CONCURRENCY PART 2 – APPLICATION OF ANALYSIS IN CONCURRENT DELAY CASES

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INTRODUCTION

In my previous article, I defined the term "concurrent delay", reviewed the available guidance about concurrency in delay analysis, and examined certain contract provisions relating to it. In this article, I discuss the approaches taken by the courts when considering concurrent delay.

As mentioned in Part 1, the initial step in any analysis will be to identify if there are any contractual provisions relating to concurrent delay within the specific contract. As noted in *'North Midland Building Ltd v Cyden Homes Ltd [2017]* [i] , the Court of Appeal decision stated that a clause in a construction contract which allocated the risk of concurrent delays to the Contractor is valid and enforceable. In England, this means that the general approach to concurrency is subject to the express terms to which the parties have agreed.

If there is no contract provision, then more general legal principles will be relevant. In order to consider this, I have examined relevant case law from the UK to consider how the courts have treated concurrency.

It should be noted that I am not a lawyer, and this paper does not seek to give legal advice.

Additionally, when considering an approach for assessing different concurrent delay scenarios, it is evident that each individual case will turn on its own facts and merits. We strongly advise getting project-specific legal or practical advice as necessary.

Although this paper does not cover forensic delay analysis methodologies, it's important to note that some form of critical path analysis will almost always be necessary when assessing concurrent delay. Firstly to establish the relative extent of the delay, and the potential causes, before moving on to establish liability and entitlement. It may be that (as I noted in my previous paper) the question of concurrent delay could be avoided in its entirety.

However, to the extent there is a need to consider concurrency, potential analysis and assessment methodologies may include:

- As-Planned v As-Built Method.
- Collapsed As-Built Method.
- Time Impact Analysis Method.

Construction contracts generally provide extension of time clauses. These protect both

i North Midland v Cyden Homes Ltd [2018] EWCA Civ 1744

parties, allowing the Employer to recover liquidated damages if the Contractor is late completing, while potentially allowing the Contractor to claim an extension of time for Employer-responsible delay events. These clauses typically protect the enforcement of a contractual completion date from the activation of the "Prevention Principle", which could lead to time becoming "at large" (as I discuss below) and throwing into doubt the time that the contractor has to complete the works (where this would revert to a "reasonable period").

The provisions for concurrent delay in Standard Forms of Contract (JCT, NEC and FIDIC) were briefly discussed in Part 1 of this series. As noted there, while we are starting to see some cases relating to NEC contracts, the majority of UK case law is still based on JCT Contracts.

To the extent the works are late, and the Contractor is responsible, the Employer may claim liquidated damages for delayed project completion. However, to the extent there are (concurrent) Employer delays, the Contractor can claim those delays as a defence to the damages claim (an entitlement to an extension of time) and potentially to claim prolongation costs.

The "problem" for the parties, in respect of concurrency, is that without clear contractual guidance about concurrent delay, and assuming those delays are of "approximately equal causative potency"[ii] , then it may be the case that both the Employer delay and the Contractor delay be considered an effective cause of critical delay to project completion. In such a situation, then it could be that:

- Both the Employer and Contractor claims succeed (with the Contractor claiming full compensation for the delay, while the Employer claims full Damages)
- Both the Employer and Contractor claims fail (with the Contractor being refused compensation for the delay, with the Employer similarly not being entitled to claim Liquidated damages).

This article discusses the following legal approaches to the assessment of concurrent delay:

- The Prevention Principle.
- The 'But For' Test.
- The Dominant Cause Approach.
- The Malmaison Approach (Time No Money).
- Apportionment.

Furthermore, it is noted that there is a clear division between the approaches that have found favour in English Law and Scottish Law and, therefore, I discuss these separately below.

ii This term having been coined by John Marrin in his SCL Concurrency papers

ENGLISH LAW

PREVENTION PRINCIPLE:

The Prevention principle, under English law, can be summarised by the phrase "a party cannot benefit from its own wrong" (whether that is a breach of contract or some other act which "prevents" the other party from performing). Without express terms to the contrary, the "Prevention Principle" will apply to the determination of liability and damages resulting from concurrent delay.

For example, a Contractor may be in a position where progress is being limited by an act of prevention from the Employer. However, that act is not identified within the extension of time clauses as something that would permit an extension of time. As such, there is no contractual provision for the Employer to extend the completion date, and he would be in a position where he might otherwise benefit from his act of prevention. Without an enforceable date for completion, most common law jurisdictions would consider "Time at large". Under English law, the Contractor's obligation would only be to complete the remaining works within a "reasonable period" (with such a period often being unclear in the circumstances). This is somewhat unsatisfactory (to both parties) but ensures that the Employer does not benefit from his own act of prevention.

