPM is to compare the as-planned CPM schedule with the as-built CPM schedule. The technique can be summarized in the following six questions:

1. How was it planned that the project would be constructed?
2. Was the plan reasonable?
3. How did construction actually occur?
4. What are the variances, or differences, between the plan for performance and the actual performance with respect to activities, sequences, durations, manpower, and other resources?

5. What are the causes of the differences or variances between the reasonable plan and the actual performance?
6. What are the effects of the variances in sequence, duration, manpower, and so on as they relate to the costs experienced, both by the contractor and the owner for the project?

#### METHODS FOR PROOF OF DELAY CLAIMS—AN OVERVIEW

As noted, scheduling has become a means of both guiding performance through the contract's life and gauging the accuracy and appropriateness of performance claims. In that regard, there are a variety of potential choices for the use of schedules to analyze project delays. A listing of these choices, along with a summary of advantages and disadvantages, is noted below:

#### BAR CHART

Bar chart techniques are more than 90 years old and they continue to play a role on projects where we have a few activities with linear-type relationships between those activities. This type analysis is of limited help (without extensive supporting testimony) in proving the impact of construction delays on modern, complex construction projects with a variety of activities, complex logic relationships (predecessor, successor, concurrent), and with varying resource requirements and availability. For example, in a 1988 decision, the Court of Appeals for the Federal Circuit affirmed a board decision which had criticized “the bar chart appellant provided which lacked a critical path, a favorite device with present day fact finders in contract disputes.” *Al Johnson Construction Co. v. United States*, 854 F.2d 467, 470 (Fed. Cir. 1988).

## SCHEDULE UPDATE

### UPDATE ON CPM PROOF OF DELAY CLAIMS (CONT'D.)

#### “BUT FOR” ANALYSIS / COLLAPSED AS-BUILT

This analysis calls for a protocol where we (1) compare the reasonable planned schedule to the as-built schedule with all delays encountered on the project; (2) remove the delays of the other party from the as-built schedule; (3) review the collapsed as-built for anomalies representing “why hurry up and wait” type of activities (rescheduled due to prior delays), and make appropriate adjustments to remove the anomalies to arrive at an adjusted “but for” CPM analysis of project delays.

Perceived advantages of this approach are that it is based on the actual events on the project; it allows us to compare a reasonable plan for performance with the as-built schedule. We can then identify variances between the plan and actual, look for causes of the variances, and finally determine what, if any, the effects of the variances may be. We can also compare our “But For” collapsed as-built with the plan and actual to get an idea, not only of delay effects to the critical path, but also to make judgments relative to issues of lost efficiency.

There are a number of disadvantages of the collapsed as-built CPM. First, the after-the-fact approach fails to address the need to address the issue of time extensions on a real time basis as required to address events on the project. Second, the analysis is not forward looking, chronological and cumulative. Third, in order to collapse the schedule, the analyst is typically forced to insert after-the-fact logic ties which may not reflect the thinking of the executor of the schedule during actual performance. Fourth, adjustments for anomalies in the adjusted schedule require ex-

perienced judgment, beyond the capability of many analysts, and may be subject to dispute by experienced experts for others on the project. Regardless of these disadvantages, “But For” analyses have, on occasion, been accepted as valid. *Fischbach & Moore Int’l Corp.*, ASBCA No. 18,146, 77-1 BCA ¶ 12,300 (1976); *John Murphy Constr. Co.*, AGBCA No. 418, 79-1 BCA ¶ 13,836 (1979).

#### “TOTAL TIME” ANALYSIS

Total cost pricing, which asks the other party to pay for all losses on a project (actual costs plus mark-ups less contract price), is subject to serious objections due to underlying assumptions. For example, the approach assumes that the contractor’s original bid was reasonable, that the contractor performed as efficiently on the project as anticipated in its bid, and that all the causes of the increased costs on the project were the sole responsibility of the owner.

Likewise, a “Total Time” Analysis which compares the contractor’s plan with the actual as-built schedule, and blames the owner for all the variances, is subject to similar attack for the underlying assumptions. These include the assumption that the original plan was reasonable, that the contractor performed at least as efficiently as planned, and that all the variances between the planned and actual are the responsibility of the owner (not due to excusable or contractor delays). There are a number of court and board decisions which have rejected the “total time” type analysis.

