

CONCURRENT DELAY REVISITED

John Marrin QC

Introduction

The purpose of this paper is to discuss, once again, the correct approach to contractors' claims arising out of concurrent delay in the execution of construction projects. In 2002 and 2003 the writer presented papers on the same subject to the Society of Construction Law in London and the Society of Construction Law Hong Kong, respectively.¹

At that time, it was suggested that the approach to concurrent delay which had then recently been recognised in *Malmaison* would ordinarily be appropriate.² Since then, a substantial body of opinion has emerged which supports that approach.³ However, two cases in Scotland have suggested that the approach of apportioning delays would be preferable;⁴ and there have been suggestions that the same approach should be adopted by the courts of Hong Kong⁵ and in Australia.⁶ Since the issues arising have yet to be considered by the highest court in any one of these jurisdictions, there is, accordingly, room for discussion.

This paper is concerned with remedies afforded to parties to construction contracts by the contractual provisions upon which they have agreed. Accordingly, whilst it is common for contractors to combine claims brought under such contracts with claims for damages for breach of contract, the focus of this paper is on the former, rather than the latter.

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- 1 John Marrin QC, 'Concurrent Delay', SCL paper 100 (February 2002) <www.scl.org.uk> and 'Concurrent Delay' (2002) 18 Const LJ 436.
 - 2 *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* 70 Con LR 32 (TCC).
 - 3 Stephen Furst QC and The Hon Sir Vivian Ramsey (editors), *Keating on Construction Contracts* (9th edition, Sweet & Maxwell, 2012), para 8-025; Nicholas Denny, Mark Raeside and Robert Clay (general editors), *Hudson's Building and Engineering Contracts*, (12th edition, Sweet & Maxwell, 2010), para 6-059.
 - 4 *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* v 2004 SC 713 (Court of Session, Inner House), 2004 SCLR 872, [2004] BLR 295, (2004) 20 Const LJ 477, [2004] CILL 2135. *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190 (Court of Session, Outer House), [2008] BLR 269, (2008) 24 Const LJ 590, [2008] CILL 2537; and *City Inn Ltd v Shepherd Construction Ltd* [2010] CSIH 68 (Court of Session, Inner House), 2011 SC 127, 2011 SCLR 70, [2010] BLR 473, 136 Con LR 51, [2010] CILL 2889.
 - 5 *W Hing Construction Co Ltd v Boost Investments Ltd* [2009] BLR 339, High Court of Hong Kong.
 - 6 Paul Tobin, 'Concurrent and Sequential Causes of Delay', (2007) 24 ICLR 142.

The meaning of concurrent delay

In 2002, the writer proposed the following definition of concurrent delay:

‘... the expression “concurrent delay” is used to denote a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency.’⁷

That definition has since been approved⁸ and adopted.⁹

It has been pointed out that true concurrency in this sense will only arise in exceptional factual situations.¹⁰ As the writer pointed out in 2002:

‘... where there are two competing causes of delay, they often differ in terms of their causative potency. Even where both competing causes are effective causes of delay, in the sense that each taken on its own would be regarded as the cause of the whole delay, the two may be of unequal causative potency. It is a commonplace to find that during the course of the factual enquiry, it becomes obvious as a matter of common sense that the two supposed causes of delay are of markedly different causative potency. One is then regarded [by the tribunal] as the effective cause and the other as ineffective. In other words, the minor cause is treated as if it were not causative at all.’¹¹

It will be noted that the focus is on the point in time at which delay impinges on the progress of the contractor’s works. In *Royal Brompton Hospital v Hammond*, His Honour Judge Richard Seymour QC put forward a narrower definition which would require the coincidence in time of the occurrence of the events in question as well as their effects. He said:

‘However, it is, I think, necessary to be clear what one means by events operating concurrently. It does not mean, in my judgment, a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in 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 on the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, 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

7 John Marrin QC, SCL paper, note 1, page 2.

8 *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm), [2011] BLR 384, 136 Con LR 190, para [277].

9 *Keating*, note 3, para 8-025.

10 *Keating*, note 3, para 8-025.

11 John Marrin QC, SCL paper, note 1, page 2.

the other is not. In such circumstances there is a real concurrency of causes of delay.¹²

In *City Inn* at first instance, Lord Drummond Young said that he had some difficulty with the distinction sought to be drawn by Judge Seymour.¹³ In the same case on appeal, the Inner House of the Court of Session agreed.¹⁴

The distinction between concurrency of causes and the concurrency of the effects of delay has been recognised.¹⁵ Plainly there is room for a distinction between sequential events which cause concurrent delay, on the one hand, and coincident events which cause concurrent delay, on the other.

Example

For the purpose of exploring the arguments which arise, it is convenient to identify a set of hypothetical facts as an example for discussion. It is useful, for these purposes, to select an example which involves one cause of delay which constitutes an instance of contractor default and another which constitutes an instance of employer prevention.

Let it be supposed, therefore, that the contractor has just completed a conventional building project, perhaps a block of flats. The contract called for the work to be carried out over the 12 months, January to December 2011. Let it be supposed further that the job overran by exactly one month (ie the month of January 2012), the causes of delay being, on the one hand, the carrying out of remedial work needed to rectify the contractor's defective workmanship and, on the other hand, variations ordered by the architect. Let it be supposed also that these two causes of delay were of approximately equal causative potency.