In short, the Employer cannot cause delay to the Contractor while maintaining the original contractual completion date, and still claim liquidated damages for late completion. It would be a rare contract that allows the Employer to claim liquidated damages in such a scenario.

The Prevention principle has roots dating back to, *'Holme v Guppy (1883)*[iii], where 'time at large' was first introduced. Lord Esher upheld that decision in *'Dodd v Churton (1897)*[iv] .

In *'Holme v Guppy'*, the plaintiff (Contractor) agreed to carry out carpentry works on a new brewery in Liverpool. The contract specified a completion date and provided for liquidated damages if the completion was delayed. When delays occurred, the defendant (Employer) withheld certain payments resulting in the Contractor bringing an action for the balance of the contract price. It was established that the Employer delayed site possession. It was also established that there were other Contractor delays and further delays caused by the Contractors engaged by the Employer. The cause was tried before Coltman, J at the Liverpool Summer Assizes in 1837, resulting in an award of £200 to the Contractor. The award was then unsuccessfully challenged by the Employer and upheld by the Court of Exchequer.

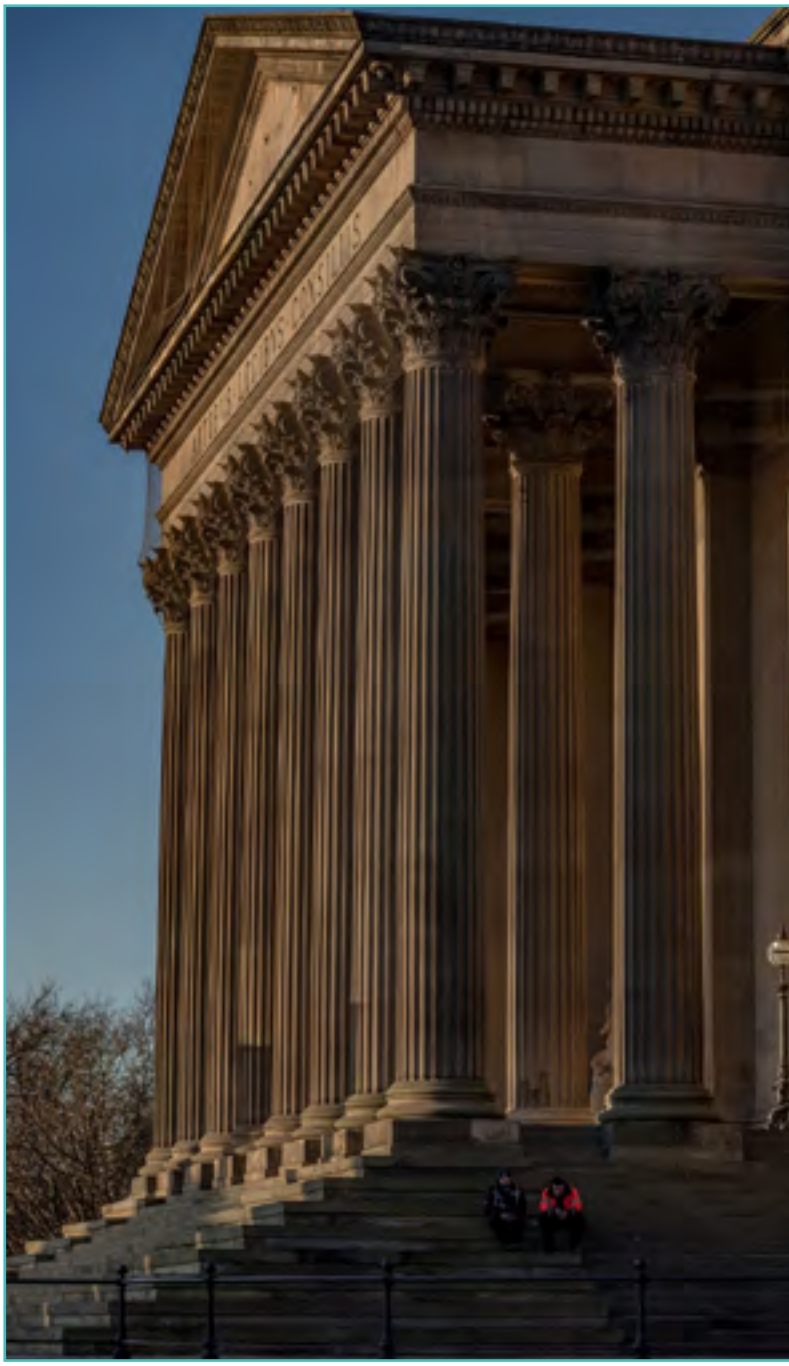
iii Holme v Guppy (1838) 3 M&W 387

iv Dodd v Churton (1887) 1 QB 562

The Court considered the case, and then Park, B stated:

> "On looking into the facts of the case we think no deduction ought to be allowed to the defendants. It is clear from the terms of the agreement that the plaintiffs undertake that they will complete the work in a given four months and a half and the particular time is extremely material because they probably would not have entered into the contract unless they had had those four months and a half within which they could work a greater number of hours a day. Then it appears that they were disabled from by the act of the defendants from the performance of that contract; and there are clear authorities, that if the party be prevented by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default ... It is clear, therefore, that the plaintiffs were excused from performing the agreement contained in the original contract and there is nothing to show that they entered into a new contract by which to perform the work in four months and a half ending at a later period. The plaintiffs were therefore left at large; and consequently, they are not to forfeit anything for the delay. The rule must therefore be discharged."[v]

Other more recent cases, such as *'Peak Construction v McKinney Foundations (1971)*[vi]*'* and *'Percy Bilton v GLV (1982)*[vii], refined the prevention principle as it relates to delay, and thereby encouraged the use of clear "extension of time" clauses in contracts.



v Holme v Guppy (1838) 3 M&W 389

vi Peak Construction v McKinney Foundations (1971) 1 BLR 111

vii Percy Bilton v Greater London Council [1982] 20 BLR

In the case of *'Peak Construction v McKinney Foundations Ltd (1971)'*[viii], Salmon LJ held that:

> "If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employer's own breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension of time on account of such a fault or breach on the part of the employer."[ix]

Interestingly, in relation to potentially concurrent delay, the judge added:

> "...if the failure to complete on time is due to the fault of both the employer and the contractor, in my view the [damages] clause 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".

In the case of *'Percy Bilton v GLC [1982]'*[x], Lord Fraser of Tullybelton stated that the extension of time provisions found in clause 25 were very important to ensuring that the contractor is protected from liquidated damages for events out of his control:

> "The general rule is that the main contractor is bound to complete the work by the date for completion stated in the contract. If he fails to do so, he will be liable for liquidated damages to the employer...That is subject to the exception that the employer is not entitled to liquidated damages if by his acts or omissions he has prevented the main contractor from completing his work by the completion date..."

In *'Balfour Beatty v Chestermount [1993]'*[xi], however, Coleman LJ highlighted the problems that could be encountered, if the prevention principle were to be applied too broadly (in a scenario when the delays were not truly concurrent):

> "The remarkable consequences of the application of this principle could therefore be as if ... the contractor fell well behind the clock and overshot the completion date ... if the architect then gave an instruction for the most trivial variation, representing perhaps only a day's extra work, the employer would thereby lose all right to liquidated damages for the culpable delay ... what might be a trivial variation instruction would destroy the whole liquidated damages regime..."

In *'Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd [2007]'*[xii], the court took this further by providing three clear propositions, stating:

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viii Peak Construction v McKinney Foundations (1971) 1 BLR 111

ix Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd [1970] 1 BLR 114, p121

x Percy Bilton v Greater London Council [1982] 1 WLR 784

xi Balfour Beatty v Chestermount (1993) 62 BLR 1 para 3

xii Multiplex v Honeywell No.2 [2207] EWHC 447 (TCC), para 56

(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 an extension of time in respect of those events.

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

In any event, the prevention principle may not always apply to cases of concurrent delay. An example of this is *'Adyard Abu Dhabi v SD Marine Services [2011]'*[xiii], where the ourt held that a party seeking to rely on the prevention principle must establish that actual delay was caused by the prevention relied upon. Because Adyard did not establish that actual delay, it was not entitled to rely on the prevention principle, and its claim was dismissed.

In *'Jerram Falkus Construction v Fenice Investments [2011]'*[xiv] , the court also considered that the prevention principle may not apply in cases of clear concurrent delay. It 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."

