

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

by

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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.

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1.0 Introduction

The concept of time is incongruous in construction contracts, setting them aside from most simple commercial contracts. The apt link between time and cost means that the liability for delays caused to the timely completion of contract works is often vigorously disputed, with contracting organisations and employers alike blaming each other for causing the delay. Modern day methods of retrospective delay analysis may have enabled some level of clarity within this complex area, though such methods alone are often not appropriate in circumstances where concurrent causes of delay exist.

Unfortunately, the law¹ is equally unclear in this extremely complex area, partially due to a lack of a clear definition regarding the meaning of concurrency in a delay context. This in itself is a major subject of debate, as the law appears to accept the principle that a period of delay can be attributable to more than one contributing concurrent cause, but does not provide any strict definition.

Instead, the law currently offers a series of differing solutions to dealing with concurrent delays, each of which may appear to be sensible and correct on the basis of the facts in one case, whilst appearing completely inappropriate in relation to another. This lack of clarity is also reflected within the standard form contracts commonly in use within the construction industry, the majority of which do not deal with concurrency either adequately or at all.

The apportionment of liability in view of the causal potency of concurrent causes in delay disputes brought in contract is suggested by some commentators on this subject as being a common sense and logical approach to addressing the shortcomings of the current position in law. However, such an approach is generally not permitted in the current common law in England. The law currently takes a rigid view on liability allowing only

¹ All reference to “*the Law*” is made with regard to the **Law of England and Wales** unless identified otherwise

either claimant or defendant to succeed in proving the other's 100% culpability for causing the delay.

This win or lose position has instigated differences in opinion surrounding the adequacy of the current law to address matters on concurrent delay and the perception of justice within a system that apparently acknowledges the causative principle of concurrent and contributing causes, but does not allow any contribution or apportionment in view of the relative causative potency, in direct relation to liability. Many have called for reform of the law in this area.

This research will examine the issues surrounding the proposals to incorporate an apportionment principle in contract law, and the common perception that its current absence is resulting in imbalanced decisions that do not provide justice to parties in dispute only in contract. This general view will be examined specifically in relation to concurrent delay disputes and the inherent uncertainty present in the current position in law, as well as within the orthodox standard form contracts widely in use.

The aim of the research is to formulate reasoned argument in support the proposed reform of the law, or otherwise, from the viewpoint of the perception of injustice held by many regarding this general position in law.

2.0 Literature Review

Furst et al in the seventh edition of Keating (2001) draw summary conclusion on the subject of concurrent or competing causes of delay, that the law is unclear in the contractual context. This position remains unchanged in the eighth edition of Keating published in 2006, highlighting a continued lack of development in the law in this area. Helps (1999) suggests that the lack of development in the law may be attributable to the fact that standard form contracts traditionally contain arbitration clauses, therefore disallowing the courts the opportunity to establish clear authority. Subsequent to this view, Helps (2001) then suggests that it may be wishful thinking to expect judicial guidance on this point. However, whatever the source of this lack of clarity, Bristow (1986), Hatherley (1984), FitzPatrick (2001), Burrows (2004) and Burr (2005) all concur that the current position in law in England does not provide justice to the parties in circumstances where concurrent liability exists in relation to delay disputes.

This dissatisfaction was considered by Dering (2007), who suggests that the definition of concurrency, by virtue of the variety of meanings attributed it, contributes to the uncertainty in this area. Wrzesien & Wessing (2005) concur with Dering, offering their own definition to the debate. Definition is also offered by Pickavance (2005), as follows: “...an effect caused by at least two events occurring at the same time...” comprising “...probably the most conceptually challenging aspects of delay analysis”. By contrast, Wrzesien & Wessing’s definition is much more simplistic, noting that concurrency arises “...where a single period of delay is caused by more than one event”. Both of these definitions differ in technical content and may also appear to be technically correct in their own right, but they are distinctly different.

Williamson (2005) does not attempt any definition, but does provide a useful example in understanding the inherent complication with concurrent delay disputes. His example is that if an Architect² has failed to grant possession of a site for a period of one week, whilst at the same time the Contractor was not ready to commence the works as it did not

² In the context of the JCT Standard Form Contract(s)

have the requisite labour, then both parties are seemingly culpable for the same one weeks delay. In this circumstance, Williamson suggests that the Employer would naturally be unhappy about having to reimburse loss and expense to the Contractor and would be equally unhappy at the prospect of losing its right to apply liquidated damages for delay. Likewise, the Contractor is also likely to have grievances if it should have to pay liquidated damages and also fail to recover compensation for its preliminary and other resource costs that were prolonged on site. This example leads one to reasonably conclude that it would be unfair and unjust to penalise one party to the benefit of the other as both are precisely and equally at fault. This example is referred to by Williamson as being ‘true concurrency’, with two events occurring at exactly the same time, of exactly equal causative potency and of exactly equal effect. Whilst any broad definition of concurrency does not appear to have been addressed by the judiciary, the theory and existence of true concurrency has not escaped their attention. In *Brompton v. Hammond*³, Judge Seymour, by reference to the prior ruling of Judge Dyson in the *Malmaison Hotels*⁴ decision, acknowledged the occurrence of true concurrency, but then significantly went on to postulate that there are different types of concurrency without providing any further definition.

Williamson suggests that true concurrency is a most unlikely finding to be made by any Court or tribunal properly applying the law, on the basis that acceptance of this principle is to abandon the search for the truth and concede that it is really too difficult to identify what did cause the delay to the project in question. Hudson (2004)⁵, accepts that true concurrency does occur, at least in the very rare case, adding that in this rare circumstance both parties’ claims must fail on the grounds that neither party can meet the essential basis for any contractual claim i.e. “...*that neither party would be able to satisfy the necessary causation requirement...*” and, therefore, each parties’ losses would remain where they fall.

³ Royal Brompton Hospital v. Hammond (& others) [2000] B.L.R. 75

⁴ Henry Boot Construction v. Malmaison Hotel (Manchester) [2000] C.I.L.L. 1572

⁵ Citation taken from Pickavance, K. (2005) *Delay and disruption in construction contracts*, 3rd Edition, London, LLP, at page 625, paragraph 16.24

2.1 The link between causation and concurrency

Williamson continues to set out that in order to understand concurrency it is necessary first to examine the basic principles of causation. Piper (2005) also endorses this method of analysis. The position on causation in law is set out Beale (2004) as follows:

"The courts avoided laying down any formal test for causation; they have relied on commonsense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the Claimant's loss. The answer to whether the breach was the cause of the loss, or merely the occasion for loss must in the end depend on the court's commonsense in interpreting the facts".

Williamson and Piper reiterate the legal and evidential burden upon both claimant and defendant of proving the nexus between the event or cause, and the delay and/or the effect for each concurrent cause pleaded. The prerequisites to which they refer, for delay claims brought in contract (or a common law claim for damages), were reiterated in the Scottish case of *John Doyle v. Laing Management*⁶, that the claimant must aver:

1. the occurrence of an event for which the defendant bears legal responsibility,
2. that he has suffered loss or incurred expense, and
3. that the loss or expense was caused by the event.

Brewer (2001) identifies that the Courts have stated a tacit acceptance that a single period of delay may be attributable to more than one causative event.

⁶ John Doyle Construction Ltd v Laing Management (Scotland) Ltd [2004] S.C.L.R. 872 B.L.R. 295

2.2 The current position in law in relation to concurrent delay

Furst et al (2006) in Keating set out three approaches to concurrent delay as the law currently stands.

The first is referred to as the “*the Devlin approach*”. The approach set out by Mr. Justice Devlin in *Heskell v. Continental Express*⁷ is this:

“If a breach of contract is one of two causes of a loss, both causes co-operating and both of approximately equal efficacy, the breach is sufficient to carry judgement for the loss....”

Williamson condemns this approach referring to its obvious logical flaws that could result in an absurd position where both a Contractor’s claim for loss and expense and an Employer’s claim for liquidated damages succeeded in view of the same period of delay. This is also identified by Furst et al as the “*obverse problem*”. Neither Eggleston (1997) nor Marrin (2002) provide comment on this approach, whilst Chappell (1998) and Knowles (2000) accept the Furst et al view but do not provide further comment in favour or against this approach. Eggleston and Marrin’s ignorance of this approach is suggestive of the lack of support that it has received in construction context. Furst et al also refer to the possibility that application of the Devlin approach may result in the same outcome as the dominant cause approach (which is set out below), as in *Fairfield-Mabey v. Shell*⁸ where it was found that, on the facts, a concurrent cause was the dominant cause.

The second approach identified by Keating (2006) is the “*the burden of proof approach*”⁹, which is said to be as follows:

⁷ Heskell v. Continental Express [1950] W.N. 210

⁸ Fairfiel-Mabey v. Shell U.K. (Metallurgical Testing Services) (Scotland) (Third Party) [1989] 1 All E.R. 576

⁹ See Government of Ceylon v. Chandris [1965] 3 All E.R. 48

“If part of the damage is shown to be due to a breach of contract by the Claimant, the Claimant must show how much of the damage is caused otherwise than by his breach of contract, failing which he can recover nominal damages only...”

Williamson again identifies that this approach has the reverse logical consequence of the Devlin position, that on this test neither the Contractor nor Employer would be able to succeed with their respective claims, i.e. the obverse problem identified by Furst et al in reverse. Eggleston (1997) and Chappel (1998) both express reservations regarding this approach, adding that it does not appear to have much support in the construction context.

The third, and the one to which the most weight is given by Furst et al, is “*the Dominant Cause Approach*”, which is said to be as follows:

“If there are two causes, one the contractual responsibility of the Defendants and the other the contractual responsibility of the Claimant, the Claimant succeeds if he establishes that the cause for which the Defendant is responsible is the dominant cause”.

This position has the obvious advantage of being applicable to both claim and counterclaim, thus avoiding the obverse problem. Williamson sets out that if the dominant cause is demonstrated as being the contractual responsibility of the Employer, then the Contractor would recover loss and expense, as well as immunity from liquidated damages for the period of delay. Conversely, if the dominant cause was found to be the contractual responsibility of the Contractor, then his claim for extension of time would fail, allowing the Employer to recover liquidated damages. The decision as to which cause is dominant is a question of fact, which is not necessarily resolved by the chronological order in time, but is to be decided by applying common sense standards, as applied in *Leyland Shipping v. Norwich Union*¹⁰.