The issues are:

- Is the contractor to be granted a month's extension of time?
- Is the contractor entitled to recover a month's worth of prolongation costs?
- Is the employer entitled to recover a month's worth of liquidated damages?

In this context, there is one truth which can scarcely be over-emphasised. The answers to these questions will depend on the terms of the construction contract agreed between the parties. Let it be supposed, therefore, that the contract is governed by the Joint Contracts Tribunal (JCT) Standard form of Building Contract with Quantities, 2005 edition. The specified date for completion was 31st December 2011. Clause 2.32 provides for the recovery

12 *Royal Brompton Hospital NHS Trust v Hammond (No 7)* [2001] EWCA Civ 206, 76 Con LR 148, para [31].

13 *City Inn*, note 4, para [17].

14 *City Inn*, note 4, para [36].

15 Andrew Stevenson, 'Who Owns the Float and Related Legal Issues?' (2004) 20 BCL 97, page 109; Mallesons Stephen Jaques, 'Concurrent Delay' (2003) 92 Australian Construction Law Newsletter 35; Paul Tobin, note 6, page 145.

or deduction of liquidated damages for delay; clause 2.28 affords the contractor a remedy in extension of time for various delays including that caused by compliance with the architect's instructions for variations; and clause 4.23 affords the contractor the opportunity to recover prolongation costs when the carrying out of varied work materially affects the progress of the works.

Preliminary considerations

The prevention principle

A number of commentators have suggested that in reviewing the correct approach to concurrent delay it is necessary to have regard to the prevention principle.¹⁶ The prevention principle was aptly summarised by Lord Denning MR in the Court of Appeal in *Trollope & Colls v North West Metropolitan Regional Hospital Board*:

‘... It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if one party by his conduct – it may be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for the non-completion in that time.’¹⁷

The history of the principle can be traced back to *Comyns' Digest*.¹⁸ In *Multiplex v Honeywell*, Mr Justice Jackson (as he then was) said:

‘The essence of the prevention principle is that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing.’¹⁹

Later, having reviewed the authorities, his Lordship continued as follows:

‘From this review of authority I derive three propositions:

- (i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date.
- (ii) Acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events.

16 Paul Tobin, note 6, page 148; *Hudson*, note 3, paras 6-060 and 6-062; Sir Vivian Ramsey, ‘Claims for Delay & Disruption: the Impact of *City Inn*’ (an address to the Technology and Construction Court Bar Association Conference 2011).

17 *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 (HL), page 607; also [1973] 2 All ER 260, 9 BLR 60.

18 *Comyns' Digest* 1762, Condition L(6), Volume 3, pages 116-117.

19 *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* [2007] EWHC 447 (TCC), [2007] BLR 195, 111 Con LR 78, [2007] CILL 2458, para [47].

- (iii) Insofar as the extension of time clause is ambiguous, it should be construed in favour of the contractor.²⁰

For present purposes there are two important features of the prevention principle to be borne in mind. First, it has long been accepted that the principle applies unless the contract expresses a contrary intention.²¹ Second, it is open to the parties to adopt extension of time machinery which relieves the contractor of delay occasioned by acts of prevention with the effect that there is ordinarily no need to have recourse to the prevention principle.

In this context, it should be mentioned in passing that there is a lively debate²² amongst commentators about whether the introduction of time-bar provisions has the effect of triggering the prevention principle where it might not otherwise apply. But this debate is beyond the scope of this paper.

Before examining how the prevention principle might affect the arguments, it is necessary to address a recent suggestion that the prevention principle has no application in cases of concurrent delay. In *Adyard*, the Commercial Court was concerned with the disputed termination of two contracts for the construction of Moorings and Special Operations Support Vessels.²³ *Adyard* invoked the prevention principle. Mr Justice Hamblen held that a party seeking to rely upon the prevention principle must establish that actual delay was, on the facts, caused by the particular acts of prevention relied upon. Since actual delay was not established on the facts, *Adyard* was not entitled to rely on the prevention principle and its claim was dismissed.

Subsequently in *Jerram Falkus*, Mr Justice Coulson held, *obiter*, that the prevention principle does not apply in cases of concurrent delay. He said:

‘Accordingly, I conclude that, for the prevention principle to apply, the contractor must be able to demonstrate that the employer’s acts or omissions have prevented the contractor from achieving an earlier completion date and that, if that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the contractor’s own default, the prevention principle will not apply.’²⁴

In *SMK Cabinets* the full court of the Supreme Court of Victoria had occasion to consider, amongst other things, the application of the prevention principle in circumstances where the acts of the contractor also contributed to delay. Mr Justice Brooking (with whom the other members of the court agreed) said:

‘The sole remaining matter is the soundness of the ground on which the arbitrator in fact rejected the defence of prevention. He evidently considered that where acts or omissions of a proprietor do in fact substantially delay completion, the proprietor nonetheless cannot be said

20 *Multiplex*, note 19, para 56.

21 *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111 (CA), page 122, Salmon LJ.