In *'North Midland v Cyden Homes [2017]'* [xv], it was shown that parties were able to agree contractual provisions that would allocate the risks associated with concurrent delay. The case was appealed in 2018, and in the Appeal Decision [xvi], Coulson LJ stated:

> "A building contract is a detailed allocation of risk and reward. If the parties do not stipulate that a particular act of prevention triggers an entitlement to an extension of time, then there will be no implied term to assist the employer and the application of the prevention principle would mean that, on the happening of that event, time was set at large. But it is a completely different thing if the parties negotiate and agree an express provision which states that, on the happening of a particular type of prevention (on this hypothesis, one that causes a concurrent delay), the risk and responsibility rests with the contractor".

From all the above, it is my conclusion that the prevention principle will, of course, remain in general application, even where there is concurrent delay, unless the contract states otherwise. However, it may not be considered relevant to the Contractor's claims for an

xiii Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)

xiv Jerram Falkus v Fenice No.4 [2011] EWHC 1935 (TCC), para 52

xv North Midland Building Ltd v Cyden Homes Ltd [2017] EWHC 2414 (TCC)

xvi North Midland Building Ltd v Cyden Homes Ltd [2018] EWCA Civ 1744

extension of time, where the Employer's act of prevention, if concurrency does exist (and it is not the only cause of the critical delay).

'BUT FOR' TEST:

The main purpose of the 'But For' Test in legal cases is to seek to determine the real extent of factual causation in contractual disputes.

Keating 9.093 – 5, defines the 'but for' test stating:

> "This test requires it to be shown that "but for" the conduct complained of, the claimant would not have suffered the damage of which complaint is made.285 Satisfaction of the "but for" test is generally a necessary, but not sufficient, condition for establishing causation in fact in the law of contract. The "but for" test can be too restrictive and is departed from in unusual tort cases.286 In the contractual context the "but for" test need not be satisfied where there are two independent causes of loss caused by two defendants287 although there may be, in addition, exceptional circumstances where fairness and reasonableness also permit recovery where the test has not been satisfied.
>
> Subject to such exceptions, to the extent that common law concepts of causation are relevant to the test of causation under a loss and expense contractual provision, it is likely that there will be a requirement to satisfy the "but for" test.289 It may be, however, that in certain circumstances, the burden of proving that the loss in question would have occurred in any event, rests on the defendant.290" [xvii].

In *'De Beers UK Ltd v Atos Origin IT Services UK Ltd [2010] EWHC 3276 (TCC)*[xviii], it was determined that, irrespective of the Employer's delay, the Contractor would have suffered exactly the same financial loss because of his own delay (i.e. "But-for" the Employer's delay there would be no difference, and the Contractor would be no better off).

This case was stark, however, in that the delays assessed were considered fully and wholly concurrent. Such cases are considered rare.

The application of this test has received some criticism where concurrent delays occur that are of approximately equal causal potency. While it can be seen as a "common-sense" approach, when applied to complex delay cases, the results can be misleading (and may not accord with common sense and reasonability). As a result, the but-for test is less likely to be considered applicable or relevant when determining liability for concurrent delays.

The Courts have historically taken a relaxed view on the 'But For' Test when considering concurrent delay in order to avoid a result that runs contrary to the parties' express intentions - that is, in JCT cases at least, the contractor is entitled to a "fair and reasonable" extension of time.

xvii Keating on Construction Contracts, 11th Edition, November 2021, Sweet & Maxwell

xviii De Beers UK Ltd v Atos Origin IT Services UK Ltd [2010] EWHC 3276 (TCC)

Additionally, a significant disadvantage with the 'But For' Test is that, even though it might be suitable to ascertain whether an individual event has caused delay, the test does not assist the parties to allocate responsibility if there are concurrent events that both pass the test.

DOMINANT CAUSE APPROACH:

Iain Wishart has defined 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"[xix] .

The 'But For' Test and 'Dominant Cause' approach are both 'all or nothing' tests. For example: if the Employer's delay is considered the more dominant delay, then the Contractor would be entitled to an extension of time (and money), whereas if the Contractor's delay were to be considered dominant, he would not be entitled to an extension of time (or money) and would be subject to damages.

Whether a clear dominant cause can be found in relation to delay will be a question of fact, based on the application of common sense (and not just the order or timing of the delays). If it is not possible to determine which delay event is "dominant", then it may be appropriate for the Contract Administrator to exercise discretion in determining an outcome which is "fair and reasonable". Such a decision becomes difficult and problematic if the competing causes of delay are of approximately equal causative potency.

