Abstract

There continues to be considerable debate concerning the ownership of ‘float’, the implications of concurrent delays and the assessment of delays relative to the award of extension of time and financial settlement.

The implications of float ownership and concurrency have been addressed by many notable authors in delay analysis, the implications have been considered by the courts and are the principle subject of the Society of Construction Law’s Delay and Disruption Protocol (SCL Protocol) and The Association For Advancement of Cost Engineering International’s (AACEI) recommended practice No. 29R-03.

In an attempt to rationalise the subject to a series of key facts this paper provides a definition of float and delay, a summary of the pertinent United Kingdom court cases, an overview of the common law position, consideration of the SCL protocol, an overview of the standard contract forms regarding float and a comparison to Australian and American approaches. The article provides a final summation of the findings and conclusion.
**Definition of Float and Delaying Events**

Float is defined by the (SCL Protocol)\(^4\) as “the amount of time by which an activity or group of activities may be shifted in time without causing delay to a contract completion date”.

Judge Fay in (Henry Boot Construction Limited v. Central Lancashire New Town Development Corporation 1980)\(^5\) identified three forms of delaying events ‘delays caused by the contractor’, delays caused by neutral events and delays caused by the employer or his agents (Williams 2001 p.20)\(^6\) defined three categories of delay and entitlement (from an American perspective); excusable / compensable, excusable/non-compensable and non-compensable (King and Brooks 1996)\(^7\) provide US legal cases to illustrate each category. (Iyer, Chaphalkar and Joshi 2007)\(^8\) identified two classes of delays ‘critical delays’ and ‘non-critical delays’.

These are descriptions of singular delays, which can be readily apportioned to the employer (or his agents) or to the contractor. ‘Concurrent delays’ are delays in which two or more delaying events occur at the same time and are the responsibility of both the employer and the contractor. (Williams 2001 p. 22)\(^9\) provides reference on the nature of current delay reviews and the legal position in America, whilst (Lyden 1993)\(^10\) provides reference to two significant cases in the UK.
Common Law Considerations

At common law there is no implied term in contracts that the contractor should exercise due diligence and expedition in the performance of their work. In (Greater London Council v Cleveland Bridge and Engineering Company Limited 1984)\(^{11}\) Judge Staughton quoted the case of (Wells v. Army and Navy Co-operative Society 1902)\(^{12}\) allowing the contractor to decide for themselves at what time they are to be supplied with the details and to do the work in what order they pleased. By inference this suggests that the contractor, not the employer has more control over the float in the contract. However; (Brown 1999)\(^{13}\) states that in the absence of express agreement to the contrary, neither party owns the float, this position is confirmed by the UK case of (Ascon Contracting Limited v. Alfred McAlpine Construction Isle of Man Limited 1999)\(^{14}\).

Construction Cases in the UK

The most relevant UK case regarding float ownership is (Ascon Contracting Limited v. Alfred McAlpine Construction Isle of Man Limited 1999)\(^{15}\). McAlpine’s programme contained a ‘float’ of five weeks. McAlpine argued that the float was for their ‘benefit or value’, i.e. they owned the float and therefore they could use it as an option to ‘cancel’ or reduce delays for which it or other sub-contractors would be responsible in preference to those chargeable to Ascon. Judge Hicks considered the argument misconceived and rejected McAlpine’s consideration.
He confirmed that no one party owned the float and that no one party could benefit from use of the float to obviate losses for themselves. He clarified that in making this judgement he did not raise questions of concurrent liability or contribution, the contention was explicitly on the benefit of ownership and therefore residual liability. (Keane and Caletka 2008 pp.199-202)\(^{16}\) provide further discussion on this case and draw the conclusion (pp. 202) “that the decision supported the view that float was a shared commodity (coincidental with the SCL Protocol) as opposed to the ‘first come-first served’ basis.

Two cases (Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd 1971)\(^{17}\) and (Rapid Building Group v Ealing Family Housing Association 1984)\(^{18}\) concluded that if it is impossible to separate the delays caused by the employer from those which are the contractor’s own, then the contractor must be given the benefit of doubt in regard to an extension of time.

In (John Doyle Construction Ltd v Laing Management (Scotland) Ltd. 2004)\(^{19}\) the Court favoured an apportionment method in determining a contractor’s entitlement for delay where it cannot be said that the events for which the employer is responsible are the dominant cause.

In (Henry Boot Construction Limited v. Central Lancashire New Town Development Corporation)\(^{20}\) Judge Dyson confirmed that 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. This was confirmed in (Royal Brompton Hospital NHS Trust v Hammond 2002)\textsuperscript{21}. 