22 See for example, Professor Doug Jones, ‘Can Prevention be cured by Time Bars?’ [2009] ICLR 57.

23 *Adyard*: note 8.

24 *Jerram Falkus Construction Ltd v Fenice Investments Inc (No 4)* [2011] EWHC 1935 (TCC), [2011] BLR 644, 138 Con LR 21, [2011] CILL 3072, para [52].

to have prevented the contractor from completing by the relevant date unless the contractor would have been able to complete by that date had it not been for the supposed prevention. Mr McCurdy asks us to uphold that view. But it has been accepted for more than one hundred years that this is not the law. The cases are all one way.’²⁵

In *Jerram Falkus*, Mr Justice Coulson was referred to a footnote in the 8th edition of *Keating*²⁶ and to *SMK Cabinets* and *Adyard*.²⁷ As to the former, he said:

‘In fact, on an analysis of that case, and indeed the other cases referred to in the Keating footnote, it becomes apparent that they were not dealing with *concurrent* delay, but instead with the situation where the contractor was in delay for part of the time but where, for other periods of delay, the contractor could show that they were the result of the acts of prevention on the part of the employer. I am in no doubt that, in those circumstances, the prevention principle applies. But none of those cases deal with concurrent causes of delay, and in my judgment, in that situation, the right analysis is provided by Mr Justice Hamblen in *Adyard*.’²⁸

However, there are some difficulties with this conclusion. First, Mr Justice Hamblen did not go so far as to hold that the prevention principle was inapplicable in cases of concurrent delay. Second, no rationale is offered for distinguishing between cases of concurrent delay and the other cases of contractor-caused delay referred to. The suggestion appears to be that the prevention principle applies where the employer’s act is the sole cause of the relevant period of delay but not when the same act is one of two concurrent causes.

It is suggested that on analysis this question involves two separate issues. The first concerns whether the prevention principle depends on the employer’s act being the sole cause of delay in the relevant period, as opposed to being a concurrent cause. On that issue, the writer’s preferred view is that expressed by the editors of *Hudson* as follows:

‘Thus, it is well established that an Employer is not entitled to liquidated damages if by their acts or omissions they have prevented the Contractor from completing their work by the completion date. *Whether concurrent with another Contractor delay or not, there is no reason why the principle should not be the same.* As Salmon LJ observed: “If the failure to complete on time is due to the fault of both the employer and the contractor, in my view the clause (giving the employer liquidated damages) 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 ... I consider that unless the contract expresses a contrary intention, the employer, in the circumstances

25 *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391 (Supreme Ct of Victoria).

26 *Keating* (8th edition, Sweet & Maxwell, 2006).

27 *Adyard*: note 8.

28 *Jerram Falkus*, note 24, para [51].

postulated, is left to his ordinary remedy; that is to say, to recover such damages as he can prove flow from the contractor's breach".²⁹
[*Emphasis added*]

The second question concerns the relationship between the prevention principle and the terms of the contract agreed between the parties. As already pointed out, the prevention principle applies unless the contract expresses a contrary intention. In the writer's experience, it is rare to find such expressions of contrary intent. Certainly, it is difficult to find any such expression in the JCT Standard form of Building Contract.

Accordingly, for the purposes of this paper, it is assumed that the prevention principle does apply even in cases of concurrent delay. On that basis, it is necessary to have regard to the prevention principle in considering the correct approach. If the approach under consideration involves no departure from the prevention principle because the contractor receives a full extension of time for any act of prevention, all well and good. But if, on the approach under consideration, the contractor does not receive an extension of time (or does not receive a full extension) there is a difficulty. The extension of time machinery will have failed to insulate the contractor against the employer's act of prevention and the prevention principle will or may be brought into play. In those circumstances, it will be necessary to consider whether the principle does come into play or whether the terms of the contract are such as to express a contrary intention.

The obverse problem

The second preliminary consideration is the potential for inconsistent monetary cross-claims. In the chosen example, the contractor's claim for prolongation costs associated with the month of delay taken up with carrying out extra work is likely to be met by the employer's cross-claim for liquidated damages for the same delay which will be attributed to the need for the contractor to rectify his defective workmanship. Logic suggests that, in the absence of apportionment, both claims cannot succeed. It would be nonsensical if the contractor and the employer each had valid cross-claims against each other for the whole of the month of January 2012. So, unless the losses are to be apportioned, common sense demands that one claim must succeed and the other must fail. On that basis, a choice is required. This is sometimes referred to as 'the obverse problem'.³⁰ The problem has significance which extends beyond monetary claims. The success of the employer's counterclaim for liquidated damages is inversely related to the success which the contractor achieves on his extension of time claim. It follows that no approach to the question of extension of time is likely to be acceptable unless it accommodates the obverse problem.

29 *Hudson*, note 3, para 6-060.

30 The problem was first so described in 1991 by Sir Anthony May in the 5th edition of *Keating*, page 195.

But-for causation

The third preliminary consideration again arises out of the interrelationship between claims for time and claims for compensation for delay. It is necessary to have regard to conventional tests of causation. Where concurrent delay occurs during construction works, employers often defend contractor's monetary claims, relying on the 'but-for' test of causation. Citing the contractor's own delay, the employer's argument is that the event relied on in fact caused no delay because the contractor had by its own default already disabled itself from completing on time. The defence is that the contractor is unable to establish causation because it cannot show that it would have completed on time but for the event relied upon.