¹⁰ Leyland Shipping Co. v. Norwich Union Fire Insurance Society [1918] A.C. 350

Furst et al submit that the dominant cause approach is, or should be, the correct approach as the law currently stands, drawing authority for this view primarily from the great weight given to this approach in insurance cases. Chappel (1998) agrees with Furst et al's view. Williamson and Newman (1999) also concur with Furst et al, that this is the most robust authority applied and used by the Courts, but this is with some uncertainty on their part. Dering (2007), Knowles (2000), Marrin (2002) and Silver (2005) disagree with Furst et al citing the *H. Fairweather v. L.B. Wandsworth*¹¹ in support of their view. Of the same case, Eggleston (1997) draws attention to the fact that the Court was not directly addressing the matter of causation, and that this decision, in the context as referred, should be used with caution. Chappell (1998) supports Eggleston's view and goes further to reject the view of Dering, Knowles, Marrin and Silver, stating that such reliance on the *Fairweather* case in this way is "...almost certainly obiter this statement nowhere near the kind of condemnation often suggested"¹². Chappell also refers to the *Galoo v. Bright Greame Murray*¹³ case as supporting the dominant cause approach. In the *Galoo* case the 'but for' test was rejected in favour of establishing the effective or dominant cause of the loss, and Chappell's reference to this case is acknowledged by Newman, who adds that "*the Court of Appeal confirmed that the dominant cause approach is correct as a starting point*". Marrin summarises that the rationale commonly offered in support of the dominant cause approach is less than wholly persuasive.

Pickavance's view is that the dominant cause approach is redundant in a modern context, preferring a more complicated study of the facts through retrospective delay analysis. He summarises that a claimant should only be allowed to recover its losses in circumstances of concurrency if it could prove that the losses were suffered as a result of the acts or omissions of the other party, and therefore would not have been incurred in any event. Dering, in contrast to Pickavance's view, comments that in some cases the facts alone cannot always answer the question.

¹¹ H Fairweather v. Wandsworth L.B.C. [1988] 39 B.L.R. 106

¹² at page 146

¹³ Galoo Ltd. v. Bright Grahame Murray [1994] 1 W.L.R. 1360

Whilst Dering, Williamson, Silver and Newman agree that the dominant cause is, or should be, the correct approach, they also concur that there is no direct authority that expressly supports the dominant cause approach. This raises questions surrounding how their support of this position was formulated. Williamson identifies support for the dominant cause approach, at least to an extent, in the decision of the Commercial Court in *Balfour Beatty v. Chestermount*¹⁴. However, he is critical of the case, as in his view, it only goes part of the way to support the dominant cause approach, and that the Court was not immediately concerned with the issues of causation or concurrency.

Dering and Williamson also identify further support for this approach in the *Malmaison Hotel*¹⁵ case where the Court adopted an approach which recognised that any one delay or period of delay may properly, as a matter of causation, be attributed to more than one delaying event and that it would be sufficient for a Contractor to succeed with its claim if just one event were sufficient as such to afford grounds. Brewer (2001) adds further weight to this decision and refers to its support and replication in the more recent *Brompton Hospital*¹⁶ case. Both Marrin and Dunn (2005) concur that the *Malmaison* approach is most appropriate¹⁷, but Morris (2000) and Nash (2002) express reservations regarding its application.

Marrin (2002) and Knowles (2000) suggest that another approach worthy of consideration is the “*first in line approach*” (also referred to as the ‘but for’ test), which is not identified by Furst et al in Keating, but shares some characteristics with the burden of proof approach. The logic behind this approach takes a somewhat technical view that allows a cause to be prevalent over the other, on the basis that it occurred first. Other causes of delay are, therefore, ignored unless they continue to occur after the first cause has ceased. Marrin is critical of this approach, believing that it has limited application. Knowles simply sets out how this approach is to be applied, summarising generally that there are no hard and fast rules as to which cause of delay should take precedence.

¹⁴ *Balfour Beatty v. Chestermount Properties* [1993] 62 B.L.R. 1

¹⁵ *Henry Boot Construction v. Malmaison Hotel (Manchester)* [2000] C.I.L.L. 1572

¹⁶ *Royal Brompton Hospital v. Hammond (& others)* [2000] B.L.R. 75

¹⁷ Specifically for use with the JCT standard forms of contract

Marrin also acknowledges that there do not appear to be any reported cases purporting to support this approach to determine delay claims, and cites the *Galoo* case and *Turner Page Music v. Torres Design*¹⁸ as examples of rejection of the first in line approach. Silver (2005) adds that this approach has generally been given unsympathetic support, to the extent that it can generally be discounted.

Burr and Palles-Clark (2005) believe that the present state of English law is summarised accurately and succinctly in the Scottish case of *Motherwell Bridge v. Micafil Vakuumtechnik*¹⁹, within which the basic principle encapsulated in paragraph 12 of Dyson J's judgement in the *Malmaison Hotel* case was adopted. This approach was followed in the Inner House Court of Session case of *John Doyle v. Laing Management*²⁰. Burr and Palles-Clark set out that, in paragraph's 14 to 17 of the judgement, Lord Drummond Young dealt with two scenarios in situations of concurrent delay, one of which fell within Furst et al's current understanding of the position in English law and a second which, according to Furst et al, is currently not permissible in English law. Firstly, paragraph 14 of the judgement identifies that, in some cases, it may be possible to identify a causal link between Employer culpable events in determining what is a significant cause, therefore, the dominant cause approach is of relevance. Secondly, "...if it cannot be said that events for which the Employer is responsible are the dominant cause of the loss, it may be possible to apportion the loss between the causes for which the Employer is responsible and other causes...in an appropriate case..." [emphasis added].

Burr and Palless-Clark welcome this judgement's indication, firstly of a preference to apply a common sense approach in applying the dominant cause approach, so that then, in the absence of a dominant cause being established, an apportionment of the loss may take place. Wrzesien & Wessing (2005) add that this is persuasive authority, despite its non-binding status in England. They also confirm that such an approach would generally not be permissible under the current law.

¹⁸ Turner Page Music Ltd v. Torres Design Associates Ltd [1997] C.I.L.L. 1263, QBD

¹⁹ Motherwell Bridge Construction Ltd v. Micafil Vakuumtechnik [2002] 81 Con L.R. 44

²⁰ John Doyle Construction Ltd v Laing Management (Scotland) Ltd [2004] S.C.L.R. 872 B.L.R. 295

2.3 The apportionment principle in the law in England

Silver (2005) and Marrin (2002) share the view that the apportionment of liability in the event of concurrent delay on the basis of the relative causative potency of each cause appears to be a reasonable and sensible approach.

On the same subject Bristow (1986) reinforces Furst et al's view that in common law the Courts are generally not entitled to apportion damages claimed for breach of contract on the basis of a plaintiff's contribution to their own loss. This is in contrast to the position of contributory negligence in tort. No direct authority or reference in support of this strict rejection is provided by any of these writers. Marrin notes that the Courts have historically always sought to attribute any one event to a single cause with the result that a plaintiff either succeeds completely or not at all, and this view has not changed through history due to the absence of statutory authority enabling it to do so. Burrows (2004) refers to this as the 'all or nothing straight jacket' which arises as the Law Reform (Contributory Negligence) Act 1945 often does not apply to breaches of contract. On the same subject, Burrows (1993) also made reference to the case of *Schering Agrochemicals v. Resibel*²¹ before the Court of Appeal as a classic illustration of injustice resulting from the common law's inability to apportion damages in contract. Whilst this was not a concurrent delay case, the principle of shared culpability was tested, to which His Honour Nolan L.J. observed that the defendants "...were fortunate that the present state of law ruled out apportionment.". Burrows concurs that an apportioned result would, in this case, have been a more just outcome.

There appears to be widespread support for the reform of the law generally, to include an apportionment principle in contract law, on a similar basis to the principle of contributory negligence currently permitted in tort. Bristow, Hatherley (1984), Burr (2005), Baron (2004), Wier (1998), Anson (1888), Trindade and Cain (1990), FitzPatrick (2001) and

²¹ *Schering Agrochemicals Ltd. v. Resibel NV SA* [1992] (unreported)

Eggleston (1997) all express their support for this position in principle. Bristow argues that the current position of the law is unfair and does not provide justice to the parties on the grounds that a plaintiff, if proved factually to be partially culpable for causing or contributing to its own loss, albeit to a lesser extent than the defendant, is not held at all liable if the defendant is found to have caused the remaining, more significant portion, of the loss. Some nineteen years later Burr (2005) reinforced Bristow's view, stating that the absence of an ability to apportion liability leads to an inevitable injustice to one of the parties. Hatherley (1984) also shares Bristow and Burr's view, and adds that to make a defendant pay full damages, where part of the loss is due to the conduct of the plaintiff is to take damages beyond compensation, to the point of being punitive. Conversely, by applying Hatherley's view, the 'winning' party also gains the benefit of not having to pay compensation in view of its own culpable action, which she suggests also appears contrary to the legal maxim that a party cannot benefit from a wrong of its own doing. By definition, this also appears to contradict the ethical principles of unjust enrichment, as discussed by Barker (2006). On the basis of the definition provided by Cheshire, Fifoot and Furmston (2001) that unjust enrichment comprises "...*three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit.*", it is difficult to disagree with Hatherley's view.

In tort the basic concept of contributory negligence is set out by Furst et al, that a claimant who has contributed to the cause of a loss must bear the responsibility for the liability in direct proportion to the causal potency of the contributing cause²². A number of theories have been discussed surrounding the origins and reasons for the absence of such a right in contract going as far back as the nineteenth century. Anson (1888) discussed the sources of obligation created under contract compared with the obligations created in tort and concluded the two to be "*precisely similar*" in kind. He explained this finding as follows:

²² By application of the Law Reform (Contributory Negligence) Act 1945

“While A is under promise to X, X has a right against A to the performance of his promise when performance becomes due, and to the maintenance up to that time of the contractual relation. But if A breaks his promise, the right of X to performance has been violated, and, even if the contract is not discharged, a new obligation springs up, a right of Action, precisely similar in kind to that which arises upon a delict or breach of a Duty.”

Wier (1998)²³ is supportive of Anson’s view and adds that the rules of remoteness in contract and tort are so intertwined, and the presence of concurrent liability is so rampant, that it would be perplexing to relate the rules to the source of the liability. Trindade and Cain also point out that apportionment in tort by the application of contributory negligence is more a plea of mitigation than plea in defence, raising the question as to why such a defence should not be allowed in contract. They provide the example that a plea of ‘partly responsible’ is not allowed in tort actions, but the defendant is still required to plead either guilty or not guilty. It is for the Court to decide upon any level of contribution or otherwise.