For example, in *Morganti National, Inc. v. United States*, the court noted that the contractor’s expert “simply takes the original and extended completion

## SCHEDULE UPDATE

### UPDATE ON CPM PROOF OF DELAY CLAIMS (CONT'D.)

dates, computes therefrom the intervening time or overrun, points to a host of individual delay incidents for which defendant was allegedly responsible and which 'contributed' to the overall extended time, and then leaps to the conclusion that the entire overrun time was attributable to defendant." The court held that a "total time" approach to proving delay was "as unsatisfactory as the 'total cost' method of proving damages," and denied the contractor's claim. 49 Fed. Cl. 110 (2001), *aff'd*. 36 Fed. Appx. 452 (2002). Similarly, the board in *Southwest Marine, Inc.*, rejected the contractor's "disfavored total delay" theory, noting "cumulative inefficiency or impact is not proved by the issuance of numerous change orders without proof that these change orders proximately caused that indirect or cumulative inefficiency or impact." ASBCA No. 36854, 95-1 BCA ¶27,601 (1995). See also *Santa Fe Engineers, Inc.*, ASBCA No. 24,578, et al., 94-2 BCA ¶26,872 (1994). (Board rejected total time approach because it believed some delays were the contractor's responsibility.)

#### "IMPACTED AS-PLANNED" CPM

This approach, which purports to present a fair picture of responsibility for owner delays on the project by impacting the original CPM on the project solely with owner delays encountered during performance, suffers from one fatal flaw. It ignores what actually happened on the project. This approach totally ignores excusable delays and delays by the contractor. Actual performance by all parties must be considered. Thus, hypothetical impacted as-planned network delay analyses that do not take into account actual events on the project as they evolve have been held unacceptable measures for evaluating project delays. *Gulf Con-*

*tracting, Inc.*, ASBCA Nos. 30195, et al., 89-2 BCA ¶ 21,812 (1989), *aff'd Gulf Contracting Co. v. U.S.*, 23 Cl. Ct. 525 91991), *aff'd* 972 F.2d 1353 (Fed. Cir.), *cert. den.*, 113 S.Ct. 598 (1996); *Titan Pacific Constr. Corp. v. U.S.*, 17 Cl. Ct. 630 (1989).

#### CHRONOLOGICAL AND CUMULATIVE APPROACH / TIME IMPACT ANALYSIS

This approach was developed to address the needs of the construction process to recognize time adjustments due the contractor in a timely manner and to provide the ability to resolve disputes prior to some exhaustive after-the-fact analysis reconstructed after the completion of the project.

In this approach, we start with a reasonable as-planned CPM; next, we status the project (to take into account past performance) prior to the onset of a delay which we wish to evaluate; in statusing the project we identify the location of the critical path. The original as-planned schedule is then modified from that point forward, incorporating the time impact which may or may not cause a project extension based on the location of the critical path and its relation to the delay in question. When the next delay is evaluated, the project network (as revised by the prior analysis and taking into account actual events on the project) is again statused immediately prior to the advent of the delay to locate the critical path; the second delay is then introduced into the network to see what result it may have.

This approach has been widely accepted and has significant merit. See, e.g., *SAE/American-Mid Atlantic, Inc.*, GSBCA Nos. 12,294, et al., 98-2 BCA ¶30,084 (1998).

## SCHEDULE UPDATE

### UPDATE ON CPM PROOF OF DELAY CLAIMS (CONT'D.)

However, care must be taken to make sure that during the period of the analysis of individual delays, other delays which may be the responsibility of the contractor or owner do not overtake the delay in question on the critical path. One way to avoid this problem is through the use of measuring points such as monthly updates. In this manner, the fact finder cannot only look at the location of the critical path at the inception of the delay, but also confirm the actual impact of delay by looking at the project status at the end of the update and the history of actual events of the project in between. This allows the fact finder to identify and net out concurrent delays from consideration of compensability.