It has often been observed that the but-for test is a necessary but not a sufficient test of causation.³¹ It is also well recognised that there are cases where the courts regard it as appropriate to relax the rule. Prominent examples concern some of the more difficult tort cases. In contract, an example is where the acts of two separate contract-breakers are both effective causes of the same damage. Whichever defendant the claimant chooses to sue, he is not required to prove that he would not have suffered the damage but for that defendant's breach because otherwise the claimant would be left without a remedy, being unable to prove his case against either contract-breaker.³²

Of the different approaches which have been suggested, some at least would involve a relaxation of the but-for test. In reviewing the arguments, it is therefore necessary to consider whether the parties can be taken to have intended that.

Apportionment

Looking at the problems thrown up by the chosen example, the lay observer might well start with the idea that the delay during the month of January 2012 might be apportioned between the employer and the contractor so as to share the risks. It is scarcely surprising, therefore, that the approach of apportioning the responsibility for delay has received some support.

In Scotland, the apportionment of such risks was first put forward by Lord MacLean in *John Doyle*. Referring to a contract which substantially adopted the Scottish Works Contract (March 1988), he said:

'... we are of the opinion that apportionment of loss between the different causes is possible in an appropriate case. Such a procedure may be appropriate in a case where the causes of the loss are truly concurrent, in the sense that both operated together at the same time to produce a single consequence. For example, work on a construction

31 *McGregor on Damages*, (18th edition, Sweet & Maxwell, 2009), para 6-006; *Orient-Express Hotels Ltd v Assicurazioni General Spa* [2010] EWHC 1186 (Comm), [2010] 1 CLC 847, [2010] Lloyds Rep IR 531, [2011] Bus LR D7, para [21].

32 *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 (KBD), page 1047A; also (1949-50) 83 Lloyd's Rep 438 applied in *Great Eastern Hotel Company Ltd v John Laing Construction Ltd* [2005] EWHC 181 (TCC), 99 Con LR 45, paras [314] – [316].

project might be held up for a period owing to the late provision of information by the architect, but during that period bad weather might have prevented work for part of the time. In such a case responsibility for the loss can be apportioned between the two causes, according to their relative significance.’³³

In the *City Inn* case at first instance, Lord Drummond Young, referring to the JCT Standard form of Building Contract, Private Edition with Quantities 1980 edition, said:

‘Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable. Precisely what is fair and reasonable is likely to turn on the exact circumstances of the particular case.’³⁴

This view was affirmed by a majority of the Inner House of the Court of Session on appeal.

The approach of apportioning such risks has, however, not received much support in England. In *Tennant Radiant Heat v Warrington Development Corporation*, the Court of Appeal apportioned damages between the parties, treating the matter as one of causation.³⁵ The case concerned the roof of a warehouse which collapsed due to an accumulation of rainwater because of blocked rainwater outlets. The tenant’s claim in respect of the goods which were damaged was met by the landlord’s counterclaim for damages for breach of the repairing covenant. Lord Justice Dillon justified apportionment in the following terms:

‘The problem which this court faces, on the claim and counterclaim alike, is in my judgment a problem of causation of damage. On the claim, the question is how far the damage to its goods which the lessee has suffered was caused by the Corporation’s negligence notwithstanding the lessee’s own breach of covenant. On the counterclaim, the question is how far the damage to the Corporation’s building which the Corporation has suffered was caused by the lessee’s breach of covenant, notwithstanding the Corporation’s own negligence. The effect is that on each question, apportionment is permissible.’³⁶

Although the decision in *Tennant Radiant Heat* was followed by His Honour Judge John Hicks QC (albeit with some reservations) in *Lamb v Jarvis*,³⁷ the Court of Appeal’s decision has been doubted not only by the Law

33 *John Doyle*, note 4, para [16].

34 *City Inn*, note 4, para [19].

35 *Tennant Radiant Heat Ltd v Warrington Development Corporation* [1998] 1 EGLR 41 (CA), (1988) 4 Const LJ 321.

36 *Tennant Radiant Heat*, note 35.

37 *W Lamb Ltd v Jarvis & Sons Plc* 60 Con LR 1, (OR).

Commission³⁸ but also by the Court of Appeal.³⁹ In *Hi-Lite v Wolseley, Tennant Radiant Heat* was held to be a decision on its own facts and distinguishable.⁴⁰

However, the practice of permitting apportionment in cases for damages of breach of contract is well established in Canada⁴¹ and there are indications that the same practice will be followed in New Zealand⁴² and in Hong Kong.⁴³

Nevertheless, it is submitted that there are difficulties with the apportionment approach. First, there are practical problems over the basis for the apportionment. In the *City Inn* case at first instance Lord Drummond Young explained his approach as follows:

‘That leads on to the question of how the exercise of apportionment is carried out. That exercise is broadly similar to the apportionment of liability on account of’ contributory negligence or contribution among joint wrongdoers. In my opinion two main elements are important: the degree of culpability involved in each of the causes of the delay and the significance of each of the factors in causing the delay. In practice culpability is likely to be the less important of these two factors. Nevertheless, I think that in appropriate cases it is important to recognise that the seriousness of the architect’s failure to issue instructions or of the contractor’s default may be a relevant consideration. The causative significance of each of the factors is likely to be more important. In this respect, two matters appear to me to be potentially important. The first of these is the length of the delay caused by each of the causative events; that will usually be a relatively straightforward factor. The second is the significance of each of the causative events for the Works as a whole. Thus an event that only affects a small part of the building may be of lesser importance than an event whose effects run throughout the building or which has a significant effect on other operations. Ultimately, however, the question is one of judgment.’⁴⁴

In relation to the losses incurred, Lord Drummond Young continued:

‘In that case [*John Doyle*] it is recognised at paragraphs [16]-[18] that in an appropriate case where loss is caused both by events for which the employer is responsible and events for which the contractor is responsible it is possible to apportion the loss between the two causes. In my opinion that should be done in the present case. This is a case where

38 Contributory Negligence as a Defence in Contract, Law Commission Working Paper No 114 (HMSO, 1990).

39 *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1990] 1 QB 818 (CA), page 904D; also [1990] 2 WLR 547, [1989] 3 All ER 628, [1989] 2 Lloyd’s Rep 238.

40 *Hi-Lite Electrical Ltd v Wolseley UK Ltd* [2011] EWHC 2153 (TCC), [2011] BLR 629, para [238].

41 *Tompkins Hardware Ltd v North Western Flying Services Ltd* [1982] 139 DLR (3d) 329; *Ribic v Weinstein* [1982] 140 DLR (3d) 258; and *Doyron v Caisse Populaire D’Inkerman Ltee* [1985] 17 DLR (4th) 660.

42 *Day v Mead* [1987] 2 NZLR 443 (CA); *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA).

43 *Hing Construction*, note 5, para [61].

44 *City Inn*, note 4, para [159].

delay has been caused by a number of different causes, most of which were the responsibility of the employer, through the architect, but two of which were the responsibility of the contractor. It is accordingly necessary to apportion the defenders' prolongation costs between these two categories of caused [*sic*]. I consider that the same general considerations, the causative significance of each of the sources of delay and the degree of culpability in respect of each of those sources, must be balanced. On this basis, I am of opinion that the result of the exercise should be the same; I am unable to discover any reason for treating the two exercises under clause 25 and clause 26 on a different basis. I accordingly conclude that the defenders are entitled to their prolongation costs for nine weeks.⁴⁵

In these passages, Lord Drummond Young made clear that he contemplated that precisely the same approach should be taken in apportioning both time and loss. However, in *John Doyle*, Lord Macfadyen had taken a rather different approach to the apportionment of time as follows:

‘Where the consequence is delay as against disruption, that can be done fairly readily on the basis of the time during which each of the causes was operative. During the period when both operated, we are of the opinion that each should normally be treated as contributing to the loss, with the result that the employer is responsible for only part of the delay during that period. Unless there are special reasons to the contrary, responsibility during that period should probably be divided on an equal basis, at least where the concurrent cause is not the contractor’s responsibility. Where it is his responsibility, however, it may be appropriate to deny him any recovery for the period of delay during which he is in default.’⁴⁶

These observations may be compared with Paul Tobin’s paper discussing but rejecting the possibility that responsibility for concurrent delays should be apportioned on a 50:50 basis.⁴⁷

In the *City Inn* case, reliance was placed on the use of the expression ‘fair and reasonable’ in the JCT Standard form of Building Contract to justify the use of a fair and reasonable apportionment. It has been suggested that this places too much weight on the words used.⁴⁸

Wording which clearly prescribes the basis for apportionment is noticeable by its absence from most standard forms of contract. The JCT Standard form is no exception.

A second and related difficulty with the apportionment approach concerns the prevention principle. It is implicit in a finding of concurrent delay that two or more causes have given rise to delay during the same period. If one of those causes is an act of prevention on the part of the employer, the extension of

45 *City Inn*, note 4, para [167].

46 *John Doyle*, note 4, para [16].

47 Paul Tobin, note 6, page 151.

48 *Keating*, note 3, para 8-027.

time machinery will not be effective to avoid the application of the prevention principle unless the contractor is granted an extension of time for the whole period. However, if the delay during the period is apportioned between the parties, perhaps on a 50:50 basis, the contractor will not receive a full extension of time and the prevention principle will come into play.

It is for this reason that several commentators have suggested that the apportionment approach should be rejected.⁴⁹

The dominant cause approach

In the 1980s, it was common for employers to argue that, in cases of concurrent delay, the decision maker (whether an architect, an engineer or an arbitrator) is called upon to choose between the competing causes of delay according to which is 'dominant' or 'predominant'. This was the approach which appealed to the arbitrator in *Fairweather*.⁵⁰

Writing in the 5th edition of *Keating* in 1991, Sir Anthony May summarised the dominant cause approach as follows:

'If there are two causes, one the contractual responsibility of the Defendant and the other the contractual responsibility of the Plaintiff, the Plaintiff succeeds if he establishes that the cause for which the Defendant is responsible is the effective, dominant cause. Which cause is dominant is a question of fact, which is not solved by the mere point of order in time, but is to be decided by applying common sense standards.'⁵¹

If applied to the chosen example, the dominant cause approach would require the engineer to decide whether it is the extra work or the defective workmanship which should be regarded as the dominant cause of the delay during the month of January 2012.