Bristow’s view is that the source of this opposed position is simply beyond recollection, and that it has always been so. Porat (1995), FitzPatrick (2001) and Stone (2002) speculate upon the relevance of this position in the modern day context. Porat suggests that the most common objection to apportionment in contract is the apprehension that such a defence would hamper the ability of parties to rely on the contract, referred to as the “*reliance and planning*” argument. Stone also identifies this theory and places emphasis on the importance of the concept of freedom of contract in the historical development of contract law and that this encompasses the freedom to decide the content of contractual obligations, with limited outside interference from the judiciary. Stone also refers to economic and socio-political considerations which govern the development of the law of contract. FitzPatrick (2001) critically reassessed the policy decisions

²³ Citation taken from “Contributory Negligence and Contract—A Critical Reassessment” FitzPatrick (2001)

adopted by the judiciary, albeit in relation to the Australian High Court ruling in *Astley v. Austrust Ltd*²⁴. In this case, the policy arguments against apportionment were summarised by the Court. These are identified as: a) commercial people's preference for certainty in their transactions, b) the distinct differences between tort obligations and contractual obligations, and c) the role of consideration in contract. Eggleston (1997) raises the further concern, specifically in relation to concurrent causes of delay, that however sensible this approach may seem, it can cut across legal principles and may establish incorrect liabilities in some instances. Baron further identifies Joint and Several Liability as such an issue.

Whilst Stone does not offer any view on the merits or otherwise of the current position, FitzPatrick's findings are that none of the identified factors act to forbid the application of apportionment in contract, but that each goes some way to support such an approach, prefacing the approach taken by the Courts in Canada in support of his view. Porat also suggests that the reliance and planning argument is not as powerful as many objectors imply, and that in certain categories of cases a defence of contributory negligence would not substantially harm the reliance and planning argument. This would, as Porat notes, add a benefit in providing the court with an instrument through which it can reach balanced results in appropriate cases.

The lack of any provision to apportion damages in contract has not gone unnoticed in England. In 1990, the Law Commission concluded that it is correct in principle for damages to be apportioned in claims brought in contract, when the loss suffered by a claimant was partly from their own conduct. In its working paper No.114, the Law Commission supported Anson's view that the rights and obligations of the parties to a contract are not exclusively defined by their agreement. The working paper also highlighted Bristow and Hatherley's view that it does not follow that a contracting party should be required to compensate the other in situations where that party has been part author of its own loss. However, in apparent contradiction of this view, the working

²⁴ *Astley v. Austrust Limited* [1999] 197 C.L.R. 1

paper considered the case of *Tennant Radiant Heat v. Warrington*²⁵, which some had considered to represent a development in the law towards apportionment in contract. In this case, the Court of Appeal apportioned damages as a matter of causation, whilst at the same time recognising that the provisions of the Law Reform (Contributory Negligence) Act 1945 did not apply. This was described within the working paper as an “*unusual application of causation principles*” with further doubts being raised about its application. This decision appears not to have received acclaim in the wider context. Although the law commission concluded that an apportionment principle in contract would be correct, no proposals were made for reform. Burrows and Porat both suggest that the Law Commission could, and should, have gone further with reform in this area. Bristow also suggests that there is broader judicial approval of apportionment, prompted to a large degree by the objective unfairness of decisions made by the Court, and that there is no strong theoretical argument which justifies a refusal to apply the concept of apportionment to contract law.

As at 2006, Furst et al, in Keating (2006), confirm that the Law Commission do not plan on making any recommendations for reform, adding that this area of law is worthy of statutory intervention.

2.4 Appraisal of literature review and problem specification

This chapter sets out to establish why there is so much dissatisfaction within the industry with regard to the current position in law relating to concurrent delay disputes, and the levels of guidance offered by the judiciary in dealing with this complex issue. A further objective was to analyse the perception of justice within the current law and investigate whether possible reform of the law within the English legal system could lead to improvements in this complex area.

²⁵ *Tennant Radiant Heat v. Warrington Development Corp.* [1988] 11 E.G. 71

The Courts have seemingly accepted that, as a matter of causation, a single period of delay could be attributable to more than one event. However, the meaning and definition of concurrency itself has not been adequately addressed. In recent years the theory of true concurrency has been identified, but this is only perceived to arise in very rare cases, if ever at all. Whilst formal definition of this subject remains a grey area, the prerequisites of causation may act to preclude non-genuine cases of concurrency and, therefore, provided that two causes meet these causative requirements, perhaps no strict definition is needed.

The chapter then went on to examine the current position of the law, establishing common ground between authors that there is precious little authority as to how the difficult questions of concurrency and the causal potency of competing causes should be approached. In the construction context it appears that the dominant cause approach is the most robust authority applicable in concurrent delay disputes, at least as a starting point. This is not by any means a clear position in law and there is a distinct lack of direct authority upon which to rely in support of this approach. Development of this position has occurred in Scotland. There, the dominant cause was applied as a starting point with the option of apportioning the liability proportionate to the potency of the cause if no dominant cause were established, but this approach would not be permitted in contract within the current law in England.

Further review of literature surrounding this subject has established support for an apportionment approach to be incorporated into the law of contract generally. Much of the support directed at this approach fits directly with the support of an apportionment principle in consideration of concurrent delay disputes, similar to the principle of contributory negligence in tort. It has also been established that there is widespread discontent surrounding an inherent lack of justice in the current law, brought about by the inability to apportion liability, and therefore damages, in disputes existing only in contract. This imbalanced position in the current law is viewed by many as crossing the boundaries of punitive compensatory principles and unjust enrichment and presents

strong argument for the reform of the law in England, bringing it into line with some other common law jurisdictions.

Therefore, the subsequent chapters of this dissertation will address the following research question:

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

3.0 Research Design and Methodology

This dissertation constitutes a research question into the reform of the current position of the law of contract in England and Wales in relation to concurrent delay disputes. This will seek to identify shortcomings within the current law, and examine the possible effects, beneficial or otherwise, of widening the options available to the judiciary if the law were reformed, as has been proposed and recommended, to include a right to apportion liability to disputes arising in contract.

It is not possible to ascertain the research objectives through any form of empirical measurement or assessment. Therefore, according to Naoum (1998) quantitative research is not appropriate in this instance. As this research relates to the possibility of future reform, which cannot be fully known at this time, a degree of interpretation and forecasted outcome will be required to be formulated from the research data, and for this reason a research question approach has been adopted. The research will be largely opinion based and will examine the current guidance offered by the judiciary, the inherent strengths and weaknesses of the current position, and further consideration of the respective literature and debate (both in favour of and against) the reform of the law, and how this is accommodated in (or is likely to effect) the administration of standard form contracts.

This will be carried out by identification, collation and consideration of the relevant data from a combination of primary and secondary sources. In view of the subjective nature of this research a qualitative research approach will be used. Naoum identifies this as being the correct approach for research of this kind. Denzin and Lincoln (1998) also identify that this approach is appropriate in this instance, as it provides an interpretive approach to the subject matter.

A combination of primary and secondary data sources will be used.

Secondary sources will be used via a desk study in order to carry out the main body of the research leading to the formulation of reasoned argument. Stewart and Kamins (1993)²⁶ (page 37) make the following comment in view of the high quality and significance of secondary data:

“The most significant of the advantages of the secondary data are related to time and cost. In general, it is much less expensive to use secondary data than it is to conduct a primary research investigation. This is true even when there are costs associated with obtaining the secondary data. When answers to questions are required quickly, the only practical alternative is to consult secondary sources. If stringent budget and time constraints are imposed on primary research, secondary research may provide higher quality with a new research project. Secondary data also may provide a useful comparative tool. New data may be compared to existing data for the purpose of examining differences or trends.”

The comparative nature of the secondary data will be of particular use within chapters four to seven of the dissertation. These will examine in detail the position as the law currently stands in England, the arguments for and against the reform of the law by reference to its acceptance within other common law and commonwealth jurisdictions and how standard form contracts currently cater for the administration of concurrent delay disputes.

In order to ascertain current judicial guidance the applicable case law and legislation has been identified from the literature review, as well as a number of additional sources including: The Society of Construction Law, the Royal Institution of Chartered Surveyors and Her Majesty’s Stationary Office. This case study was required in order to identify as precisely as possible the correct judicial guidance and principles of the law (including statute) following which the perception of its inherent merits and pitfalls in relation to concurrent delay disputes can then be considered. This type of desk study analysis of

²⁶ Citation taken from Naoum (1998) at page 49

case law is well established and accepted in reputable journals such as Construction Law Journal and the Building Law Reports and represents the starting point for the research.

Having established the problem specification and methodology the dissertation goes on to discuss the existing literature identifying the divisions in view amongst published authors from a combination of literature sources. This section of the research is contained in chapters five and six and considers in detail the dichotomy of view relating to the incorporation an apportionment principle in contract law, as well as the wider reaching effects of this principle into areas of the law outside of the specific nature of concurrent delay disputes. An examination of the current position within alternative common law and commonwealth jurisdictions is undertaken, as well as examination of the status of, and proposals contained within the Society of Construction Law's Delay and Disruption Protocol. The examination and consideration of these issue, in the wider context, is used in order to formulate reasoned argument surrounding the general principles of the proposed reform and its potential for acceptability, in the construction industry context, in English law.

The seventh chapter examines the JCT 2005²⁷ standard form of Contract in order to, firstly, establish whether its drafters have made any adjustments by way of alteration or addition to the way in which concurrent delay is administered, and secondly, to critically analyse its procedure for managing and administering concurrent delay. The JCT 2005 was chosen due to a recent survey indicating that it is still the most commonly used standard form within the construction industry.

Following the desk study, three structured interviews will be held with professionals from the construction industry, representing the Project Management, Quantity Surveying and Legal disciplines. The questions presented to each of the interviewees were established through the desk study research, and the objective of the primary data collected is to supplement this research and to aid the development of reasoned argument toward the formulation of the conclusion.

²⁷ Joint Contract Tribunal Standard Form Contract(s) 2005

Finally, in the ninth chapter, the dissertation arrives at its conclusion based upon the evidence, along with recommendations to the construction industry of issues that are worthy of further research.

4.0 Current judicial guidance relating to concurrent delay disputes (with reference to the Joint Contracts Tribunal Limited Standard Forms of Contract (1998 and 2005 editions))

In a press release on 31 May 2005, Sweet and Maxwell, the publishers of the Joint Contracts Tribunal Limited Standard Form(s) of Contract (JCT) claimed that its range was now used in around 90% of UK construction contracts. Claims were also made surrounding reductions in the level of litigation brought about by the forms. However, this does not apply to the matter of concurrent causes of delay which are mentioned but not dealt with at all within the JCT 1998 edition (JCT 98). As no direct guidance is offered within the contract on how the Architect/Contract Administrator (A/CA) should address concurrent causes of delay, this chapter will identify the current guidance offered by the judiciary via the most recent and authoritative case law. This review will ascertain the correct position on how concurrent causes should be dealt with both in law, and under the JCT forms of contract.