#### “WINDOW ANALYSIS”

This type of analysis is a variant of the chronological and cumulative approach detailed above. In this approach, we look at the status of the project immediately prior to the advent of the delay, such as the monthly update of the CPM for September. We then introduce the actual events and delays into a window of time, typically an update as they occurred. We would then see which delays impacted the critical path, as well as which delays may have represented concurrent delays to the critical path. Like the chronological and cumulative approaches, this is a valuable tool and has been accepted by boards and courts.

*Cogefar-Impresit U.S.A., Inc.*, is a case that provides some lessons on the treatment of time impact and window analyses. In that case, the contractor was required to submit time impact analyses to establish entitlement to time extensions. The board found that the owner waived the right

to terminate for default for delays, including the failure to submit time impact analyses in their proper form. Further, the board determined that the owner presented incorrect “window” analyses of delays because the “window analyses” failed to reflect actual conditions on the project at the time of the delays. This ruling was based on the principle that any evaluation of project delays must be based on a CPM schedule that is “current” as of the delays. DOTBCA No. 2721, 97-2 BCA ¶29,188 (1997).

#### THE CPM EXPERT AND THE NEED FOR IMPARTIALITY

Although the use of network analysis techniques to prove delay claims is now commonplace, a number of industry challenges remain. As the courts and boards of contract appeals become more knowledgeable about network analysis techniques, they have also become more skeptical about expert scheduling testimony which appears biased and result driven. It is clear, therefore, for expert scheduling testimony to be of value, it must reflect a fair and complete review of the project data and must reflect analyses that take into account major and controlling delays of all parties on the project.

The challenges facing the industry have been increased by the significant developments that have occurred in the federal arena during the past decade concerning the use and admissibility of expert testimony. These developments have effectively given the courts the power to exclude, prior to trial, “junk science” as well as other testimony that is “unreliable” for a number of reasons. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (interpreting Rule 702 of the Federal Rules of Evidence). Under *Daubert* and subsequent cases, there is a clear potential to completely exclude ex-

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### UPDATE ON CPM PROOF OF DELAY CLAIMS (CONT'D.)

pert testimony that may be essential to prove a cause of action for delay recovery or to deny such recovery, unless a proper groundwork has been laid by the party seeking to introduce such testimony.

Rule 702 of the Federal Rules of Evidence adopted in 1975 and amended in 2000 provides:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine fact in issue, a witness qualified as an expert by knowledge, skill experience, training, education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

Under the Federal Rules of Evidence, the trial court must determine whether the proffered expert is reliable and fits the facts of the case. In *Daubert*, the Supreme Court provided guidance on the application of these principles. In that context, “scientific knowledge” requires that the proposed expert opinion be grounded in the methods and procedures of science. Further, knowledge means more than subjective belief or unsupported speculation. “Scientific knowledge” means “any body of known facts or . . . any body of ideas inferred from such facts or accepted as truths on good grounds.” Further, the court in *Daubert* found that the trial

court had the duty to act as a “gatekeeper” to determine the qualifications of the proposed expert scientific testimony *before* the trial court admits the testimony. In addition, in *Daubert*, the Court found that the gatekeeper function applied not just to novel testimony but also to more established scientific testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. at 590-593 (1993). Further the 2000 amendments to Rule 702 incorporated the requirement that the trial court assure the reliability of even conventional expert testimony before admitting it into evidence. The federal principles set forth in *Daubert* are also used as guidance, if not precedent, by state courts, board of contract appeals and arbitration panels.

For example, in *The Sherman R. Smoot Corp.*, ASBCA No. 52261, 03-1 BCA ¶ 32,197 (2003), the contractor moved to exclude the testimony and written report of the government’s proposed expert witness who had prepared a CPM schedule analysis in an attempt to refute the contractor’s delay claim. The contractor contended that the government’s proposed witness was not qualified as an expert in construction CPM schedule analysis and could not assist the trier of fact to understand the evidence or to determine a fact in issue, pursuant to Rule 702 of the Federal Rules of Evidence. In ruling on the contractor’s motion, the presiding judge at the board hearing reviewed the expert’s qualifications set forth in his curriculum vitae, deposition transcript and proposed expert report. The expert’s curriculum vitae indicated that he had a Bachelor’s and Master’s Degree in Chemical Engineering and a Ph.D. in Industrial Engineering and industrial experience at Phillip Morris USA.