In the case of *'H Fairweather & Company Ltd v London Borough of Wandsworth (1988)'*[xx], the arbitrator decided that where it was not possible to allocate the extension among different causes of delay, the extension must be given for the dominant reason. However, the Courts decision considered this an incorrect approach and referred to *'Henry Boot v Central Lancashire (1980)'*[xxi]

David Chappell, Vincent Powell-Smith and John Sims state, "Other cases, indeed, show that the courts have embraced the 'dominant cause approach' quite happily" [xxii].

The dominant cause approach was considered valid in the Scottish Court's decision in '*City Inn Limited v Shepherd Construction [2010]*'[xxiii]. It was held that if the "dominant cause" is a "relevant delay event" then a claim for extension of time will be successful. However, the decision went on to consider that it may be the responsibility of the tribunal to apportion the delay between the various competing causes, such that the Contractor only receives an extension

xix Iain Wishart, SCL Concurrent Delays, 4 June 1996

xx H Fairweather v London Borough (1988) 39 BLR 106

xxi Henry Boot v Central Lancashire New Town (1980) 15 BLR

xxii Chappell D, Powell-Smith V, Sims J, Building Contract Claims 4th Ed, 2005

xxiii City Inn Limited v Shepherd Construction [2010] CSIH 68

for the part of the overall delay reasonably apportioned between the concurrent causes. This has resulted in favour toward, and the development of, the "apportionment" approach (at least in Scotland). However, while English cases may consider dominance, they have tended not to support apportionment.

It seems that the case of Fairweather supports the view that the dominant cause approach should not be used for concurrent delay in extension of time claims.

If a dominant cause can clearly be found it seems reasonable that the court would run with that as it would mean that the dominant delay was effective, while the other was not resulting in the delays not being considered concurrent at all.

MALMAISON APPROACH (TIME BUT NO MONEY):

In recent years, if concurrency is likely to be established, English courts appear to consider the general rule to be that the Contractor is awarded 'Time but no money'. This philosophy was stated (albeit not actually used) in the landmark case of *'Henry Boot v Malmaison Hotel [1999]*[xxiv] and has become known as the 'Malmaison Approach'. In the case, when asserting what appeared to be "matters of common ground" between the parties, Mr Justice Dyson stated:

> "it is agreed 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 notwithstanding the concurrent effect of the other event." [xxv]

This approach was adopted by the Society of Construction Law[xxvi] when considering true concurrent delay.

xxiv Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd 70 ConLR 32

xxv Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd 70 ConLR 32, Dyson 13, p6

xxvi Society of Construction Law, Delay and Disruption Protocol, February 2017

Jeremy Winters, in his article, "How Should Delay be Analysed – Dominant Cause and its Relevance to Concurrent Delay", SCL Paper 153, January 2009, suggested that Malmaison represents how English law should deal with concurrency and that the dominant cause test is not applicable to extension of time claims where concurrency is a key component.

A case referred to in the Malmaison judgement was *'Balfour Beatty Building Ltd v Chestermount Properties Ltd (1993)'*[xxvii] . It involved relevant events occurring after the original completion date, in a period when the Contractor was in culpable delay. It was held that the Contractor was entitled to an extension of time to the extent that was attributable to the event (which were late variations or instructions). However, the period of any extension should relate to the additional critical delay actually caused (and the time due would be added to the original or extended completion date). In any case, the relevant event must be shown to cause a critical delay, and cause and effect must still be established between the event and the delay.

While the "Malmaison" test was supported in the case of *'Royal Brompton Hospital National Health Trust v Hammond [2001]'*[xxviii], the judge went on to decide that the timing of events was important when determining whether there was, in fact, concurrency. In this case, two events were both claimed to cause the delay, but the judge found that the first event that occurred (in time) was dominant and had caused all the delay.

Judge Seymour suggested the problem with the Malmaison approach was that Mr Justice Dyson was referring only to a situation of "true concurrency", that is, where two delay events occur at the same time and cause the same delay (that being a rare occurrence). From this judgement, it seems clear that, for a Contractor to obtain an extension of time, he must show that the relevant event caused the critical delay to completion. A detailed analysis of factual events and how they fit in with the project's critical path is likely to be required to determine if completion was actually affected when the delay events actually occurred.

It seems a large proportion of the English cases dealing with concurrency are based on versions of JCT Standard Contracts (Clause 25.3), albeit there are more recent exceptions, including Edwards-Stuart J's decision in *'De Beers UK Limited v Atos Origin IT Services UK Limited [2010]'*[xxix], and Hamblen J's decision in *'Adyard Abu Dhabi v SD Marine Services [2011]'*[xxx].