4.1 Balfour Beatty v. Chestermount Properties [1993]²⁸

This case addressed the matter of concurrent delay and the Court gave general guidance on how extensions of time should be considered under JCT, concluding that time must be given on a “*net*” basis. Therefore, the revised completion date is to be calculated by the A/CA by reference to the aggregate total number of working days following the date of possession, within which the Contractor ought fairly and reasonably to have completed the works. This approach avoids the situation whereby an Employer would lose its right to recover liquidated damages in the event that it were to instruct additional works at the end of a period of Contractor culpable delay. This is also known as the “*colour of the front door*” argument, which appears to be generally accepted.

²⁸ Balfour Beatty v. Chestermount Properties [1993] 62 B.L.R. 1

On matters of causation the decision appears to be less well received. Piper (2005) believes that this decision clarified the position for addressing concurrent delay within the JCT form. Upon analysis, this decision appears to confirm that the A/CA must still grant an extension of time when a relevant event occurs during a period of Contractor culpable delay. This was set out within the judgement as:

“...where the delays act at the same time and comprise excusable and culpable delays then the Contractor is entitled to an extension of time for the period of delay caused by the relevant event even though there were culpable delays in existence.”

Pickavance (2005) states that this establishes that the A/CA must make adjustment to the Contractors completion date if a relevant event occurs within a period of Contractor culpable delay, adding that whether or not a ‘relevant event’ was neutral, they are of the same effect regarding extensions of time. Williamson remains critical of this decision, and adds that it can only be of limited application due to the fact that it relates only to delay during a period of Contractor culpable delay and that the Court was not immediately concerned with the issues of causation or concurrency. Eggleston (1997) also disagrees to an extent with the Pickavance view and expresses reservations regarding the status of ‘neutral’ relevant events during periods of Contractor delay, seemingly on the basis that no additional delay or loss occurred, by virtue of the ‘but for’ test.

4.2 Henry Boot Construction v. Malmaison Hotels (Manchester) [2000]²⁹

The matters raised within the Balfour Beatty case were re-examined in the *Malmaison Hotel* case. The defence brought by the Contractor in this case was that the Architect should not be permitted under clause 25 of the JCT to consider ‘other events’ if a relevant event has occurred affording the Contractor an extension of time, even if the Contractor were liable for the other events. Judge Dyson expressed the view in this case that the

²⁹ Henry Boot Construction v. Malmaison Hotel (Manchester) [2000] C.I.L.L. 1572

A/CA should grant an extension of time to the Contractor in the event that a relevant event was truly a cause of delay, even if another matter at the risk of the Contractor, which is not a relevant event, had resulted in the same period of delay. This was, however, accompanied by the statement that it was incorrect to say that, as a matter of the application of clause 25 in JCT 98, the A/CA was not entitled to consider the impact of the Contractor's own liability. This approach, as identified by Dering in Chapter 2, recognises that any one period of delay may be attributable to more than one delaying event. This is identified specifically at paragraph 13 of the judgement as follows:

“...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...”

Dunn (2005) and Marrin (2002) place a lot of support in the ***Malmaison*** approach, stating that this is the most appropriate for use with the JCT standard form and that this clarifies the matter of concurrent delays in JCT. This view does not, however, appear to be universally accepted. Helps (2001) asserts that it is a bit of a myth that the ***Malmaison Hotel*** case is the definitive word on concurrent delay, as the issues of causation and concurrency were not explored in great detail. Williamson also identifies that this approach must be viewed with caution due to a concession that existed between the parties. A prior agreement had been entered into relating to the status of concurrent causes of delay, and for the procedure to be adopted by the parties in the event of concurrency. The same matter of concern was also raised by Morris (2000) and Nash (2002). Williamson also adds that in the JCT context, the problem of inconsistent conclusions with regard to claim and counterclaim arise. Under this approach, when true concurrency is identified, the Contractor is awarded an extension of time and the Employer's claim for liquidated damages fails. Such an outcome could prove to be inoperable under JCT, as the Contractor could not demonstrate that it had been delayed by the Employer's risk event. Silver (2005) also identifies that the ***Malmaison Hotel*** decision only deals with one type of concurrency, being 'true concurrency', which is

difficult to reconcile if a delaying event did not occur at exactly the same time, for the exact duration and with the same effect as the other concurrent cause.

This case also addressed the notification provisions contained within JCT. *Henry Boot's* case surrounded the ability, or otherwise, of the A/CA to consider delays for which they were responsible that were not relevant events. Murdoch and Hughes (2000) argue that the Contractor's obligation to notify at clause 25.1 of JCT 98 extends beyond the relevant events contained within clause 25.4. Clause 25.1 states that:

“Whenever it becomes reasonably apparent that the progress of the works is being delayed or is likely to be delayed for any reason the Contractor is required to give written notice to the Architect.”

Therefore, the fact that the Contractor may not have notified the A/CA of its own culpable delay is not seen as preventing the A/CA from considering such culpability in assessing any extension of time due. This view is shared by Pickavance (2005) who draws emphasis to the provision within the clause to provide notice of delay for any reason.

4.3 Royal Brompton Hospital NHS Trust v. Hammond (& Others) [2000]³⁰

This case was welcomed by many commentators, including Helps (2001), as it appears as something of a balance between the parties, providing a more fair and reasonable solution. The implications are that the Employer cannot levy damages against the Contractor and the Contractor cannot recover its prolongation costs in the event that there are concurrent causes of delay. Practical examples were used by the Court to illustrate his view of how concurrent delay should be considered, also clarifying Silver's view that the *Malmaison Hotel* approach is limited to cases of 'true concurrency'. At page 174, the judgement refers to and follows the *Malmaison* approach but with clarification that

³⁰ Royal Brompton Hospital v. Hammond (& others) [2000] B.L.R. 75

‘true concurrency’ was unlikely to be found very often. Judge Seymour QC set out the following.

“...it is, I think, necessary to be clear what one means by events operating concurrently. It does not mean, in my judgement, 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”.

Whilst Helps appears to welcome this decision, he concludes that **Brompton** is not as straightforward as many have given it credit, and that it in fact asks more questions than it answers with regard to concurrency. The existence of true concurrency is based upon the premise that two events occur at exactly the same time. However it is more likely that critical delays overlap but are not completely co-extensive, and, therefore, this raises questions as to how the existence of critical and non-critical delay is to be measured on this model. Winter (2001) considers that **Brompton** is too simplistic as it ignores the fact that both the Contractor delay and the relevant event are contributing to the delay beyond the completion date. It is noteworthy at this point to reiterate that this does not accommodate any consideration of the causal potency of each event, as was advanced by Marrin and Silver. Williamson adds that caution must be aired as this relates to a professional negligence case within which the Court did not directly address the issue of whether or not extensions of time should be awarded when there is true concurrency. Morris (2000) also recognises the limitations of this decision. Silver’s view is that whilst **Brompton** may fit well within the JCT requirement for the Architect to be fair and reasonable in its approach, it may limit the scope of the **Malmaison Hotel** decision and may in fact encourage the dominant cause approach.

4.4 **Great Eastern Hotel v. John Laing Management [2005]**³¹

The *Great Eastern Hotel* case primarily related to the defendant construction manager's obligations under a construction management agreement, which provided that the construction manager would carry out its services using the reasonable skill, care and diligence to be expected of a properly qualified construction manager. This is one of the only such cases to reach the Courts. Concurrency was dealt with in this case subsequent to the ascertainment of the afore mentioned. It is also worthy of note that the defendant's case regarding concurrent causes of delay was seriously undermined by the Judge's criticism of the defendant's expert witness, who the Judge found to be unreliable for the main part³². In addressing the issue of concurrent delay, the Court did follow the *Malmaison Hotel* approach, however, His Honour Judge Wilcox made a statement with regard to the efficiency of a concurrent event in causing the loss. At paragraph 313 and 314 of the decision the court set out the following.

"...The answer to whether the breach was the cause of the loss, or merely the occasion for loss must in the end depend on the court's commonsense in interpreting the facts"

"...If a breach of contract is one of the causes both co-operating and of equal efficiency in causing loss to the Claimant the party responsible for breach is liable to the Claimant for that loss. The contract breaker is liable for as long as his breach was an "effective cause" of his loss. The Court need not choose which cause was the more effective [emphasis added].

This wording appears to confirm that a claim could succeed if it were considered to be of equal causative potency, depending on a common sense approach in interpreting the facts. This case also raises questions surrounding the occurrence of true concurrency as dealt with in the *Malmaison Hotel* and *Brompton* decisions as, by application of the

³¹ Great Eastern Hotel Company Ltd v. John Laing Construction Ltd, Laing Construction Plc [2005] E.W.H.C. 181 (TCC)

³² See paragraph 128 of the judgement

above, a claimant could succeed provided it could demonstrate that an event was an effective cause of the loss.

4.5 The Civil Liability (Contribution Act) 1978

The Civil Liability (Contribution Act) 1978 (CLA) enables contribution to be recovered from any other person liable in respect of the same damage, by enabling a just and equitable apportionment to be made. The act, at Part 1, defines the specific circumstances under which an “*Entitlement to Contribution*” will arise. Part 2 sets out the “*Assessment of Contribution*”.

Provided that liability has not ceased to exist, by means of expiry in accordance with section 10 of the Limitation Act (1980) or by agreed settlement, contribution may be sought by virtue of Part 1 (6) of CLA, which sets out:

“...any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage”

Tettenborn (2005) reiterates the ability under the act to claim contribution no matter the source of the liability, be it in contract or tort, setting out that in most cases the formula by which the Court’s will apportion liability and damage causes little difficulty. He sets out that, in practice, the Court decides the extent of the parties’ respective responsibility by engaging in a fairly “*rough-and-ready*” balancing of two parties’ relative culpability, factoring in the relative causative potency of their wrongful acts with regard to the loss suffered. What appears less certain is the Court’s view of other matters considered to be “*just and equitable*” and to be taken into account. For example, whether the action of a party constitutes a deliberate breach or whether the party retained any benefit from the wrong.