The expert had also testified in his deposition that he lacked education and experience in construc-

## SCHEDULE UPDATE

### UPDATE ON CPM PROOF OF DELAY CLAIMS (CONT'D.)

tion, and his study and teaching of PERT/CPM analysis were in manufacturing and production, not construction. The expert further admitted in his deposition transcript that he had not prepared a construction schedule, had not used the terms “excusable” and “compensable” delay in dealings with contractors, and he was not an expert in “concurrency.” After hearing this evidence, the presiding judge at the board hearing granted the contractor’s motion to exclude from evidence the testimony and written report of the government’s proposed expert. In so ruling, the presiding judge noted that the expert’s qualifications in construction CPM generation, adjustment and analysis were “quite thin” if not non-existent. In the subsequent written decision on the contractor’s claim, a three-member panel of the Armed Services Board of Contract Appeals affirmed the exclusion of the expert testimony and report. 03-1 BCA ¶ 32,197 at p. 159,151. *See also The Sherman R. Smoot Corp.*, ASBCA Nos. 52,173, et al., 03-1 BCA ¶ 32,212.

Of course, even when expert scheduling testimony has passed the *Daubert* test and is actually admitted in a court or board proceeding, if such testimony is not based on a fair or impartial review of the project record, it will most likely be found unpersuasive. Several recent board and U.S. Court of Federal Claims cases are illustrative.

In *Fraya, S.E.*, ASBCA No. 5222, 02-2 BCA ¶ 31,975 (2002), the government terminated a contractor for failure to make adequate progress on a renovation project in Puerto Rico. The contractor challenged the termination for default and offered the expert CPM testimony attempting to demonstrate that the contractor could, in fact,

rejected the expert’s analysis and denied the contractor’s appeal. Instead of using industry recognized estimating guides, the expert had used what he referred to as “ways and means” of construction. This “ways and means” method of estimating later turned out to be nothing more than the contractor’s oral estimates of the time required for various tasks. The Board also rejected the expert’s planned schedule because it was not resource loaded as required by the contract, did not take into account the limited building access because of security requirements, and failed to take into account the fact that the construction industry in Puerto Rico took extended holidays in December and January.

The contractor’s CPM expert analysis was also rejected in *Jimenez, Inc.*, VABCA No. 6351, et al., 02-2 BCA ¶ 32019 (2002). In this case, the contractor argued that delays resulting from the government’s tardy approval of an air handling unit were compensable. The installation of the air handling units, however, were never shown as a critical path activity on any of the contractor’s schedules that it had submitted during the performance of the project. Faced with that fact, the contractor hired a CPM expert. As the Board noted, “not surprisingly,” this expert’s newly created CPM analysis showed that the delays to the air handling units accounted for the entire project delay. The Board rejected the expert’s opinion and noted that “such self-serving analyses, created after project completion which make adjustments to attain new and revised projected schedules, depending on theoretical contingencies, are of limited value.” 02-2 BCA ¶ 32,019 at p. 158,252.

A CPM’s expert’s failure to apportion government delays from concurrent contractor delays resulted in the complete rejection of a contractor’s delay claim in *Manuel Bros., Inc. v. United States*, 55 Fed. Cl. 8 (2002).

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### UPDATE ON CPM PROOF OF DELAY CLAIMS (CONT'D.)

In this case, the contractor entered into an agreement with the Federal Aviation Administration to excavate and install concrete duct banks and manholes necessary for the installation of new fiber optic lines at the Dallas-Ft. Worth International Airport. The contractor sought over \$2 Million in delay-related damages based upon its allegation that the critical path of the project had been directly affected by (1) differing site conditions involving clay and rock; (2) breach of the government's implied duty to cooperate which limited the contractor's access to the project site; and (3) additional time required for the location of unknown or misplaced utilities. Of the contractor's three claims, the court held that only the third, concerning the unknown misplaced utilities, was meritorious. The contractor's CPM expert testified that the contractor had been delayed for a total of 7½ months as a result of the three problems. The expert, however, could not give an opinion on the precise number of days of delay attributable to each issue. He also admitted he had based most of his analysis solely on information provided by the contractor's employees. Because the contractor could not separate the government caused delay from the contractor's own delays, no delay damages were awarded.

