

**Would a common law right to apportion liability in contract
facilitate justice in concurrent delay disputes?**

by

Paul David Baines

Submitted in partial fulfilment of the requirements
for the MSc. Construction Law and Arbitration

Leeds Metropolitan University

July 2007

ABSTRACT

This dissertation is concerned with the current position in the law relating to concurrent delay disputes, and the inability at present to apportion liability in claims that exist only in contract. There is a view in relation to the general law, that the position of awarding strict liability on a 'win or lose' basis evades perceived justice in many circumstances, resulting in imbalanced decisions and taking damages beyond compensation to the point of being punitive.

Proposals have been made for reform of the common law to include a right to apportion liability and damages in contract, in a similar manner to the concept of contributory negligence in tort. Suggestion also exists that this position would provide the Courts with the additional, but necessary, tools for dealing with concurrent delay disputes.

The purpose of this dissertation was to consider the current position in law specific to concurrent delay disputes and contrast this with the support for an apportionment approach to be incorporated into the general law. This research was used to establish reasoned argument regarding the reform of the law, and the adequacy or otherwise of standard form contracts commonly in use within the industry.

The evidence indicates that there is widespread perception of injustice within the current law, and this has resulted in support for an apportionment approach in the law generally. Decisions of the Courts have, in some circumstances, defied causation principles, further fuelling the debate.

However, in the concurrent delay context, this is not seen to be relevant. Whilst the current position in the law surrounding concurrent delay remains something of an uncertainty, the conclusion of this research is that a right to apportion liability would only add to this uncertainty. This is primarily due to the status of commercial contracts, which are not viewed as being instruments for this perceived justice.

Commercial contracts regulate agreements between the parties, and, therefore, the recommendation of this study is that greater certainty in contracting terms remains the most effective tool for rationalising and clarifying concurrent delay. Further research is recommended in this area.

ACKNOWLEDGEMENTS

I wish to thank all of those who have contributed to the MSc. in Construction Law and Arbitration at Leeds Metropolitan over the past three years. The knowledge, experience and enthusiasm emanating from the tutors and the range of external professionals as guest lecturers has been a major contributing factor in my interest, enthusiasm, and determination for the subject and in the completion of this paper.

My thanks are also extended to my current employers, Cleveland Bridge UK Limited, who have both actively encouraged and supported me throughout my studies.

Additionally, thanks go out to Tim Bowen, Alistair Gill and Rachael Aaron for the time and the quality of the contributions that they each made to this research.

Finally, special thanks go to my partner (and wife to be) Moira and our daughter Isobel, whose consistent support and encouragement throughout the preparation of this paper has, over anything else, made it possible.

STATUTES

England and Wales

Law Reform (Contributory Negligence) Act 1945

The Civil Liability (Contribution Act) 1978

Unfair Contract Terms Act 1977

CONTENTS

Chapter One

- 1.0 Introduction

Chapter Two

- 2.0 Literature Review
- 2.1 The link between causation and concurrency
- 2.2 The current position in law in relation to concurrent delay
- 2.3 The apportionment principle in the law in England
- 2.4 Appraisal of literature review and problem specification

Chapter Three

- 3.0 Research Design and Methodology

Chapter Four

- 4.0 Current judicial guidance relating to concurrent delay (JCT 2005)
- 4.1 Balfour Beatty v. Chestermount Properties [1993]
- 4.2 Henry Boot Construction v. Malmaison Hotels (Manchester) [2000]
- 4.3 Royal Brompton Hospital NHS Trust v. Hammond (& Others) [2000]
- 4.4 Great Eastern Hotel v. John Laing Management [2005]
- 4.5 The Civil Liability (Contribution Act) 1978
- 4.6 Chapter Appraisal

Chapter Five

- 5.0 The apportionment principle in alternative jurisdictions
- 5.1 The approach of the Courts in the USA
- 5.2 The approach of the Courts in Canada
- 5.3 The Australian approach

CONTENTS

- 5.4 The approach of the Courts in Scotland
- 5.5 Chapter Appraisal

Chapter Six

- 6.0 The Society of Construction Law Delay and Disruption Protocol
- 6.1 The current status of the SCL Delay and Disruption Protocol
- 6.2 How the Protocol addresses concurrent delay
- 6.3 Summary and appraisal

Chapter Seven

- 7.0 The Joint Contracts Tribunal Limited Standard Form(s) of Contract 2005
- 7.1 General overview
- 7.2 Key condition changes between the 1998 and 2005 (the administration of Contract delay)
- 7.3 The provisions for dealing with concurrent delays within the JCT 2005 form of contract
- 7.4 The dual role of the A/CA in JCT 2005
- 7.5 Chapter Appraisal

Chapter Eight

- 8.0 Structured Interviews
- 8.1 The Interviewees
- 8.2 The Interviews
- 8.3 Chapter Appraisal

Chapter Nine

- 9.0 Conclusion
- 9.1 Recommendations

CONTENTS

Bibliography

Table of Cases

Table of Statutes

Appendix A