The recent case of *Re-source America v. Platt*³³ has cast some doubt on this subject and has raised interesting questions surrounding the Courts standpoint in relation to causation and contribution (Tattenborn). Whilst this ruling does not relate to concurrent delay, the principle of concurrent liability was addressed. In awarding a SubContractor 100% contribution against the Contractor, the Court explicitly took into account two factors outside of the parameters of causation, namely that the responsible employee of the Contractor's had somewhat callously left the scene as soon as the event had occurred and that, thereafter, the Contractor had sought manfully to conceal its responsibility. Tattenborn identifies some difficulty with this approach, as the above actions had taken place after the event, and, therefore were not connected in any way with the causation of the damage. The Court of Appeal reiterated the broad terms of section 2 of the CLA and the fact that responsibility for the damage was only one factor to be taken into account, declining to infer any limitation on what were relevant factors in deciding what was "*just and equitable*". Therefore, the party's share of the contribution was increased on the basis of its non-causative action. This point of principle has now been confirmed in another similar construction case, *Warwicker v. HOK International*³⁴, which seems to defy the basic causation principles identified within chapter 2.

Tettenborn is highly critical of this logic, and further points out that neither complies with the contributory negligence regime under the Law Reform (Contributory Negligence) Act 1945, or the CLA itself which states at section 2(1) that damages "*shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage*". It would appear clear that, by operation of this section, liability should only accrue in the event that a party is responsible by causation.

³³ *Re-source America International Ltd v. Platt Site Services* [2004] 95 Con LR 1

³⁴ *Brian Warwicker Partnership plc v. HOK International Ltd* [2005] EWCA Civ 962

4.6 Chapter Appraisal

This chapter has demonstrated that the case law relating to concurrent delay disputes is uncertain, and that there is an apparent lack of precise guidance. Whilst it may be considered that the questions of causation and concurrency have not been properly brought before the Courts, they have failed when opportunity has arisen, to record any precise definition. Partial definition of concurrency seems to be provided within the *Royal Brompton* case, where an event which “...by reason of the existing delay made no difference.” would not be considered as being a concurrent cause. Nevertheless, many consider that the key judgements are to be of limited application only, although it is generally apparent that the Courts will take a view on the basis of the facts that a cause of delay is either “...truly a cause of delay...” and “...effective cause of the loss”.

Some further guidance also appears to have been offered to A/CA's acting under JCT, so far as awarding extensions of time on a net basis and the obligation to consider all causes of delay, relevant event or otherwise, is concerned. The question of causation and the potency of individual concurrent causes, however, remain something of a grey area to A/CA's.

Generally, the CLA will not apply in cases of concurrent delay due to the current inability to apportion liability in contract, therefore, disallowing the establishment of any contributory liability.

5.0 The apportionment principle in alternative jurisdictions

There are strong historical links between the origins of the classical law of contract in England and the basic principles of the contract law of North America and much of the Commonwealth. Through the literature review, it has been established that an apportionment principle in contract has received apparent widespread support in alternative common law and commonwealth jurisdictions. With reference to the modern law of contract in England, Stone (2002) records that, until recently, the flow of influence between these jurisdictions tended to be in the outward direction due to the significance of these historical links but that this trend has changed with the English Courts paying attention to developments in the law of contract within other parts of the common law world. Therefore, as all of the afore mentioned have their roots within the English system, the impact of the introduction of an apportionment approach within these jurisdictions may provide some insight into the potential effect and acceptability of the proposed same reform in England. This chapter will set out to identify their acceptance of the apportionment principle, and to establish the level of satisfaction with which this has been received within the construction industry.

5.1 The approach of the Courts in the USA

Knowles (2000), Marrin (2002) and Pickavance (2005) have all considered the approach taken by the Courts in the USA and contrast this with the current position in England. The Courts in the USA appear to differ in their approach to the English Courts, recognising delays only in three distinct categories:

1. Excusable delay (neutral causes for example acts of God or exceptionally inclement weather – may be further categorised into compensable and non-compensable as a term of the contract);
2. Compensable delay (causes that are the Employer's risk); and
3. Inexcusable delay (causes that are the Contractor's risk).

It is worthy of note that Wrzesien (2005) identifies the same categorisation of delay in relation to the current system in England, substituting ‘inexcusable delay’ with ‘culpable delay’.

The definition of which causes might fall in to each of the above categories is a matter of contract. When causes of delay occur concurrently, either party will generally only be granted recovery against the other to the extent that it can separate one cause of delay from the other, and directly attribute its losses to that cause of delay. This would allow the recovery in view of proportionate liability so far as its cause could be demonstrated. This approach appears to share much common ground with the Pickavance view set out within chapter 2, which is indicative of his support for a more rigid and fact based approach. Marrin suggests that a similar approach in England would settle the outcome in two commonly found combinations of causes, but that this could not be an absolute remedy. He identifies, firstly, that in cases where excusable and in-excusable delays arise, then the Contractor would receive an extension of time but not its prolongation costs, also depriving the Employer of its right to impose damages. Secondly, when a compensable delay occurs concurrently with a non-compensable delay, the Contractor would be awarded an extension of time but not recover prolongation costs. Whilst this view would allow the apparent advantage of certainty, Marrin expresses reservation with regard to such a rigid approach. It is also difficult to reconcile how this position would provide any solution to the matters of the perceived injustice identified by Bristow and Hatherley in chapter 2, as although this approach prevents punitive compensation being recovered by either of the parties, in the cases stated above the Employer and Contractor are denied the right to damages despite there being culpability on both parts for the causes of delay. This raises questions into the levels of damages anticipated by each of the parties, and the likelihood that one party’s damages could exceed that of the other party, despite liability being considered to be equal.

There have been more recent developments in case law in the USA that suggest the traditional approach as identified by Marrin and Pickavance is not as rigid as perceived,

and that in fact the apportionment principle has not been as fundamentally incorporated as has been suggested. In the 2004 case of *RP Wallace Inc v. United States*³⁵, the Court reiterated the position that a Contractor would not, generally, be able to recover costs for concurrent delays as no causal link can be shown, since the prosecution of the works as a whole would have been delayed regardless of any culpable act of the Employer. The definition of concurrency was brought into question. The position as stated above occurs certainly in the event of ‘true concurrency’, however, the judge in this case went on to say “...more heated debate surrounds the treatment of sequential delays, the law on which has aptly been described as unsettled” describing such circumstances where there are both Contractor and Employer delays which do not run truly concurrently but overlap each other. This decision is consistent in its conclusion with the *Malmaison Hotel* and *Brompton* decisions in England, that the rules on concurrency only apply in cases of ‘true concurrency’, and it could, therefore, be suggested that the position in the USA is actually closely aligned to the current position in England (true concurrency aside).

The approach in the USA is also not consistent with the provisions of the Joint Construction Tribunal Standard Building Contract 2005 (JCT 2005). Under JCT 2005 the A/CA is afforded, at clause 2.28, the discretion to assess a potential cause of delay as he then estimates to be fair and reasonable. This provision does not accommodate the strict rules applied in the USA, and it could be argued that these would fall outside of the intention of the parties in forming the contract.

5.2 The approach of the Courts in Canada

Bristow (1986) examined the incorporation of apportionment in the contract setting within the Canadian Courts and found that the apportionment principle was receiving universal acceptance throughout Canada, albeit more than twenty years ago.

³⁵ RP Wallace Inc v. United States (unreported, Dec 15 2004)

The current stance of the Courts in England has now been out of date for more than twenty-five years in Canada, and was last advocated in 1972 in the *J. Nunes Diamonds*³⁶ case. In this case the Supreme Court of Canada restricted the principle of apportionment to cases where a tort liability also arises independently of the contract, generally in line with the current law in England. Bristow's finding is that this restriction has been under attack ever since, to the point that it is virtually ignored.

The lack of consideration to the *Nunes Diamonds* case was demonstrated ten years later in the case of *Ribic v. Weinstein*³⁷, within which the Court concluded: “...*The principle that where a man is part author of his own injury he cannot call upon the other party to compensate him in full has long been recognised as applying to cases in tort...I see no reason why it should not equally be applicable in cases of contract...In such circumstances, there should, in my opinion, be apportionment whether the action be brought in contract or in tort*”.

This position was subsequently tested in the case of *Longview v. Valentine*³⁸, where the apportionment principle was rejected, in Bristow's view with some doubt, on the basis that the defendant did not actually contribute to the damage but failed to prevent it. Again, Bristow suggests that this finding is not likely to be followed, although it is accepted that there may still be some reluctance to accede to apportionment due to difficulties arising in comparing fault with strict liability, and the imposition of “*anticipatory mitigation*” insofar as this may contribute to, or exacerbate, the loss. Again, this must be considered as a matter of fact on the basis of common sense principles.

In 2001, FitzPatrick prefaced the approach of the Canadian Courts in his critical reassessment of the law in Australia, confirming the longevity of the approach identified by Bristow.

³⁶ *J Nunes Diamonds Ltd v Dominion Electric Protection Co.* [1972]

³⁷ *Ribic v. Weinstein* [1982] 26 R.R.R. 247

³⁸ *Longview Forming v. Valentine Developments Limited (& Others)* [1984] 4 C.L.R. 243

5.3 The Australian approach

The traditional approach of the Australian Courts, until recent times, had followed the same approach as the English Courts, in disallowing apportionment in contract. Reform is, however, proposed within the Australian system. In 2002 the Commonwealth Government of Australia commissioned a review of the law of negligence in Australia. Interestingly, the review, which had touched upon causation, foresee-ability, contributory negligence and damages amongst other things, recommended that a principle of joint and several liability should remain and not be replaced with proportionate liability, which would reach across much broader aspects of the law (including contract). Despite this, the majority of Australian state governments have passed Acts with the aim of providing for proportionate liability, therefore limiting the liability of a concurrent wrongdoer to the extent to that for which they are culpable. As an example, the state of Victoria passed the Wrongs and Limitation of Actions Acts (Insurance Reform) Act (2003). The effect that this evolution in general principle in Australia will have on concurrent delay disputes cannot be ascertained at this time. However, following the passing of the above act, Baron (2004) recorded that *“There is little doubt that there has been an enormous doctrinal shift in Australia over the past 10 years or so. The traditional approach of viewing claims from the perspective of the ‘innocent plaintiff’ has been abandoned. Now, the courts are required to focus on, and limit damages in accordance with, each defendant’s degree of culpability”*. It is difficult to interpret Baron’s comment as meaning anything other than support for an apportionment approach.

Baron’s view though may not fit with the standard forms of contract that are commonplace in Australia. Pickavance (2005) contrasted the differences in approach between the status of the contract programme in orthodox United Kingdom standard forms of contract and Australian standard forms contract. In the AS³⁹ forms, the contract programme is given contract document status, and the Contractor is obliged to its existing programme, unless there is *“reasonable cause”* for departure. Pickavance considers that

³⁹ AS2124 & AS4000

this will frame any slower than planned working and culpable delay of the Contractor, identifying the true cause of delay as and when they arise. This rigid position must also act to fix any float into the contract programme with any benefit being transparent to both parties as progress is plotted against fixed programme duration. It is also significant how the time related risk in view of concurrent delay is allocated in each. The Australian AS2124 contract⁴⁰ states:

“Where more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is not a [Employer culpable event] then to the extent that the delays are concurrent, [the Contractor] shall not be entitled to an extension of time...”