#### CONCLUSION

The use of inexperienced personnel to schedule work and so-called "user friendly" software advances that mask the logic and changes to CPM networks have also lead to serious scheduling

abuses. A significant development in the fight to establish ethical and professional scheduling practice is the formation of the College of Scheduling within the Project Management Institute. The primary purposes of the College include facilitating training of professional schedulers, fostering best practice standards in the scheduling field, eliminating software user abuses, and establishing standards for ethical conduct. With this and other industry initiatives, the future of CPM scheduling in the construction field remains bright.

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## SCHEDULE UPDATE

### CONCURRENT DELAY UNDER ENGLISH LAW

The purpose of this article is to examine how English law deals with issues of concurrent delay i.e. delay to completion of a project caused by multiple sources.

As this article will discuss, English law resolves issues of alleged concurrent delay by the application of established causation principles. However, whilst English law does recognize the concept of concurrent delay in theory, in practice many alleged cases of concurrent delay are likely to fail the applicable causation tests. As this article will also discuss, there is no general rule on the effect of concurrent delay under English law. Instead, this is determined by the terms of the contract between the parties.

#### The Causation Test

The English common law rule is that causation of damage claimed to arise from a breach of contract will not be established unless (i) there is a causal connection in fact between the defendant's breach of contract and the claimant's loss and (ii) the breach of contract was the "effective" or "dominant" cause of that loss. Regarding (i), the requirement to establish a causal connection is equivalent to a "but for" test i.e. that "but for" the event complained of the claimant would not have suffered the loss in question. Regarding (ii), a breach of contract will not be deemed the effective or dominant cause of loss where it is only the "occasion" for the loss. There is no fixed rule as to what constitutes a cause or merely an occasion of loss: this is considered a matter for the Court's

The test(s) stated above should also apply, in most cases, to the resolution of delay causation issues arising under construction contracts. The requirement to satisfy both the "but for" and the "effective cause" tests in order to establish causation has significant implications for construction delay claims subject to English law. In particular, the "but for" test effectively means that a "first in time" principle should, in most cases, apply to the resolution of delay claims.

#### Recognition of Concurrent Delay by the English Courts

It has long been established that English law recognizes the possibility that there may be two effective or dominant causes of the same loss. It follows that English law should have no difficulty, in principle, with the existence of concurrent causes of delay to completion of a construction contract. This has now been confirmed by the recent *Malmaison and Royal Brompton Hospital* cases.

*Malmaison and Royal Brompton Hospital* both accept that where there actually are concurrent causes of delay to completion, one of which entitles the contractor to an extension of time under the terms of the contract and the other does not, then, as a matter of contract construction, the contractor remains entitled to an extension of time in respect of the "excusable" delay notwithstanding the existence of the concurrent "non-excusable" cause of delay:

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### CONCURRENT DELAY UNDER ENGLISH LAW (CONT'D.)

(*Malmaison*)

"[where] 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 of causes of the delay. It was circumstances such as these that Dyson J. was concerned with in [*Malmaison*]."

(*The Royal Brompton Hospital Case*)

#### Effect of Concurrent Delay

*Malmaison* and *Royal Brompton Hospital* confirm that the English courts recognize the concept of concurrent delay. These cases cannot be said, however, to constitute authority for a general rule as to the effect of concurrent delay under English law since, in both cases, the concurrent delay issue was addressed as a matter of the construction of the extension of time clause ("EOT Clause") in the particular contract at issue. This reflects the position under English law that the parties to a construction contract are generally free to decide between themselves on the allocation of the risk of delay to completion. See the House of Lords decision in *Percy Bilton v Greater London Council*.

The application of this principle was evidenced in the earlier case of *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* where Judge Fay commented on the allocation of the

should be shared, and there are cases where it should be wholly borne by the employer. There are also those cases which do not fall within either of these conditions and which are the fault of the contractor, where the loss of both parties is wholly borne by the contractor."