In *'Walter Lilley v MacKay & Others [2012]'* [xxxi], Mr Justice Akenhead also addressed the subject of whether the Contractor would be entitled to an extension of time in the event

xxvii Balfour Beatty Building Ltd v Chestermount Properties Ltd (1993)'. 32 ConLR 139

xxviii Royal Brompton Hospital NHS Trust v Hammond (No.7) [2001] EWCA Civ. 206

xxix De Beers UK Ltd v Atos Origin IT Services UK Ltd [2010] EWHC 3276 (TCC)

xxx Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)

xxxi Walter Lilley v MacKay & Others [2012] EWHC 1773 (TCC), para 370

of concurrent delay, and supported the Malmaison approach (for "effective", or truly concurrent delays):

> "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 cl. 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 cl. 25 which points very strongly in favour of the view that, provided that 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."

Mr Justice Akenhead's judgment also confirmed that there should be a difference of approach between England and Scotland when dealing with concurrency. He confirmed that the 'apportionment approach' was not likely to be applicable in England.

In conclusion and in relation to English Law, while there are several approaches which might apply in the case of concurrent delay, in the majority of cases, the delays may be separable on the facts (and might therefore not be considered concurrent at all).

However, if there are two concurrent causes of delay (with approximately equal causative potency), one of which is a relevant event, and the other is not, then the Contractor is likely to be entitled to an extension of time for the period of delay caused by the relevant event. However, it is unlikely that the Contractor will be able to recover Loss and Expense associated with that delay, in circumstances where he would have suffered the same losses as a result of his own causes of delay.

This English law position (of getting "Time but No Money" where concurrent delay is established), appears to be reinforced by a number of recent cases, including the *'De Beers UK Ltd v Atos Origin IT Services UK Ltd [2010] EWHC 3276 (TCC)*[xxxii]*'*, *'Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)'*[xxxiii] and *'Walter Lilly & Co Ltd v Giles Patrick Cyril Mackay and DMW Developments Limited[2012] EWHC 1773 (TCC)'*[xxxiv] cases. It is also supported by the SCL Delay and Disruption Protocol[xxxv].

xxxii De Beers UK Ltd v Atos Origin IT Services UK Ltd [2010] EWHC 3276 (TCC)

xxxiii Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)

xxxiv Walter Lilly & Co Ltd v Giles Patrick Cyril Mackay and DMW Developments Ltd [2012] EWHC 1773 (TCC)

xxxv The Society of Construction Law Delay & Disruption Protocol, 2nd Edition February 2017

SCOTTISH LAW

APPORTIONMENT

While Scottish courts often follow English cases, this is not the case for concurrent delay, as the principle of apportionment has found favour there (whereas it has not in England). The definitive case used to demonstrate the apportionment approach under Scottish Law is *'City Inn v Shepherd [2007]'*[xxxvi] (and the Court of Session appeal from 2010 which followed it).

The Judge in the case determined that there were a number of causes of delay, some of which were the responsibility of each party. He went on to consider that none of the causes of delay could be considered dominant and that all of them had some part to play in the overall effect on project completion. He decided that this effectively meant concurrency had occurred, and decided that finding some way to apportion the delay (as between the parties and the various events) was a suitable approach, but it had to be approached in a fair and reasonable manner.

As such, in Scotland, the responsibility for delay can be apportioned as between a Relevant Event and a Contractor Risk Event.

As already noted above, apportionment has been rejected by the English courts. As such, while the case has persuasive weight and appears to provide a "fair and reasonable" approach, the City Inn case is not applicable to the jurisdiction of England and Wales.

CONCLUSION

During the application and resolution of concurrent delay and its analysis, there appear to be three main possible outcomes, including:

- Contractor entitled to EOT / Employer not entitled to liquidated damages. (English Law).
- Contractor not entitled to EOT / Employer entitled to liquidated damages. (English Law).
- Apportionment. (Accepted jurisdiction in Scotland).

In the first two cases, there is unlikely to be any viable claim for costs, unless these can clearly be demonstrated to be associated with the Employer Events.

Mathew Cocklin stated the following in his article on concurrent delay,

> "The English courts have considered the 'but for' test, the burden of proof approach and the dominant cause approach for the assessment of causation and damage in

xxxvi City Inn Limited v Shepherd Construction [2010] CSIH 68

cases of concurrent delay. However, the preferred approach is derived from Henry Boot v Malmaison Hotel. This is described by the editors of Keating as 'the now accepted approach to resolving issues of true concurrency in the context of extension of time claims where one of the competing causes of delay cannot be said to be the dominant cause. This is confirmed by a number of English cases, the most recent being Walter Lilly v Mackay [2012]"[xxxvii].