This clause would not allow a Contractor an extension of time in the event of a concurrent delay, and it is Pickavance’s view that some justification for this must be attached to the status of the contract programme, in comparison to the respective position in orthodox UK standard form contracts. This position also appears not to comply with the change in attitude set out by Baron, and could become a point of contention. This highlights the importance and need for correlation between any proposed changes in the law and the terms of standard form contracts commonly used within the industry.

5.4 The approach of the Courts in Scotland

The Courts in Scotland have continued to apply the same position as in England, but further developments to the current position have occurred within the recent *Motherwell Bridge*⁴¹ and *John Doyle*⁴² decisions. As was set out in chapter 2, these rulings support the dominant cause approach as far as is practicably possible, but in the event that a dominant cause cannot be established then it may be possible to apportion liability between the parties based upon the relative causative potency in each case.

⁴⁰ Clause 35.5

⁴¹ *Motherwell Bridge Construction Ltd v. Micafil Vakuumtechnik* [2002] 81 Con L.R. 44

⁴² *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2004] S.C.L.R. 872 B.L.R. 295

This ruling has received widespread acclaim in England and is thought by many to be an accurate statement of the position as the law currently stands. To date, no reported cases in England have followed the *John Doyle* decision or addressed the matter of apportionment in the event that it is not possible to establish the effective dominant cause, but this remains an interesting development.

5.5 Chapter Appraisal

This chapter has demonstrated widespread acceptance of an apportionment principle in contract law within Canada, Scotland and to an extent the USA. In principle, there also appears to be widespread support for this approach in Australia. Some caution must be maintained in relation to the standard forms of contract widely in use within these jurisdictions, primarily in the USA and Australia, who have strict contractual terms commonly in use that govern the administration of concurrent delay by strict application of causation principles and contractual agreement. The information ascertained relates to the common law of these jurisdictions generally, and, whilst this must embody concurrent delay disputes, it must be acknowledged that very few of the specific cases examined related specifically to concurrent delay. Under closer examination, the general position on concurrent delay in the USA appears to reflect the current position in England.

6.0 The Society of Construction Law Delay and Disruption Protocol

Significant debate has surrounded the objective aims and status of the Society of Construction Law (SCL) Delay and Disruption Protocol (Protocol). The Protocol contains direct guidance for dealing with concurrent causes of delay. This chapter will examine its current status within the industry and the interpretation and guidance on concurrent delay contained therein. It will then be established whether or not the guidance offered within the protocol is compatible with the current law and in the context of JCT.

6.1 The current status of the SCL Delay and Disruption Protocol

The final draft of the Delay and Disruption Protocol (Protocol) produced by the Society of Construction Law (SCL) was published in October 2002 (reprinted October 2004). The aims, objectives and status of the protocol have been the subject of much debate since its release. The SCL summarised its objectives within the protocol at the third page as follows.

“The object of the Protocol is to provide useful guidance on some of the common issues that arise on construction contracts, where one party wishes to recover from the other an extension of time and/or compensation. The purpose of the Protocol is to provide a means by which the parties can resolve these matters and avoid unnecessary disputes. The information, recommendations and/or advice contained within this Protocol are intended for use as a general statement and guide only.”

It appears to be generally accepted now that the protocol’s usefulness is limited to being that of a useful guide, which even then still requires to have been adopted by the parties and be integral to their thinking in managing or avoiding disputes. Lal (2002) had argued that parties wishing to apply the philosophy and methodology of the protocol must make

their own contractual provisions to include it, but this argument appears to have lost momentum. On the same subject Mewes (2006), Burr and Lane (2003) all emphasise that this was never intended to be the status of the protocol, and it exists only as a guide to dealing with delays as they occur, and not as an adopted contract document nor as a statement of the current law.

An attempt was made by Pickavance Consulting and Fenwick Elliot in November 2003 to comprise a schedule of amendments to the JCT 98 forms of contract, known as the Change Management Supplements (PFE supplements). The aim of the PFE supplements was to make the JCT forms Protocol compliant. Hanson (2004) was critical of the PFE supplements commenting that they, and the protocol, were unlikely to be widely accepted as the content amounted to twenty-six pages of contract changes and schedules, requiring a further twenty-three pages of guidance notes to make sense of them. Lal (2004) also recorded that the JCT appeared to have rejected the idea of incorporating the PFE supplement into its contracts, highlighting that the protocol does not go so far as provide a full set of amended clauses. The PFE supplements do not appear to have been widely accepted, and significantly JCT 2005 makes no reference whatsoever to the protocol, which is strong persuasion in concluding that both Hanson's and Lal's view is the correct one.

Henchie (2005) provides further condemnation of the protocol, adding that it had “*rather predictably*” disappeared from the industry, maintaining relevance only as a lecture topic and very occasionally in adjudication cases. In stark contrast to this, Mewes (2006) states that after being slow to take off, the protocol appeared to be gaining momentum, referring to an unnamed supplement for its use with JCT 98 purporting to give it contractual status. This appears to be an isolated view.

6.2 How the Protocol relates to concurrency in relation to the JCT 2005 contracts

Burr and Lane (2003), in their examination of the protocol, identify that it does not fully reflect the delay provisions contained in some standard form construction contracts.

Concurrency in the delay context is dealt with by the protocol at core issue 9, with further guidance offered at sections 1.4.1 to 1.4.13. The recommendations made by the Protocol are as follows:

“Where Contractor delay to completion occurs concurrently with Employer delay to completion the Contractor’s concurrent delay should not reduce any time due.”

Knowles (2002) is critical of this approach to concurrency as it deals only with delays for which the Contractor is culpable and only in the occurrence of true concurrency. The Protocol does not appear to favour an apportionment approach with regard to liability, as the Contractor’s entitlement is not reduced. It does, however, make reference to the underlying principle in English law that one party cannot insist on the other party meeting its obligations to perform, unless the first party properly performs its own obligations. Knowles’s consideration of this offering, as a source for an answer, is that failure on the part of an Employer would invalidate its right to damages whilst the Contractor would only recover its additional cost so far as it is able to separate these from those caused by its own actions. This position does not appear consistent with the existing law on the subject. It is noted that entitlement to compensation does not necessarily arise from entitlement to delay, which is dealt with at core issue 10 of the protocol. Under this provision, the Contractor must demonstrate the additional cost that was caused by the Employer delay, over and above its own culpable delay in order to recover monetary compensation. By interpretation of this, seemingly the Contractor could succeed with relief from delay damages, and also additionally recover the portion of its losses that it can demonstrate were caused by the culpable act of the Employer.

The Protocol, at core section 13, also suggests that there should be a duty upon the Contractor duty to mitigate the losses caused by delay, reiterating the current case law relating to the issue of mitigation⁴³. This general duty does not extend to requiring the Contractor to add extra resources or to carry out its works outside its planned sequence or programme, in relation to periods of Employer culpable delay, unless the Employer agrees to compensate the Contractor for the cost associated with mitigation. Barnes (2003) suggests that the obligation to mitigate under the protocol is a lesser obligation than the best endeavours obligation contained within the JCT contracts.

6.3 Summary and appraisal

This chapter demonstrates that the Protocol has not been accepted by JCT, or by the construction industry or legal profession as a whole. Therefore, its objective as an aid to the effective management of delay disputes is seemingly limited by its widespread lack of incorporation. The rigid position offered by the protocol is neither compliant with the existing law or JCT 2005, which has perhaps lead to its demise. Whilst it must be noted that the Protocol was never intended to be a contractual document or correct statement of law, it could be suggested that its rigid position may be sensible and logical in some circumstances of concurrency, but equally not suitable in others, which is similar to the range of positions currently available in law.

⁴³ See *British Westinghouse v. Underground Railways Co.* [1912] AC 673, HL and *Garnac Grain Co. Inc. v. Faure & Fairclough Ltd.* [1968] AC 1130 at 1140, HL

7.0 The Joint Contracts Tribunal Limited Standard Form(s) of Contract 2005

Patrick (2006) states that the complex matter of concurrent delays and how they are caused, and more importantly who caused them, is fuelled by the fact that “*most standard form contracts fail to address the issue [of delay] either adequately or at all*”. With specific reference to the JCT 98 form, perhaps in anticipation of the revamp in 2005, Blackler (2002) suggested that concurrency is unnecessarily dodged by JCT 98, and that two simple changes would “*sort this out*”:

1. That the Contractor must be obliged to provide early notification of a possible claim, and that a clear timetable must be introduced to alert the A/CA so that investigation and possible pre-emptive action can be taken. Along with this, it must be made clear that failure by the Contractor to provide notice will invalidate the Contractors right to pursue the claim at a later date;
2. The removal of the fall back right to claim for common law damages over and above any contractual entitlement.

In 2005 the Joint Contracts Tribunal Limited (JCT) launched its new and updated suite of standard forms of building contract and subcontract (JCT 2005). The JCT 2005 suite brought forward the ageing 1998 (JCT 98) forms to the modern age, as well as extending its range by the introduction of two new contracts aimed at the smaller end of the market⁴⁴, and also publishing a framework agreement in both a binding and non binding format. The introduction of the new forms, as expected, attracted widespread analysis, review and literary commentary. Opinion, however, appears to be consistent in those that have taken the time to investigate and analyse the new documents. Hemsley (2006), Graham (2006), Boulding, Holt & Lamont (2006) all concur that whilst the changes in the documents appear subtle and the approach and overall sense of the JCT remains

⁴⁴ JCT 2005 Minor Works Building Contract With Contractor's Design & JCT 2005 Intermediate Building Contract With Contractor's Design

intact, changes in its drafting in many cases effect the balance of risk and in some cases place new obligations on the parties.

This chapter will examine in detail the changes incorporated into JCT 2005 in order to establish any additional guidance or procedure offered by its drafters in relation to concurrent delay.

7.1 General overview

The contracts generally have been modernised in line with ‘fashionable’ approaches to procurement such as partnering, early Contractor involvement and supply chain integration, as well as addressing the changes in rationale and reconstruction of the documents. The JCT 2005 suite of contracts are designed, insofar as is possible, to be free standing and to enable the user to be able to read for sense. The documents generally follow a section headed approach, replacing the ‘clause by clause’ format of its predecessors.

The main changes to the general layout of the new suite of contracts can be summarised as follows (Birkby, 2006):

- o The traditional appendix has now become the Contract Particulars, which is also now also arranged at the front of the contract (with a few exceptions) along with the articles of agreement;
- o The standard template for the attestation has been revised;
- o Each contract now contains the necessary schedules;
- o The levels of headings are now consistent across the whole range of the contracts.