In this context, it is necessary to distinguish between the architect's fact-finding exercise, on the one hand, and the exercise of applying the law to the facts found, on the other. It has already been observed that, in cases of supposed concurrent delay, the fact-finding exercise often reveals that it is in reality one event only which can be regarded as a true cause of delay. In such circumstances that cause of delay is occasionally referred to as the 'dominant' cause. In truth, such a case is not one of concurrent delay at all. That kind of case is to be distinguished from those relatively rare cases where the fact-finding exercise leads to the conclusion that, as a matter of fact, two events are to be regarded as having independently caused delay to the contractor's progress during the same period. This paper is concerned with the latter category of case.

49 Paul Tobin, note 6, page 151; Sir Vivian Ramsey, note 16, page 15; *Hudson*, note 3, paras 6-060 and 6-062; *Walter Lilly & Co Ltd v Mackay* [2012] EWHC 1773 (TCC), [2012] BLR 503, 143 Con LR 79, (2012) 28 Const LJ 622, [2012] CILL 3229, para [370].

50 *H Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106 (OR).

51 *Keating* (5th edition, Sweet & Maxwell, 1991), page 195.

The rationale offered for the dominant cause approach is based upon the presumed intention of the parties, as evidenced by the terms of the contract. The argument is that the scheme of the contract leads inexorably to the conclusion that the parties must have intended any particular period of delay to be attributed to one and only one cause. The root of the argument lies in the obverse problem, described above.⁵² If multiple causes of delay are recognised, there will be cases in which the contractor's claim for prolongation costs will be met by the employer's cross claim for liquidated damages in circumstances where, logically, both cannot succeed.

In *Fairweather*, the arbitrator held that extensive delay caused by a strike ran in part concurrently with delay caused by variations and late instructions issued by the architect. Both events entitled the contractor to an extension of time but only the extra work and late instructions afforded an entitlement to compensation for delay. The arbitrator held that the contract required him to determine which of the two events was the dominant cause of delay. His Honour Judge James Fox-Andrews QC allowed the contractor's appeal and remitted the award to the arbitrator for reconsideration. In doing so, he 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, when the facts require it, the extension of time to the various heads. I do not consider that the dominant test is correct. But I have held earlier in this judgment that that assumption is false. I think the proper course here is to order that this part of the interim award should be remitted to Mr Alexander for his reconsideration ...⁵³

In that passage, it appears that the learned judge was rejecting the dominant cause approach. It is unfortunate that he did not find it necessary to identify the approach which he thought correct.

Between 1991 and 2006, successive editions of *Keating* offered firm support to the dominant cause approach.⁵⁴ In the 9th edition, the learned editors suggest that the dominant cause approach has received support in recent years from the decision at first instance in *City Inn*.⁵⁵ The background is the decision of the Inner House of the Court of Session in *John Doyle*, where Lord MacLean said:

‘In this connection, it is frequently possible to say that an item of loss has been caused by a particular event notwithstanding that other events played a part in its occurrence. In such cases, if an event or events for which the employer is responsible can be described as the dominant cause of an item of loss, that will be sufficient to establish liability,

52 Page 7.

53 *Fairweather*, note 49, page 120.

54 *Keating* (8th edition), note 26, para 8-019.

55 *Keating*, note 3, para 9-065, footnote 278 and *City Inn*: note 4.

notwithstanding the existence of other causes that are to some degree at least concurrent.⁵⁶

In *City Inn* at first instance, Lord Drummond Young said:

‘I agree that it may be possible to show that either a relevant event or a contractor’s risk event is the dominant cause of that delay, and in such a case that event should be treated as the cause of the delay. A similar principle was recognised in *Doyle*, at paragraph 15 of the opinion of the court; the principle is derived from the older case of *Leyland Shipping Company Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350.⁵⁷

With respect, there is room for doubt whether Lord MacLean and Lord Drummond Young were offering support to the dominant cause approach as outlined above. It is thought more likely that they were doing no more than reflecting the common experience of the tribunal of fact that arguments about concurrent delay often fall away when the facts are examined.

The first difficulty with the dominant cause approach is a practical one. In a case of concurrent delay, as defined, it will be implicit in the findings of fact that there was more than one cause of delay of approximately equal causative potency. Against that background, it is difficult to see how the decision-maker (be he an architect, an engineer or an arbitrator) is to select the cause which is to be characterised as dominant. As the learned editors of the 9th edition of *Keating* say, this approach does not solve the problem where there is no one dominant cause.⁵⁸

The second difficulty with the dominant cause approach is that it calls for a relaxation of the but-for test of causation. The justification for such a relaxation – indeed the rationale for the dominant cause approach itself – is that any other solution is liable to give rise to the obverse problem, described above.⁵⁹ However, as explained below, it is thought that the approach adopted in *Malmaison* equally avoids that problem.⁶⁰

The third difficulty with the dominant cause approach is that it is liable to come into conflict with the prevention principle. Taking the facts of the chosen example, let it be supposed that the architect decides to treat the contractor’s delay in carrying out remedial works as the dominant cause of delay during the month of January 2012. The assumed facts nevertheless imply that the employer’s act of prevention in instructing extra work was a concurrent cause of the entire month of delay. If the extension of time clause is implemented on the basis that contractor-default is the dominant cause of delay, it will not afford the contractor relief for delay caused by the act of prevention and the result will be that the prevention principle will come into

56 *John Doyle*, note 4, para [15].