Thus, the parties are free to decide for themselves which circumstances will give rise to an entitlement to compensation for delay and/or to an extension of time under the contract and which will not. (It should be noted, however, that, in the case of concurrent employer and contractor caused delay to completion of a contract which provides for liquidated damages for delay but contains no EOT clause or contains an ineffective EOT clause, the common law prevention principle would then operate to invalidate the liquidated damages clause and set time and damages "at large" (notwithstanding the contractor's own responsibility for concurrent delay).

#### The Obverse Problem

The so-called "obverse problem" arises from the rule that, if a breach of contract is one of two effective causes of loss to a claimant, the party responsible for the breach of contract is liable to the claimant for the full amount of the loss, notwithstanding the existence of the other co-effective cause. Thus, it is thought that, where two contractors are both responsible for concurrent causes of delay to a project, either one would be liable to the employer for the full amount of loss;

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### CONCURRENT DELAY UNDER ENGLISH LAW (CONT'D.)

It has been suggested that to avoid the "obverse problem" a single "dominant" cause of delay must, in all cases, be selected. However, as discussed above, English case law is clear that there may be more than one effective or dominant cause of loss (even if such occurrence will be rare). Further, not only is this (it is submitted incorrect) view of the dominant cause test unsupported by authority but it has been rejected expressly or impliedly in a number of cases.

It is thought that the obverse problem remains unresolved in principle. However, *Malmaison* and *Royal Brompton Hospital* confirm that this theoretical problem should not prevent the courts from recognizing a situation of concurrent delay where it exists in 1. reality. In practice, in most cases, the express contract terms will prevent (or will be construed so as to prevent) the obverse problem from arising.

#### The Causation Test in Practice

The discussion above has focused on the question of whether English law recognizes, in principle, the concept of concurrent delay and the effect of a concurrent delay situation where it is found to exist. However, in practice, in many cases where concurrent delay is alleged, a strict application of the causation tests discussed in Section I will result in one or other of the alleged causes of concurrent delay being determined not, in fact, to have caused delay to completion. Thus, the example of a concurrent delay situation given by Judge Dyson in *Malmaison*:

was clarified in *Royal Brompton Hospital* as follows:

"[regarding] a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty 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 upon the completion date for which an extension is claimed."

(Author's emphasis)

*Royal Brompton Hospital* therefore supports the position that where an EOT clause provides, as is usual, that the contractor will only be entitled to relief from liquidated damages where an employer risk event "causes" delay to completion then the (relevant) event for which an extension is claimed must satisfy the "but for" test of causation. As noted above, the "but for" test effectively creates a "first in time" principle such that the contractor is not entitled to any relief from liquidated damages if it is already in culpable delay at the time an employer risk event occurs. This is so even if the relevant event would have caused delay in any event.

## SCHEDULE UPDATE

### CONCURRENT DELAY UNDER ENGLISH LAW (CONT'D.)

For true concurrent delay to occur, the alleged concurrent causes of delay must both arise simultaneously (i.e. commence at the same time). It would not be sufficient for the two alleged causes simply to overlap. Put another way, a party seeking to prove true concurrent delay will not succeed by showing that, absent the first cause of delay, the subsequent (overlapping) event it relies on would have caused delay in any event. This is not a situation of "true" concurrent delay since the alleged concurrent cause is hypothetical not real. (It should be noted, however, that it may be possible for concurrent causes of delay to arise simultaneously from events which take place at different times.)

In the above context, the question of whether an alleged cause of delay is the "first in time" cause may depend on whether it is regarded as a single cause which operates throughout a period of time or a series of separate causes. Such issue, if it arose, would be decided as a question of fact.

It has been suggested that true concurrent delay is more likely to occur at the start of a project. One example that has been given is where, at the commencement date for a contract, the employer fails to give access to the site, but the contractor has no resources mobilised to carry out work. Yet it is questionable whether even this scenario would actually satisfy the strict causation test as stated in *Royal Brompton Hospital*.