Opportunity has also been taken to remove a number of redundant features of the JCT 98 form of contract. Nominated Sub-Contractor’s and suppliers, performance specified works, Contractor’s price statement and most of the provisions relating to the

Construction Industry Scheme (CIS) and the Value Added Tax (VAT) agreement now no longer appear. There have also been some specific clause changes that seemingly have been applied in accordance with changes in industry practice and the evolution of case law.

7.2 Key condition changes between the 1998 and 2005 (the administration of Contract delay)

The following key conditions are examined in order to establish any modification or addition to the provisions for dealing with delay and the surrounding risks within the updated 2005 documents.

Clause 2.13 Preparation of Employers Requirements⁴⁵

This clause has been made clearer within the 2005 form and now expressly provides that the Contractor is not responsible for checking the adequacy of any design contained within the Employer's requirements. This change is of significance, as it appears to reject the principle that had been laid down by the decision in *Cooperative Insurance v. Henry Boot*⁴⁶.

Clause 2.4 Date of possession – progress⁴⁷

The Contractor remains obliged to “...regularly and diligently proceed with and complete...” the construction of the Works. Although the clause has been significantly redrafted, this does not give rise to any new obligations and, therefore, the status of the Contractor's master programme remains unchanged. The Contractors programme requirements are set out at clause 2.9 and in line with clause 2.4 are substantially unchanged.

⁴⁵ JCT 98 clause 2.2.2

⁴⁶ Cooperative Insurance Society Ltd v Henry Boot (Scotland) Ltd [2002] WL 31422188 QBD (TCC)

⁴⁷ JCT 98 clause 23.1, 23.3.1

Clause 2.26 Adjustment of Completion Date⁴⁸

The term 'Extension of Time' has now been replaced with the term 'Adjustment of Completion Date'. The words 'extension of time' do still appear elsewhere within JCT 2005, but the central theory surrounding this change appears to be in recognition that the time for completion may be reduced as well as extended, for example where works are no longer required to be carried out by the Contractor. Encouragement is also given, as a sub-clause, for the parties to agree to time implications expediently and prior to the issue of instructions to vary the works. Apart from this the clause effectively operates as the previous form.

Clause 2.27 Notice by the Contractor of delay to progress⁴⁹

At clause 2.27.1, the Contractor is still required to notify the contract administrator of the cause or causes of delay "*...whenever it becomes reasonably apparent that the progress of the works is being or is likely to be delayed...*". Clause 2.27.2, however, introduces a new obligation on the Contractor, requiring it to give details of the effects of "*each event*", whereas the JCT 98 only required this for "*relevant events*⁵⁰". What is notable is that the words "*...whether or not concurrent with delay resulting from any other relevant event...*" which appeared within the JCT 98 form have been removed entirely. Birkby (2006) raises the question: does this mean that the Contractor is no longer required to give a notice of delay if it believes that the delay is concurrent with another delay? His conclusion, which is shared by Davison (2006) is that the changes and 'improved' drafting of this clause are of little effect and that the Contractor still has an obligation to notify whether concurrent or not. Davison does add that the clause appears as not requiring the Contractor to notify the Employer of prospective delay.

⁴⁸ JCT 98 clause 25

⁴⁹ JCT 98 clause 25.2.1.1-2, 25.2.3

⁵⁰ JCT 98 clause 25.4

Clause 2.28 Fixing the Completion Date⁵¹

At clause 2.28.3, the A/CA must now notify the Contractor of its decision in writing in relation to each of the events notified, whether or not an extension is given. This creates a new obligation, as previously a written response was only required if, in the opinion of the A/CA, an extension of time was warranted⁵², and only with regard to which of the relevant events it had "*taken into account*"⁵³. This position had been previously identified as an anomaly within the JCT 98 form, under which there did not appear to be an obligation for the CA to respond to the Contractor if an extension of time had not been granted. Also, the requirement under JCT 98 for the Contractor to provide the contract administrator with "*reasonably sufficient information*", including an estimate of the likely effects of the delay, has been deleted. This change obliges the A/CA to make decisions and administer the contract as intended, rather than issuing numerous requests for further information to the Contractor. The time period within which the A/CA must make their decision remains at twelve weeks, although this has been watered down somewhat, as the obligation now is to 'endeavour' to give such a decision. It is also notable that clause 2.28.4⁵⁴ and 2.28.5⁵⁵ has been redrafted to incorporate sectional completion provisions, however this does not give rise to any new obligations.

Clause 2.29 Relevant Events⁵⁶

The list of relevant events has been shortened from nineteen to twelve. Economic redrafting has accommodated for part of this reduction without affecting the obligations on the Contractor. Some deletions have taken place, reflecting both the removal of previous concepts (such as nomination and Performance Specified) and to better apportion risk onto the party in control of that risk. Previous relevant events in relation to Employer's risks, for example the late issue of instructions, works instructed directly and

⁵¹ JCT 98 clause 25.3.1, 25.3.2, 25.3.3

⁵² JCT 98 clause 25.3

⁵³ JCT 98 clause 25.3.1.3

⁵⁴ JCT 98 clause 25.3.2

⁵⁵ JCT 98 clause 25.3.3

⁵⁶ JCT 98 clause 25.4

changes in access to the site etc. have all been removed and replaced with a single catch all clause referring to “*any impediment, prevention or default...by the Employer...*”. There are also changes and additions that stiffen some of the risks imposed upon the Contractor. Additional clauses in view of the Contractor’s Design Portion have been added which create a new obligation. Also, the clauses covering the unforeseeable inability to secure labour and materials have been deleted, firmly placing risk for these items within the Contractor’s risk.

The clauses governing the payment or allowance of liquidated damages, Loss and expense and relevant matters all remain materially unchanged. No new obligations are created.

7.3 The provisions for dealing with concurrent delays within the JCT 2005 form of contract

The framework within which the ‘Adjustment of Completion Date’ is administered follows the same format as the JCT 98 form. The Contractor is required, at clause 2.27, to provide notice of any delaying event (identifying any ‘relevant event’) as well as particulars of the delay which is to include an estimate of the expected delay, at the point in time whenever the delay becomes reasonably apparent. Upon receipt of notification, the A/CA is obliged, at clause 2.28, to give written notice to the Contractor setting out its ‘opinion’ with regard to each of the events (relevant or otherwise) that were submitted by the Contractor. If it is the A/CA’s opinion that a relevant event has caused the Contractor to be delayed, then an adjustment of the completion date must be made “*as he then estimates to be fair and reasonable*”.

The Contractor, however, will not automatically receive a right to loss and expense in view of any favourable adjustment to the completion date. In accordance with Clause 4.24.4, the Contractor must demonstrate that the loss was caused by “*any impediment, prevention or default, whether by act or omission of the Employer, the Architect/Contract*

Administrator...except to the extent that caused or contributed to by any default...of the Contractor...” [emphasis added].

7.4 The role of the A/CA in JCT 2005

The A/CA has a dual role under JCT. They are engaged and paid by Employers, and some of their duties are carried out as the Employers agent, however, as in the above paragraph’s example, some duties require them to act impartially and fairly between the Employer and the Contractor. The assessment and issue of payment certificates is another example. This general understanding between Employer and Contractor is defined in *Sutcliffe v. Thackrah*⁵⁷ as “...in all matters where the architect has to apply his professional skill, he will act in a fair and unbiased manner in applying the terms of the contract”. If the Employer exerts influence upon the A/CA so far that its judgement is influenced and not truly impartial, then it may be held to be invalid. Authority for this is taken from *Hounslow v. Twickenham Garden Developments*⁵⁸, which is regarded as a classic statement of the position.

This dual role can give rise to difficulties. Elliot (2006) raises two important questions. Firstly, can the A/CA be liable to either the Employer or Contractor if it makes mistakes when acting impartially? Secondly, can the Employer be liable to the Contractor for the A/CA’s mistakes? The answer to the former appears to be no. In *Pacific Associates v. Baxter*⁵⁹ the Court of Appeal rejected the existence of any duty upon the A/CA requiring it to take care in order to prevent the Contractor suffering economic loss. In such a circumstance, the Court ruled that the Contractor would have the right to recover the alleged loss from the Employer. Regarding Elliot’s second question, it is likely that the Employer will only be held liable for the errors of the A/CA when it was aware of the

⁵⁷ *Sutcliffe v. Thackrah* [1974] 2 W.L.R. 295

⁵⁸ *London Borough of Hounslow v. Twickenham Garden Developments* [1971] Ch. 233 (see also *Page v Llandiff and Dinas Powis RDC* [1901], *Hickman & Co. v Roberts* [1913])

⁵⁹ *Pacific Associates v. Baxter* [1990] 1 Q.B. 993

error but did nothing about it. *Cantrell v. Wright & Fuller*⁶⁰ is regarded as modern authority for this position. In view of this authority, it seems somewhat illogical that there are no provisions within the JCT 2005 that allow the A/CA to correct an error made within its judgement, other than the dispute resolution provisions. This may be a deliberate step to not undermine the finality of the A/CA decision.

7.5 Chapter Appraisal

This chapter has demonstrated that the JCT have not materially changed the JCT 98, choosing not to add any provisions for dealing with concurrent delay. The introduction of the sectional completion option may act as an aid in identifying and managing the causes of delay for both the Contractor and A/CA. The incremental changes are seemingly indicative of the intent that the A/CA is required to take a more active approach in assessing the causation of delays. However, in the event of concurrent causes, the A/CA is still presented with the uncertainty of definition and procedure for administration as identified within Chapter 4. Similarly, the A/CA is entitled to consider the Contractor's contribution to its own loss and expense, but no further guidance is given. The widespread criticism of the JCT 98 regarding its inadequacy to deal with concurrency (by, amongst others, Blackler), appears to remain in view of its updated version, JCT 2005.

⁶⁰ *Cantrell v Wright & Fuller Ltd* [2003] E.W.C.A. Civ 1565 (see also *Panemena Europa Navigacion v Leyland* [1943])

8.0 Structured Interviews

The preceding chapters have identified significant argument in support of the reform of the law to incorporate an apportionment approach to liability (and damages) for concurrent delay claims in contract. The reasoned argument established through desk study will be tested in this chapter by three structured interviews with professionals currently working within the construction industry. The interviewees have been selected due to the diversity of their roles within their organisations and more specifically due to their knowledge and experience in dealing with concurrent delay claims, both in the context of claimant and of defendant. A copy of the structured interview questions is included at Appendix A for reference.

