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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STATUTES

England and Wales

Law Reform (Contributory Negligence) Act 1945

The Civil Liability (Contribution Act) 1978

Unfair Contract Terms Act 1977

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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 law[1] 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 Architect[2] 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.

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[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:

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[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 Fusrt 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 Chappel'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.

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[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 appropriate[17], 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.

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[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.

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[18] Turner Page Music Ltd v. Torres Design Associates Ltd [1997] C.I.L.L. 1263, QBD
[19] Motherwell Bridge Construction Ltd v. Micafil Vakuumtechnic [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

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 cause[22]. 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

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)

> *"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. Warrangton***[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 2005[27] 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 Tribulal 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 authoritive 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