

**PRINCIPLE METHODS OF ASSESSING CONCURRENT DELAYS
IN CONSTRUCTION**

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UNIVERSITI TEKNOLOGI MALAYSIA

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ABSTRACT

One type of delay that often give rise to dispute is concurrent delay, where contractor delay occurs or has effect concurrently with employer delay. Concurrent delay makes the contractor claiming for extension of time and also possibly claiming for additional cost, while on the other hand the employer stand that the contractor has no right to get extension of time nor additional cost, but liquidated damages that shall be borne. In relation with delay in construction contract, it was clear that various events had occurred concurrently with one another, particularly towards the end of the project, which all potentially caused delays to completion. Some of these were relevant events under the construction contract, and some were events, which were attributable to party(ies) in default. The issue of concurrent delay has been considered at length by courts in various jurisdictions, it opened in somewhat inconsistencies principles in assessing the concurrent delay between one cases to the other. Apportionment methods is less considered under common law, while in particular case law, apportionment methods is in favour. Notwithstanding many interpretations from the court, the objectives of this study is to determine the principles that apply in assessing concurrent delay. The research is based on case laws analysis, particularly on what ground the judges prefer to use specific approach. After having cases analysis, several findings were resulted: the assessing methods differ from one jurisdiction to another; and a critical path method is recently widely used in the assessing concurrent delay, regardless the successful of the claim.

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LIST OF ABBREVIATIONS

AC	Appeal Cases, Law Reports
AD	Appellate Division
All ER	All England Law Reports
BLR	Building Law Reports
Con LR	Construction Law Report
CPM	Critical Path Method
EoT	Extension of Time
EWHC	England and Wales High Court Cases
HL	House of Lords
LJ	Lord Justice of Appeal
LJJ	Lord Justices of Appeal
QC	Queen's Counsel
SC	Sub Contract
TCC	Technology Construction Courts
Tex.	Texas Supreme Court

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- Great Eastern Hostel Co Ltd v John Laing Construction* [2005] All ER (D) 368
- H Fairweather and Co Ltd v London Borough of Wandsworth* (1987)
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- Jerram Falkus Construction Ltd v Fenice Investment Inc* [2011] EWHC 1935 (TCC)
- John Doyle Ltd v Laing Management (Scotland) Ltd* (2004)
- Motherwell Bridge Construction Ltd v Micafil Vakuumtechnik* [2002] All ER (D)
- Musselburgh and Fisherrow Cooperative Society v Mowlem (Scotland) Ltd* (2005)
- Quinn v Burch Brooks (Builders) Ltd* (1966)
- Roberts v The Bury Improvement Commissioners* (1870)
- Royal Brompton Hospital NHS Trust v Hammond* (2002 All ER (D) 189)
- Royal Brompton Hospital NHS Trust v Hammond & Others* (2001) 76 Con LR 148
- Skanska Construction Uk Ltd v Egger (barony) Ltd* (2004) ECWH 1748 (TCC)
- Tennant Radiant Heat Ltd v Warrington Development Corporation* (1987)
- Turner Page Music Ltd v Torres Design Associates Ltd* (1997)
- Walter Lilly & Company Limited v Mackay and DMW* [2012] EWHC 649 (TCC)
- Wells v Army & Navy Co-operative Society Ltd* (1902) 86 LT 764
- Wells v Army and Navy Co-operative Society* (1903)

CHAPTER 1

INTRODUCTION

1.1. Background Of The Study

The construction sector represents one of the most dynamic and complex industrial environments. Peurifoy and Ledbetter (1985) identify that the construction industry is one that deals mainly with the conversion of plans and specifications into a finished product. It comprises a mixed variety of organizations that face difficult situations and to some degree similar pressures. Many of these problematic situations are either beyond control and often lead to delay.