(McAdam 2009)\textsuperscript{22} provides a review between (City Inn Ltd v Shepherd Construction Ltd 2007)\textsuperscript{23}, (John Doyle Construction Ltd v Laing Management (Scotland) Ltd. 2004)\textsuperscript{24} and (Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd. 2000)\textsuperscript{25} and the UK common law of causation, the Contribution Act of 1978 and prevention. McAdam reflects these cases against American Authorities in particular the Court of Federal Claims and (R P Wallace v. United States 2004)\textsuperscript{26} where Judge Allegra concluded that a contractor will generally receive what in the United Kingdom would be summarised as ‘time but no money’ for concurrent delays. Confirming in essence that the float is neither the contractor’s not the employers. (McAdam 2009)\textsuperscript{27} concluded that in cases of concurrent delaying events it is legally possible and appropriate to determine the extension of time by apportioning the relative responsibility of the contractor and employer. Although (Gould 2008)\textsuperscript{28} confirms that the English legal principle of prevention means that no employer can benefit from its own breach. 

**Contract Forms**

There is no definitive mechanism within the JCT contract form for defining ownership. According to (Contract Journal 2007)\textsuperscript{29} Judge Lloyd in (Royal Brompton Hospital NHS Trust v Hammond 2002)\textsuperscript{30} appeared to have granted the ownership of float to the project. The article suggests that in the NEC3 contract,
the contractor may if he wishes identify an earlier completion date than required essentially creating ‘terminal float’. The NEC3 guidance notes state that in the event of any compensation event occurring the ‘terminal float’ is preserved for the use of the contractor, thus intimating that the NEC3 contract favours the contractor in terms of ‘float ownership’ although the article confirms the intent of the guidance note has not been challenged nor confirmed in any court rulings to date (2007).

The article identifies that for the ICE standard form of contract the engineer is requested to grant an interim extension if he considers the delay suffered fairly entitles the contractor to an extension. Again; there is no definitive mechanism as to ownership of float or apportionment of float in the event of concurrent delays.
SCL Protocol Overview

The purpose of the Protocol\textsuperscript{31} is clearly stated “it is to provide a means by which the parties to a construction contract can resolve common issues that arise and avoid unnecessary disputes”. According to (Keane and Caletka 2008 pp.174-181)\textsuperscript{32} the Protocol focus on dispute avoidance by providing recommendations for managing programmes. (Keane and Caletka 2008 pp.175)\textsuperscript{33} state that the Protocol sets out 21 core statements, four sections of guidance notes, a definition and glossary of terms, ‘A Model Specification Clause’ for the provision and management of programmes, and Model Record Clauses’.

The Protocol endorses the consideration that an extension of time will only be granted where float on the critical path(s) has been reduced to below zero. The 7\textsuperscript{th} core principle ‘Float as it relates to time’ (SCL)\textsuperscript{34} addresses who owns the float. The Guidance Note suggests that the ownership of float is addressed in the contract between the parties (SCL Protocol pp. 14. section 1.3.3)\textsuperscript{35} if there is no such provision then the Protocol suggests that “where there is remaining float in the programme at the time of an Employer Risk Event, an EOT should only be granted to the extent that the Employer Delay is predicted to reduce to below zero the total float on the activity paths affected by the Employer Delay. (SCL Protocol pp. 13. Section 1.3.1)\textsuperscript{36} and (Keane and Caletka 2008 pp.177)\textsuperscript{37} refer.

In relation to float and money the 8\textsuperscript{th} core principle suggests that the contractors are entitled to direct time related costs (not overheads) for periods of delay which
deteriorate float (Keane and Caletka 2008 pp.178)\textsuperscript{38}. The guidance note (SCL Protocol pp. 24. Section 1.12)\textsuperscript{39} intimates that if an Employer Delay prevents the Contractor from completing his works by the Contractor’s Completion date (being a date earlier than the contract completion date) the Contractor should in principle be provided compensation provided at the time of the formation of the contract the Employer was aware of the intention of the Contractor to complete ahead of the contractual completion date. The authors of the Protocol recognised that this was contrary to current UK court ruling particularly (Glenlion Construction Limited v The Guiness Trust 1987)\textsuperscript{40} where it was held that there was no implied term in the building contract requiring the Employer to perform the contract to enable the Contractor to complete the works in accordance with a programme that showed the works being completed earlier than the contractual completion date.

The issue of concurrent delay and its effect on the entitlement to an extension of time is addressed in the 9\textsuperscript{th} core principle whilst the 10\textsuperscript{th} core principle addresses concurrent delay and entitlement to compensation for prolongation.