8.1 The Interviewees

The names of the interviewees and their organisations are included within this section strictly in accordance with their authorisation.

Timothy Bowen holds the position of Contracts Director at Costain Limited and is also a Chartered Engineer. He has more than 15 years experience in the project management discipline working with major Contracting, Subcontracting and Consulting organisations.

Alistair Gill holds the position of Commercial Manager at Cleveland Bridge UK Limited, and has more than thirty years experience in quantity surveying and commercial management disciplines with both major Contracting and Subcontracting organisations.

Rachael Aaron is an Associate Solicitor and has over seven years post graduate experience working in the construction sector for a broad range of private sector clients.

8.2 The Interviews

Question 1

The first question related to the absence of any ability to apportion liability in contract, quoting Wier's contention that it is perplexing to separate the source of liability in this way. Gill and Bowen agree with the logic of Wier's comment, though at the same time both raised the same query regarding the certainty of contract terms (or otherwise) and their relation to the actual causation and occurrence of loss. Aaron comments that there is an apparent harshness in the current system that sees one party penalised for causing critical delay when, but for that delay, the other party's culpable action would have caused the same delay, but does not necessarily agree that this position is wrong. Gill also commented on the inherent complexity often present in concurrent delay disputes, and that the parties generally plead that it is the other who is 100% culpable, therefore, why should the judiciary be required to decide anything other than who bears 100% of the responsibility. Bowen added that, in his consideration, true concurrency by its definition would only occur in very rare circumstances, and that apportionment as a general principle should only be considered in this very rare case. Neither Bowen nor Gill considered any particular weight should be placed within the stated common objections, i.e. commercial peoples preference for certainty or the role of consideration, but both indicated strongly their preference for detailed factual analysis and the establishment of cause and effect and its link to any loss that can be proven to have occurred. Bowen added his contention that this exercise, generally, would alleviate any requirement to apportion liability, strictly disagreeing with the suggestion that a single period of delay could have two causes, as was recognised in the *Malmaison Hotel* and *Brompton* cases. Aaron offered a somewhat different view that it is not the role of a contract to provide justice, but that they simply regulate the relationship between parties without embodying any principles of restitution other than those that are expressly agreed between the parties, unlike the law of tort. This seems a pertinent point.

Question 2

The second question presented the inherent injustice of the ‘winner takes all’ stance in law identified by Bristow and Hatherley in chapter 2. Aaron considers this view of justice to be desirable in human nature, but reiterated her view that commercial contracts are not about justice (subject to the provisions of the Unfair Contract Terms Act 1977). Bowen, true concurrency aside, does not agree that any consideration need be made of the causal potency of any particular cause and does not accept the recognition provided in the *Malmaison Hotel* and *Brompton* cases that delays could be attributable to a combination of causes. His strict view is consistent with Pickavance’s view, that by detailed delay analysis, an event either causes a delay or it does not, therefore, there can only be one true cause of delay. Again, Bowen referred to the rare occurrence of true concurrency, adding that in this rare event, the loss should “*lie where it falls*”, which is in line with the Hudson view. Gill’s view matched that of Bowen, adding that damages are intended to be restitutionary, and that by the application of the principles of causation, should lie only where the loss can be proven, and not be apportioned.

Question 3

The third question followed the findings of chapter 5, identifying that the principle of apportionment has been embraced and widely accepted in alternative common law jurisdictions, posing the question as to why such development has not taken place in England. Gill considers that this may simply be too difficult a bridge to cross for the judiciary. Bowen comments that the position currently forged by the “*law making machine*” must reflect a realisation that, in industry, the current law is adequate, and that by virtue of this, generally, people do not wish to incorporate an apportionment approach in contract. Aaron made reference to the number of disputes, particularly large international disputes, that are Arbitrated and the apparent trend that parties often accept the decision of an Adjudicator, despite its interim status as limiting the number of cases being presented before the Courts, thus limiting the opportunity to develop the common law.

Question 4

The fourth question related to the role of the A/CA in JCT 2005 and focussed on how the option to apportion damages might affect the obligations placed upon the A/CA to make adjustments to the completion date, or to assess loss and expense, on a fair and reasonable basis. Aaron, Gill and Bowen all raised concerns regarding the qualification of the A/CA to make this judgement, highlighting that A/CA's generally may not be equipped with either the specific knowledge or experience required to take such a balanced approach. Bowen also raised concerns regarding the impartiality or otherwise of the A/CA, who may look for a compromise as opposed to establishing the true cause of the delay. Aaron also considered that this obligation may lead to the A/CA's role becoming untenable due to complexity, and may also add to the cost of the project if it became necessary to employ a dedicated planner to assist the A/CA, a cost ultimately incurred by the Employer.

Question 5

The fifth question presented to the interviewee the *John Doyle*⁶¹ case, with which all three were familiar. More specifically, the interviewees were invited to comment upon the general approach applied by Lord Drummond, whereby in the event that the dominant cause could not be established then, and only then, it may be possible to consider apportioning the loss between causes. Bowen agrees with the logic in this case, and added that apportionment of liability should only ever be made on an equal share basis, which would only arise in the event of true concurrency. Aaron agrees that this may be a workable and eminently sensible approach on one set of facts, but equally could become overly complicated, expensive and unworkable on another set of facts. The question of at what point the costs and uncertainties of such an uncertain approach become disproportionate to the benefits was also raised. Again, Bowen is dismissive of the suggestion that a delay could be attributable to more than one event or cause, referring to detailed methods of delay analysis. Gill agrees in principle with this logical approach,

⁶¹ John Doyle Construction Ltd v. Laing Management (Scotland) Ltd 85 Con.L.R. 98

but reiterates his view surrounding the complication of apportioning liability and the subsequent assessment of loss, suggesting that the principles of contributory negligence by apportionment may not be workable with the conflicting evidence often asserted by Expert Witnesses, but that one remedy may be to employ a single, court appointed expert, but this would need to be accepted by the parties.

Aaron summarised that there may not be a “*one size fits all*” approach to concurrent delay disputes, emphasising that increased certainty of approach through clear contractual agreements is possibly the best tools that a party could have in avoiding disputes generally.

8.3 Chapter Appraisal

This chapter attempted to measure the view of the industry in reflection to the arguments for the reform of the law in order to allow the apportionment of liability in concurrent delay disputes. Whilst the opinions presented differ slightly in content, they all concur that the introduction of an apportionment principle would, in certain circumstances, enable a balanced decision, but would in others be wholly inappropriate and, therefore, would add to the inherent uncertainty already prevalent in this area.

9.0 Conclusion

Upon the basis of the evidence established within this research it is not possible to conclude that a common law right to apportion liability in contract would improve perceived justice in concurrent delay disputes. In fact, the conclusion of this research is to the contrary, that such an approach would more likely lead to an increase in perceived injustice by the introduction of greater uncertainty.

The concept of justice and the principles of restitution in tort, are, on the basis of this research, distinguishable from contractual relationships that exist only to regulate agreements made between parties. The case for an apportionment principle in contract law generally appears merited primarily by the instinct in human nature that requires justice by equal measure of retribution and restitution, and some recent decisions of the Courts appear to defy the principles of causation in the pursuit of perceived justice as identified within Chapter four. This broad concept, however, does not fall into the specific characteristics of concurrent delay and causation principles. The concept of this general principle in the whole of common law is far broader than the scope of this research.

The Courts have accepted that a specific period of delay may be attributable to two separate causative events, yet they are generally not asked the question of the extent to which each cause contributed to the delay. By the nature of concurrent delay disputes, plaintiff and defendant claim that it is the other party who bears sole responsibility for the delay. Therefore, the question is postulated as to why should the Courts be concerned with the causative contribution of each cause, when this is not the question that they have been asked to answer?

Despite the Courts acceptance that a single period of delay may have two contributing causes, no strict definition has been provided. This is suggestive, on the basis of this research, that strict definition is not possible, and that in fact the position is not correct. Certainly much of the literature used within the secondary research, as well as the

opinions of the professionals contributing to the primary research, suggests that concurrency on the basis of varying factual permutations and causative principles may not even exist. This controversial statement is perhaps a valid area for further research.

The evidence confirming the acceptance of an apportionment principle in other common law and commonwealth jurisdictions provides persuasive argument in support of this approach. However, again in the concurrent delay context, the principle seems equally unclear. In the USA and Australia the adoption of the apportionment principle is also accompanied by strict contractual frameworks surrounding the administration of concurrent causes of delay. The status of the programme is given greater significance as a contract document and the parties are provided with procedural certainty regarding how concurrent causes will be administered. The JCT have made no such addition or alteration in the update of its documents and the release of the JCT 2005.

The perception of justice in the afore mentioned chapters is exactly that, it is the perception of those authors. The true perception of justice in relation to the law on concurrent delay disputes can only come from those parties and organisations directly involved within the construction industry. Until parties in dispute require the Courts to assess the contribution of causes, or that the standard form contracts widely in use incorporate such provision, then reasoned argument exists that the current position reflects the wishes of those within the industry. In this context, the question needs to be considered of whether or not this actually equates to an injustice.

Therefore, in summary, reform of the law will, and should, only occur as and when the society to which it relates (the construction industry) as a whole requires it.

9.1 Recommendations

It has not been possible, by this research, to establish any cogent argument in support for reform of the law in this area specifically in relation to concurrent delay. However, the

position of the law as a reflection of the wishes of society has not been examined or investigated. In order to further develop this it is recommended that a quantitative analysis of the construction industry be undertaken in order to define and determine the industry's perception of the current provision. Its views as a whole, as to whether this reflects its wishes, or whether it perceives there is any failing in the current system to provide the required result to the parties in concurrent delay disputes is the only means for establishing if there is a need for reform of the law in this area.

The quantity and range of reasoned argument surrounding current approaches to concurrent delay is more definable, and seemingly reflective of the inherent uncertainty in the law. With the same uncertainty appearing to be reflected within the JCT 2005 standard form of contract, it is also recommended that alteration be made to the JCT 2005 to improve the certainty of the agreement between the parties in the event of concurrent causes of delay. The introduction of the following measures, in line generally with the standard form contracts widely in use in the USA and Australia, is therefore suggested for further research and consideration:

- a) The status of the contract programme to be elevated to that of Contract Document;
- b) The obligation placed upon the Contractor to progress the works be amended from a general obligation to a more strict obligation reflecting the contract programme, thus measuring the actual completion of any activity against programmed completion;
- c) Formal procedure be introduced categorising the classification of causes of delay in circumstances of concurrency, incorporating procedure for the allocation of risk and entitlement in the event that such circumstances arise, which should remain a matter of Contract agreeable between the parties.

Further research into these proposed alterations to the JCT format is therefore recommended.

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