Many construction projects suffer from delay. Suspension means stoppage of work directed to the contractor by a formal form from the client, while delay is a slowing down of work without stopping it entirely (Bartholomew 1998). Delays give rise to disruption of work and loss of productivity, late completion of project, increased time related costs, and third party claims and abandonment or termination of contract. It is important that general management keep track of project progress to reduce the possibility of delay occurrence or identify it at early stages (Martin 1976).

Delay is considered a major cause of construction claims. Claims could be due to three types of delay, namely: excusable, inexcusable, and compensable delays (Ahuja et al. 1994). Cases of excusable delays include design problems, client initiated changes, acts of God, and uncertainties. Compensable delays occur when

the owner or the consultant has delayed the contractor in the completion of the work. It entitles the contractor to additional compensation and the contractor may be granted extension of time and money if there is any change in scope of work, late supply of owner materials or information, impeded site access, differing site conditions, and failure to provide timely and review shop drawings (Potts 1995).

One type of delay that often give rise to dispute is concurrent delay, where contractor delay occurs or has effect concurrently with employer delay. Concurrent delay makes the contractor claiming for extension of time and also possibly claiming for additional cost, while on the other hand the employer stand that the contractor has no right to get extension of time nor additional cost, but liquidated damages that shall be borne.

The Society of Construction Law (2002) describes that the benefit to a contractor of an extension of time (EOT) is only to relieve the contractor of liability for damages for delay (usually LDs) for any period prior to the extended contract completion date. The benefit for the Employer is that it establishes a new contract completion date, and prevents time for completion of the works becoming 'at large'.

Properly assessment concurrent delay can be one of most difficult challenges encountered in resolving delay claims (Mark Boe 2004). The Society of Construction Law (2002) issued a delay and disruption protocol that requires appropriate program to assess the delays. The delay and disruption protocol and other critical path method follows the Apportionment Principle in assessing concurrent delays.

1.2. Problem Statement

One of the cases concerning concurrent delay is the 2007 Scottish decision of *Lord Drummond Young in City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH

190. In relation with delay it was clear that various events had occurred concurrently with one another, particularly towards the end of the project, which all potentially caused delays to completion. Some of these were relevant events under the construction contract, and some were events, which were attributable to Shepherd.

Lord Drummond Young rejected City Inn's critical path analysis and preferred the evidence of Shepherd's expert. Applying this approach, he found that Shepherd was entitled to the same nine-week EoT that had been awarded by the adjudicator.

City Inn appealed. *City Inn Limited v Shepherd Construction Limited* (2010) (CSIH 68 CA101/00). One of the three judges in the appeal decision, Lord Carloway, agreed with the overall result but rejected the concept of apportionment. Lord Carloway agreed that this was a matter of "common sense". He also agreed with the other two judges that a critical path analysis was not essential to the assessment of an EoT.

Following the City Inn case, concurrent delays and extensions of time were referred to briefly in an English case in December 2010 between *De Beers - the diamond manufacturers- and an IT software contract supplier*. Furthermore, City Inn has been rejected again in the more recent Commercial Court decision of *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm) which now brings into question both the majority and minority views that were expounded in City Inn.

As the statements about concurrent delay in De Beers case were made without reference to case law, including City Inn case, it remains to be seen what effect the case will have.¹

¹ Out-Law.com (August, 2011), *Extensions of time and concurrent delay: the City Inn case*,

1.3. Objectives

Considering the problem statement above, notwithstanding many interpretations from the court, the objectives of this study is to determine the principles that apply in assessing concurrent delay.