In considering some of the legal principles:

- The Prevention principle under English law provides that a party cannot benefit from its own wrong (a breach or an act of prevention).
- The 'But For' Test considers whether the damage would have occurred, "but for" the wrongful conduct of the defendant. If the answer is no, then the wrongful conduct is treated as a full cause, otherwise it is not. However, this test does not provide a useful solution when the same damage has resulted from two concurrent causes.
- The Malmaison approach (Time but No Money), held that if there are two concurrent causes of delay, one a relevant event and the other is not, then the contractor is likely to be entitled to an extension of time for the period of delay caused by the relevant event. However, under English Law, the prolongation costs are likely to be refused for periods of concurrency, given that each party is considered to hold concurrent responsibility for the delay.
- The *'Royal Brompton Hospital v Hammond [2001] EWCA Civ 206*[xxxviii]' case considered that the Malmaison approach should only apply to cases of "True Concurrency". The Judge appeared to determine the case based on a sort of "Dominant Cause" principle, though such terminology appears to be falling out of favour in English decisions more recently.
- While "Apportionment" is an acceptable option in Scottish cases, the '*Walter Lilley v Mackay [2012] EWHC 1773 (TCC)*'[xxxix] case rejected the applicability of the 'City Inn' judgement to English Courts. Just because the Architect has to award a 'fair and reasonable' extension of time it does not imply that there should be any apportionment in the case of concurrent delays.

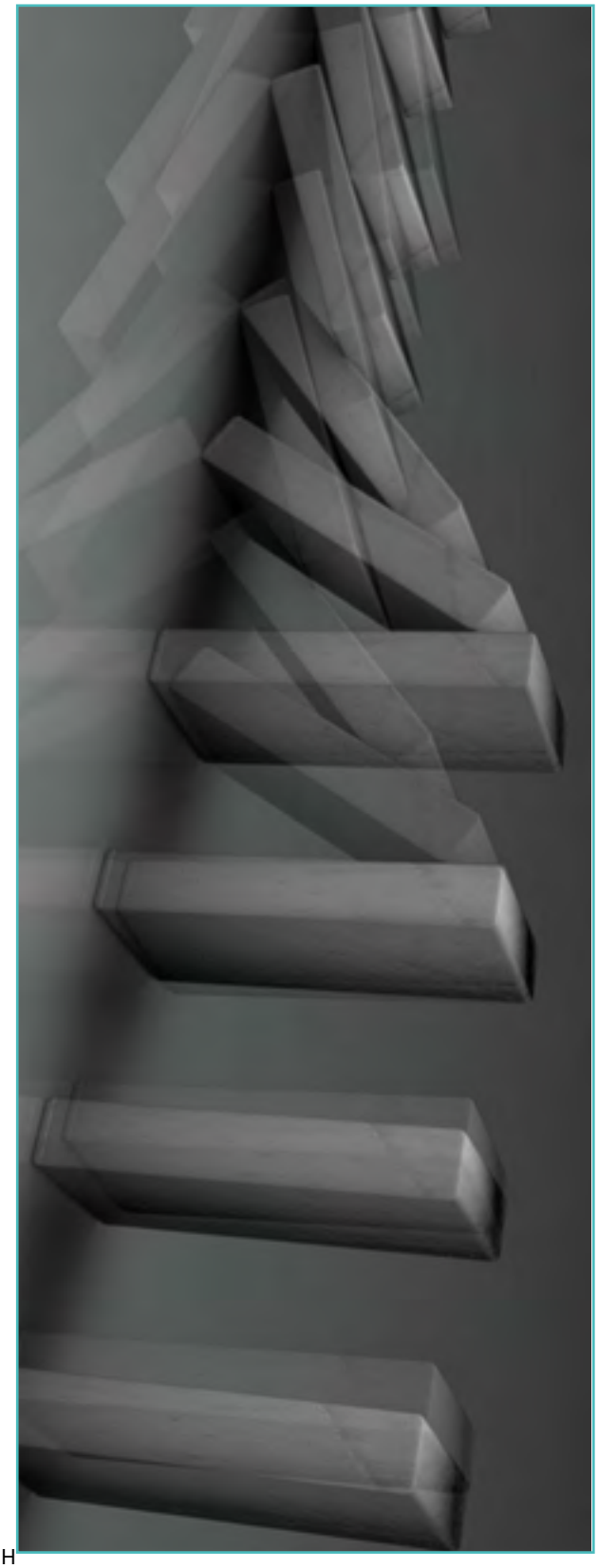
In England, therefore, it seems likely that the Malmaison Approach (of time but no money) is likely to be used for concurrent delay claims where clear dominance (or other factual enquiries) cannot separate out the cause of critical delay as the project progressed (such that the delays are considered of "approximately equal causative potency").