57 *City Inn*, note 4, para [22].

58 *Keating*, note 3, para 9-065.

59 Page 7.

60 *Malmaison*: note 2.

play. Time will be set at large, unless the contract expressly provides otherwise.

The *Malmaison* approach

As long ago as 1980, His Honour Judge Edgar Fay QC set out some general observations about the operation of contractual provisions such as those under consideration in the case of *Henry Boot v Lancashire*. The learned judge was concerned with the JCT Standard form of Building Contract, 1963 edition. He said:

‘The broad scheme of these provisions is plain. There are cases where the loss 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. But in the cases where the fault is not that of the contractor the scheme clearly is that in certain cases the loss is to be shared: the loss lies where it falls. But in other cases the employer has to compensate the contractor in respect of the delay, and that category, where the employer has to compensate the contractor, should, one would think, clearly be composed of cases where there is fault upon the employer or fault for which the employer can be said to bear some responsibility.’⁶¹

The approach to concurrent delay which is now commonly referred to as ‘the *Malmaison* approach’ was summarised by Mr Justice Dyson (as he then was) in the *Malmaison* case.⁶² The passage in question reflected an agreement between counsel appearing before him.

In the 8th edition of *Keating*, the learned editors summarised the *Malmaison* approach as follows:

‘Thus it now appears to be accepted that a contractor is entitled to an extension of time notwithstanding the matter relied upon by the contractor is not the dominant cause of delay, provided only that it has at least equal “causative potency” with all other matters causing delay. The rationale for such an approach is that where the parties have expressly provided in their contract for an extension of time caused by certain events, the parties must be taken to have contemplated that there could be more than one effective cause of delay (one of which would not qualify for an extension of time) but nevertheless by their express words agreed that in such circumstances the contractor is entitled to an extension of time for an effective cause of delay falling within the relevant contractual provision.’⁶³

61 *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation* (1980) 15 BLR 1 (QBD), page 12.

62 *Malmaison*, note 2, para [13].

63 *Keating* (8th edition), note 26, para 8-021.

That passage was approved by His Honour Judge Stephen Davies in *Steria v Sigma*.⁶⁴ Further support for the *Malmaison* approach is to be found in *Royal Brompton Hospital*,⁶⁵ *De Beers*⁶⁶ and *Walter Lilly*. In the latter, Mr Justice Akenhead said:

‘In any event, I am clearly of the view that, where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time. Part of the logic of this is that many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to construe Clause 25 on the basis that the Contractor should be denied a full extension of time in those circumstances. More importantly however, there is a straight contractual interpretation of Clause 25 which points very strongly in favour of the view that, provided the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question.’⁶⁷

For the purposes of the present discussion, there are three features of the *Malmaison* approach which are worth noticing. First, by contrast with the other approaches discussed, the *Malmaison* approach involves little risk of falling foul of the prevention principle. Applied to the facts of the chosen example, the *Malmaison* approach would afford the contractor a full extension of time for the month of January 2012. On that basis, the contractor would achieve relief for all of the delay caused by the employer’s act of prevention and the prevention principle would not be brought into play. The same would apply to other acts of prevention by the employer provided always that they are covered by the extension of time provision.

Secondly, although, in connection with extension of time, the *Malmaison* approach requires a relaxation of the but-for test of causation, it is thought that there is a robust justification for such a relaxation. It is required because, as already noted, in a case of concurrent delay (as defined) the contractor is never in a position to show that he would have completed on time but-for the event relied upon.⁶⁸

The justification for such a relaxation is that it is necessary to avoid a result which runs contrary to the parties’ expressed intention. It is convenient to return to the facts of the chosen example. The contractor will advance claims for an extension of time and for prolongation costs. The employer will advance a counterclaim for liquidated damages. The architect must decide. If he does not relax the but-for test, the contractor’s claims for time and money

64 *Steria Ltd v Sigma Wireless Communications Ltd* [2008] BLR 79 (TCC), 118 Con LR 177, [2008] CILL 2544, para [131].

65 *Royal Brompton Hospital*: note 12.

66 *De Beers UK Ltd v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC), [2011] BLR 274, 134 Con LR 151.

67 *Walter Lilly*, note 49, para [370].

68 Page 8.

will fail and the employer's cross claim for liquidated damages will succeed in full. Yet such a result would appear to run contrary to the parties' intentions. After all, by clause 2.29.1 of the JCT Standard form of Building Contract with Quantities, 2005 edition, the parties agreed that the contractor should have the opportunity to recover an extension of time in a case of delay caused by variations.

Thirdly, the *Malmaison* approach, if combined with a conventional approach to the proof of causation in relation to the contractor's monetary claims, can be relied upon to avoid the obverse problem. Applying that approach to the facts of the chosen example, the contractor's claim for an extension of time will succeed and the employer's cross claim for liquidated damages will fail. On the basis that the employer's cross claim fails, there can be no risk of inconsistent cross claims such as to give rise to the obverse problem.