The strict application of the causation test may be perceived by the party liable for the first in time

Therefore, whilst the strict causation based approach is likely to be correct as a matter of law with respect to many EOT clauses (including, in general, those permitting an extension only where a relevant event "causes" delay) it probably does not reflect industry practice in the United Kingdom. Thus, parties faced with delay damages claims continue to defend such claims on the basis of "concurrent delay" arguments which appear inconsistent with the legal authorities referred to above.

It should be noted that the causation test as set out in *Royal Brompton Hospital* would not necessarily be appropriate in the context of an EOT clause which permits an extension in circumstances wider than "true" concurrent delay. As noted above, the parties are largely free to allocate the risk of delay as they wish. Thus, it is thought that an EOT clause, which allows the contractor an extension in respect of circumstances where the contractor would have been delayed by an employer risk event had its own delay not occurred first, is entirely permissible. Unfortunately, extension of time clauses apparently drafted to achieve this object are often ambiguous as to whether they actually permit an extension in these circumstances or only in the case of "true" concurrent delay. It is also noted in the above context that, conversely, parties should be free to agree to an EOT clause which excludes the contractor's entitlement to an extension of time even in circumstances of true concurrent delay.

## SCHEDULE UPDATE

### CONCURRENT DELAY UNDER ENGLISH LAW (CONT'D.)

The SCL Protocol, which was published subsequent to the *Royal Brompton Hospital* decision, apparently disregards the strict "but for" causation test where concurrent delay is alleged and seems to envisage that a contractor would be entitled to an extension on the "hypothetical" delay basis referred to above. Whilst this may be perceived as a "fairer" or more "balanced" approach, from a strictly legal perspective it may be thought inappropriate where the applicable EOT clause clearly permits an extension only in respect of events which actually "cause" delay to completion. It is therefore suggested that, if parties wish to provide for extensions of time in the circumstances apparently contemplated in the SCL Protocol, this should be expressly stated in the contract.

#### Conclusion

Following *Malmaison* and *Royal Brompton Hospital* there should no longer be any doubt that English law recognizes the concept of concurrent delay. However, there is a clear discrepancy between the frequency with which parties allege that a concurrent delay situation exists and the very limited circumstances in which concurrent delay will be recognized at law. It is suggested that this situation might be addressed by greater thought being given to the allocation of the risk of delay at the contract drafting stage.

By: Anthony Wilson

## SCHEDULE UPDATE

### Q&A WITH STU OCKMAN, PMICOS PRESIDENT

Recently, Don Harvey conducted a brief question and answer session with PMICOS president, Stuart Ockman regarding the state of the College of Scheduling. Stu first wanted to reiterate the mission of the College, "We're going down the path of pursuing our mission which is to promote excellence in scheduling throughout the world. We've held the first annual symposium regarding our approach. We are working with PMI regarding the standard of scheduling. Our board encompasses the leaders in Scheduling."

#### **Q. What is the current state of the COS?**

*A. We have a very active and growing membership at 830 members from over 40 countries around the world.*

#### **Q. What big initiatives are upcoming?**

*A. We are in the process of developing best practices guidelines for scheduling, delay claims, scheduling software developers, practitioners and owners. We are also working to develop local COS affiliates with PMI Chapters.*

#### **Q. What accomplishments were made at the 1<sup>st</sup> annual meeting in Montreal?**

*A. The annual conference was a fabulous meeting. Many who attended (230) commented that it was the best meeting ever held on every level from participation, materials to accommodations.*

#### **Q. Are there any events PMICOS members should be aware of?**

*A. Our annual business meeting will be held on Sunday, October 24 from 12:15—2:15 at the PMI Congress in Anaheim, CA. Our second annual conference will be in Scottsdale, AZ from Sunday, May 22 - Wednesday, May 25, 2005.*

#### **Q. In your opinion, what are the noticeable impacts on the scheduling community as a result of the College of Scheduling?**

*A. The importance of good scheduling and the problems of poor scheduling as detailed in the recent ENR article. Developing an association with other entities like PlanningPlanet.com. Greater awareness in the community. The industry will see improvements in scheduling software beginning Fall 2004.*