xxxvii Cocklin M, SCL, International Approaches to the Legal Analysis of Concurrent Delay: Is there a Solution for English Law?, April 2013

xxxviii Royal Brompton Hospital v Hammond [2001] EWCA Civ 206

xxxix Walter Lilly & Co Ltd v Giles Patrick Cyril Mackay and DMW Developments Ltd [2012] EWHC 1773 (TCC)

In Scotland, in a case such as *'City Inn v Shepherd Construction [2007] ScotCS CSOH 190'*[xl], where there is a true concurrency between relevant events and contractor events, apportionment can be considered appropriate, where there is no dominant cause of delay. Events might be regarded as concurrent in the broader sense, in that they both possessed a causative influence upon some subsequent event, such as the completion of works, even if they did not overlap in time.



xl City Inn Limited v Shepherd Construction [2010] CSIH 68

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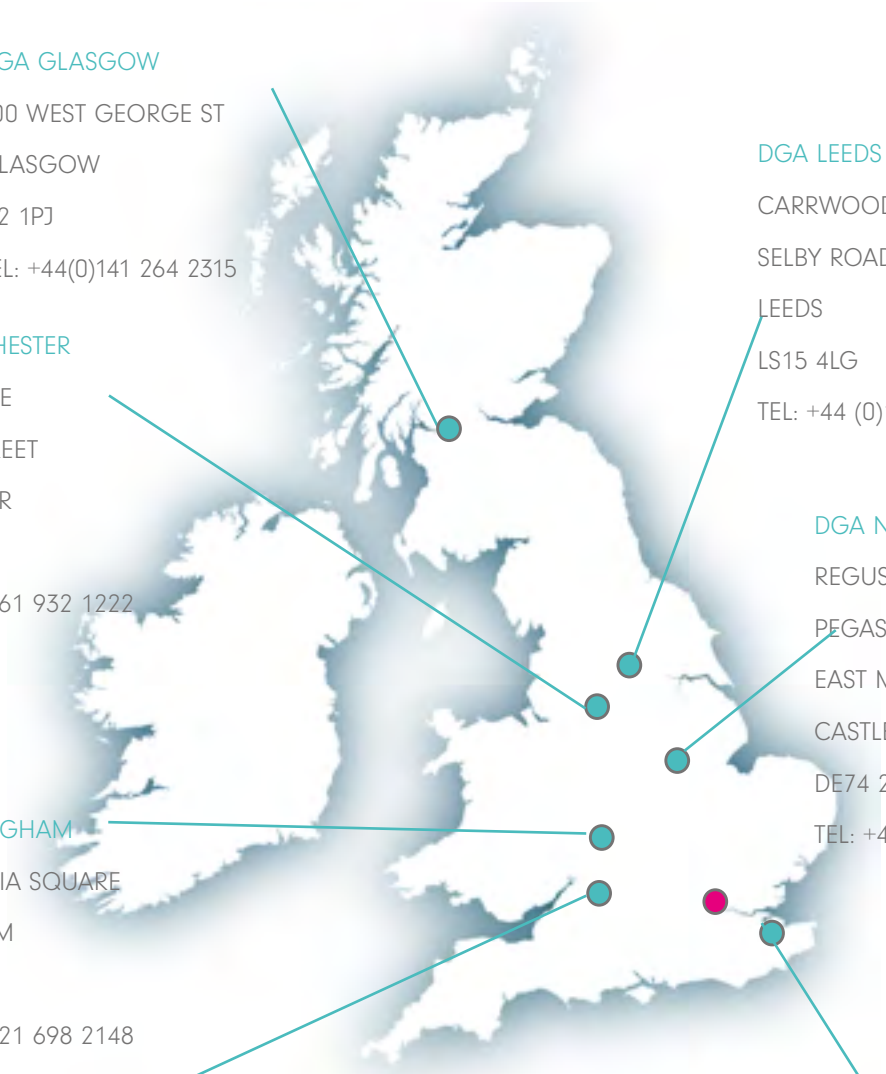

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