Prolongation costs

Before leaving the discussion, it is convenient to address the likely fate of the contractor's claims for prolongation costs. For these purposes, a distinction is drawn between prolongation costs associated with critical delay, on the one hand, and various other monetary claims, such as (a) claims for costs arising out of disruption (b) claims for costs arising out of acceleration and (c) claims for prolongation costs associated with non-critical delay, on the other. The focus, then, is on prolongation costs arising out of critical delay.

In the 9th edition of *Keating*, the learned editors address such contractors' claims together with contractors' claims for damages for breach of contract.⁶⁹ They suggest that, where one of two concurrent causes of delay is the contractual responsibility of the contractor, the position as to recovery of delay costs is unclear as a matter of law. Three possibilities are identified as follows:

- The contractor succeeds only if the event relied on is shown to be the dominant cause of the delay;
- The parties' delay costs are apportioned;
- The contractor fails because he cannot satisfy the but-for test of causation.

If the dominant cause approach is the correct approach to assessing a contractor's extension of time claim, it is not difficult to accept that the same approach will be appropriate for an assessment of the associated contractual claim for prolongation costs. But reasons for doubting whether the dominant cause approach can be the correct approach to an extension of time claim have been given above.⁷⁰

Similarly, if the apportionment approach is the correct approach to questions of extension of time, then it is easy to see why the same approach might be

⁶⁹ *Keating*, (note 3), para 9-070.

⁷⁰ Page 14.

applied to the associated money claim. But, again, the difficulties with the apportionment approach have already been pointed out.⁷¹

A hybrid approach has been suggested, the idea being that the decision-maker might apply the *Malmaison* approach to the extension of time claim and then apportion the monetary claims.⁷² However, it is suggested that that would not necessarily achieve the intended result.

It is convenient to return to the facts of the chosen example. Applying the *Malmaison* approach to the contractor's extension of time claim, the decision-maker would grant an extension of time for the whole of the month of January 2012. If the decision-maker then went on to apply the apportionment approach to the monetary claims, he might award the contractor his prolongation costs for, say, the first three weeks of January. If the apportionment were to give rise to a true sharing of the costs during that month, one might expect the employer in those circumstances to recover a monetary remedy in respect of the fourth week of the month. Yet, where (as in the example) the contract provides for liquidated damages for delay, the employer's claim for compensation will be shut out. The contractor will already have recovered a full extension of time for the entire month of January, which necessarily precludes the recovery or deduction of any liquidated damages at all. For these reasons, it is suggested that the hybrid approach is unlikely to find favour.

The third possibility identified in *Keating* is that the contractor fails because he cannot satisfy the but-for test of causation.⁷³ To the lay observer, this might at first seem counter-intuitive. It is advanced by the editors of *Keating* on the basis that it represents a conventional approach to the test of causation at common law. Recent support for this approach is to be found in *De Beers*.⁷⁴

Reasons have already been advanced for supposing that it may be appropriate to relax the but-for test of causation in relation to contractors' extension of time claims. It is not unknown for the test to be relaxed in the case of costs arising out of delay to a construction contract. *Great Eastern Hotel* is an example.⁷⁵ But that case involved concurrent delays caused by two contract-breakers other than the claimant. Such circumstances provide a compelling reason for relaxation of the but-for test, since the claimant might otherwise be left without a remedy, as in *Heskell v Continental Express*.⁷⁶ However, there is no authority – and, it is suggested, no compelling reason – for relaxing the but-for test where the two parties responsible for the damage are, respectively, the claimant and the defendant.

71 Pages 10-12.

72 Paul Tobin, note 6, page 166.

73 *Keating*, note 3, para 9-070.

74 *De Beers*, note 66, para [178] where Mr Justice Edwards-Stuart said that '... the contractor cannot recover damages for delay in circumstances where he would have suffered exactly the same loss as a result of causes within his control or for which he is contractually responsible'.

75 *Great Eastern Hotel*: note 32.

76 *Heskell v Continental Express*: note 32.

For these reasons, it is suggested that, in the case of monetary claims brought under the contract, it is the third of the three possibilities identified in *Keating* which is the most likely to find favour. That outcome coincides with the preference of those who drew up the *Society of Construction Law Delay and Disruption Protocol*,⁷⁷ and it also coincides with the conventional approach to such problems applied by tribunals in the United States.

Conclusion

In expressing any conclusion, it is necessary first to return to two points made earlier. First, in a discussion such as the present, there is one truth which can scarcely be over-emphasised. The answers to the questions raised will depend on the terms of the contract which governs the relationship between the parties. Second, experience shows that instances of concurrent delay as discussed here arise only rarely.

However, on the facts of the chosen example, it is suggested that for the reasons given the contractor should succeed on its extension of time claim upon an application of the *Malmaison* approach; but that it should fail on its claim for the associated prolongation costs upon a conventional application of common law principles applicable to the proof of causation, including the but-for test.

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⁷⁷ *Society of Construction Law Delay and Disruption Protocol* (SCL 2002), para 1.10.4, <www.scl.org.uk>