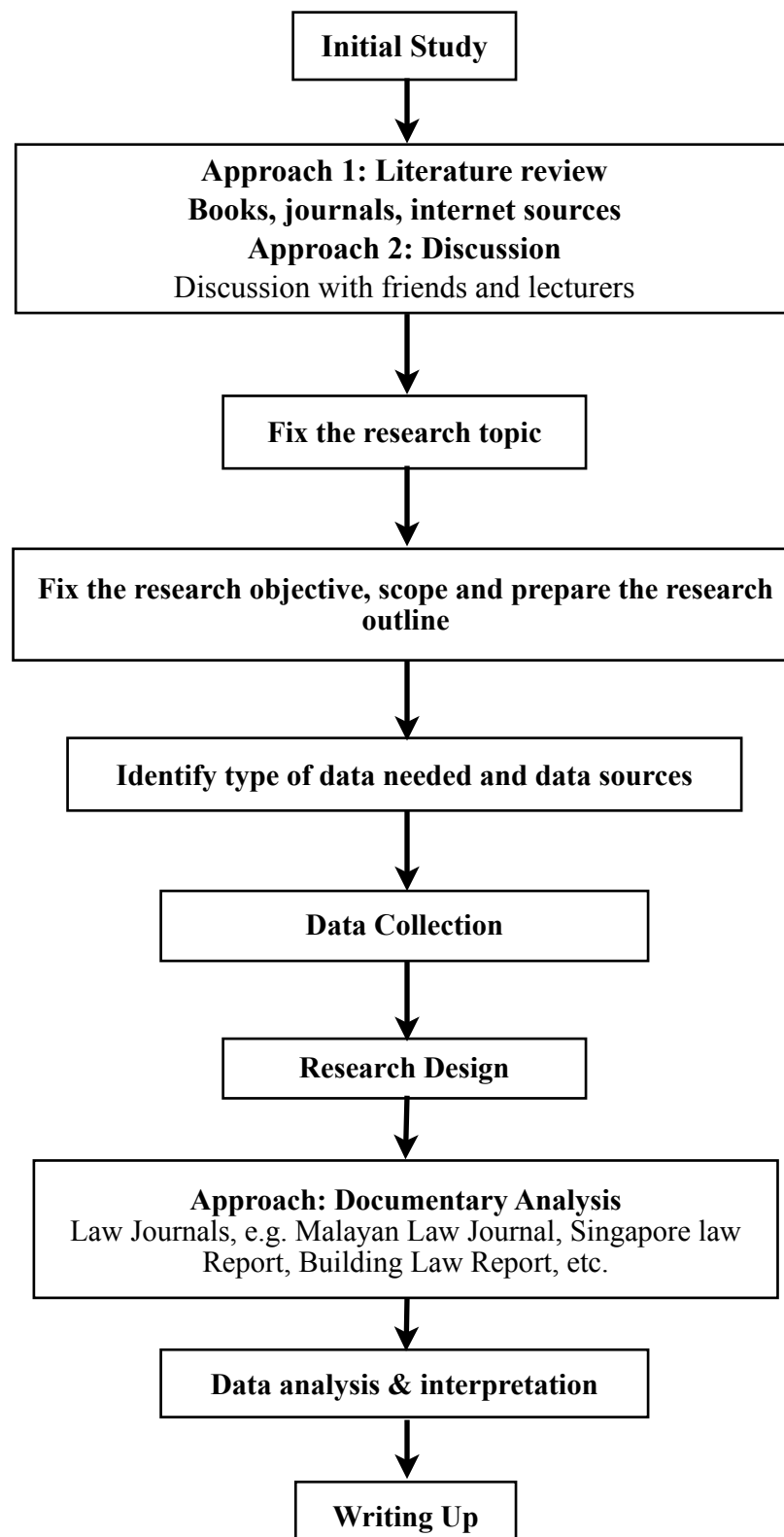
1.4. The Scope Of The Research

The study will be limited on construction cases dealing with concurrent delays and the source of the study is the judgments of the court or tribunal arbitration (if any) in construction cases.

1.5. The Importance Of The Research

This research seeks to investigate the assessing method of concurrent delays that always being faced by the construction industry. It is hoped that this study will be able to help the stakeholders in the construction industry to have a more complete understanding regarding with issue of concurrent delay in construction projects.

1.6. Research Methodology



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