(Keane and Caletka 2008 pp.181)\textsuperscript{41} suggest that whilst the Protocol has its critics, it provides useful general guidance for those involved with delay and disruption analysis.
Other Jurisdictions Australia and America

(Caletka 2000)\(^{42}\) provides insight into the American courts interpretation of float ownership and also the construction of American contracts for the pre-determination of ownership and the right to float. Caletka identifies two relevant USA court cases (Hoffman Construction Company v. US 1998)\(^ {43}\) and (Weaver-Bailey Contractors v. US, Titan Pacific and Gulf Contracting Inc) that demonstrate the court’s interpretation of float ownership issues. Caletka also confirms that the decisions in the cases in America have been ‘derived’ because of the provisions in the contracts between the various parties.

The Anglo-Australian concept of property ownership prohibits a straightforward definition of ownership of float in a legal sense (Brown 1999)\(^ {44}\). He also contends the ownership issue is further complicated because ‘float’ is not a traditional object of ownership, albeit certain contractual rights and related obligations are bound up in the notion of float.

In the case (B.G. Gregory Properties Limited v Shire of Greenough)\(^ {45}\) the contractor relied upon a programme displayed on site, and inferred that an implied term under the contract allowed him to progress his works in accordance with the programme, and thereby the Contract Manager would accommodate the contractor in achieving the programme. However, the majority of the Full Court of the Supreme Court of Western Australia concluded the implied term was inconsistent with the express terms of the contract and the wider business efficacy intent of the contract.
(Brown 1999) provides a review of Australian standard forms of contract and their considerations on the ownership of float and concludes that the “building and engineering industry in Australia has to some extent, although not in all industry forms, provided mutual rights to the use and management of float.

(Garza, Prataepusanond and Ambani 2007) identify that almost all significant public procurement contract in America include contract clauses designating that float not to be used for the exclusive benefit of any one party, i.e. it is to be used on a first come first served basis.
Final Summation

In the UK (Ascon Contracting Limited v. Alfred McAlpine Construction Isle of Man Limited 1999)\(^48\), confirms the current UK situation whereby, float is not owned by either party, and that one party cannot obviate its losses by the use of float.

In situations of concurrent delays, resolution for liability is determined by the causes of delay. If the concurrent delays are indivisible then both (Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd 1971)\(^49\) and (Rapid Building Group v Ealing Family Housing Association 1984)\(^50\) the contractor must be given the benefit of doubt in regard to an extension of time.

In the circumstances where it cannot be said that the events for which the employer is responsible are the dominant cause then an apportionment approach is to be taken (John Doyle Construction Ltd v Laing Management (Scotland) Ltd. 2004)\(^51\).

Where 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 (Henry Boot Construction Limited v. Central Lancashire New Town Development Corporation)\(^52\) and (Royal Brompton Hospital NHS Trust v Hammond 2002)\(^53\).
The SCL Protocol provides guidance on the avoidance of disputes, whilst the Association for Advancement of Cost Engineering International’s (AACEI) recommended practice No. 29R-0354 provides a unifying technical reference for the forensic application of critical path method.

Apart from NEC3 no current UK form of contract provides for the recognition or management of float. In the USA and Australia contract provisions exist for recognition and management of float and the courts in the USA have provided judgements based on these considerations.
Conclusion

It is confirmed in the absence of express terms to the contrary, no party owns the float and therefore singular and concurrent delaying events will remain subject to forensic analysis and ultimately court judgements to resolve.

Furthermore; on a cautionary note, although the UK courts have provided judgements on float ownership and concurrent delays, as in most legal considerations reliance on existing court decisions is dependent on the similarity of the disputed circumstances with the existing precedents. Each dispute must be examined on the merits of the party’s circumstances, the events involved in the dispute and the particulars of the contract arrangements, balanced against the previous judgements and common law principles.

Finally; the drafting of float ownership clauses to overcome difficulties in delay analysis would provide further consternation to both contracting parties. Potentially provide an area for further disputes that will not so readily have any precedence for their resolution. That is not to say, they should be avoided, merely intimating that their use should be with caution.

References


21 Royal Brompton Hospital NHS Trust v Hammond. 2002. EWHC 2037 (TCC); 88 Con. L.R. 1; Official Transcript.


30 Royal Brompton Hospital NHS Trust v Hammond. 2002. EWHC 2037 (TCC); 88 Con. L.R. 1; Official Transcript.


40 *Glenlion Construction Limited v The Guiness Trust.* 1987. 39 BLR 89


53 Royal Brompton Hospital NHS Trust v Hammond. 2002. EWHC 2037 (TCC); 88 Con. L.R. 1; Official Transcript.


**Bibliography**


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