

Concurrent Delay, Over-Determination and the Problem of Default Rules

Mischa Balen*

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I. Introduction

Concurrent delay is a troublesome concept. So much so that it is difficult to discern a prevailing consensus as to its meaning, let alone its effects. It is defined in the Society of Construction Law (SCL) Delay & Disruption Protocol as follows:

“True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event and the effects of which are felt at the same time. The term ‘concurrent delay’ is often used to describe the situation where two or more delay events arise at different times, but the effects of them are felt (in whole or in part) at the same time. To avoid confusion, this is more correctly termed the ‘concurrent effect’ of sequential delay events.”¹

The example of true concurrent delay given by the SCL is the situation where, at the commencement date “the Employer fails to give access to the site, but the Contractor has no resources mobilised to carry out any work”.² An example of the concurrent effect of sequential delay is the situation where the specified completion date has been delayed by inclement weather (a relevant event entitling the contractor to an extension of time) in circumstances where the delay would have occurred anyway (because, for example, of the contractor’s shortage of labour). The distinction is not straightforward to understand,³ though cases involving “true concurrent delay” are likely to be rare in practice.⁴

The judiciary has not yet offered a definitive definition of the term “concurrent delay” but the courts have, on occasion, expressed a view as to its meaning. In *Adyard Abu Dhabi*,⁵ Hamblen J adopted John Marrin QC’s definition of “concurrent delay” as “a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency”. This definition resembles what the SCL terms “the ‘concurrent effect’ of sequential

* Barrister, Atkin Chambers

¹ SCL Delay & Disruption Protocol, October 2002, p.53

² SCL Delay & Disruption Protocol, 1.4.4.

³ *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190; [2008] B.L.R. 269; (2008) 24 Const. L.J. 590 at [17], [36].

⁴ SCL Delay & Disruption Protocol; J. Marrin, “Concurrent Delay” (2002) 18(6) Const. L.J. 436.

⁵ *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm); [2011] B.L.R. 384; 136 Con. L.R. 190.

delay events”.⁶ In *Royal Brompton Hospital*,⁷ His Honour Judge Richard Seymour QC proposed a definition of “concurrent delay” as a situation where

“the Works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a relevant event, while the other is not”.

According to Mr Marrin, the latter is a “narrower definition” because it requires “the coincidence in time of the occurrence of the events in question as well as their effects”,⁸ or “true concurrent delay” to borrow from the SCL.

This paper suggests that the same causal problem ultimately lies at the root of the conceptual difficulties generated by true concurrent delay or the concurrent effect of sequential delay events. The first part of this paper explains that the causal problem in question is over-determination. This arises where an outcome has multiple causal events, all of which are severally sufficient and are independent of one another.⁹ The problem of over-determination means that a claimant cannot prove causation on the traditional “but for” basis. The second part of this paper explains the solutions which have been offered to the problem of over-determination in cases where the parties’ intentions are unclear. The third part of this paper considers the proper basis for selecting one of those options. It explains that the “default rule”, which governs in the absence of a contrary indication by the parties, should be to apportion the delay between the contractor and the employer

II. The problem of over-determination

The problem of over-determination can be illustrated by the following example.

“Suzy and Billy both throw rocks at a window; the rocks strike at the same time, with exactly the same force; the window shatters. Furthermore, each rock strikes with sufficient force to shatter the window all by itself.”¹⁰

Applying the traditional “but for” test of causation to this problem leads to the conclusion that neither throw caused the window to shatter, a logically correct but ultimately unsatisfying outcome: the reality is that both throws independently and separately caused the window to shatter. In the construction context, the problem of over-determination typically arises where the specified completion date has been delayed by two or more events, each of which would be severally sufficient to cause the delay and which are independent of one another, and the contractor applies for either or both of an extension of time and the prolongation costs which it has suffered as a result of the delay.

The causal events themselves need not be simultaneous for the problem of over-determination to arise, rather, “what is important is the simultaneity of their effects”, i.e. that their effects are felt at the same time,¹¹ but they must actually

⁶ *Adyard Abu Dhabi* [2011] EWHC 848 (Comm); [2011] B.L.R. 384 at [277], citing Marrin, “Concurrent Delay” (2002) 18(6) Const. L.J. 436.

⁷ *Royal Brompton Hospital NHS Trust v Hammond* [2001] EWCA Civ 206; 76 Con L.R. 131 at [31].

⁸ J. Marrin, “Concurrent Delay Revisited”, a paper presented to the Society of Construction Law at a meeting in London on 4 December 2012.

⁹ S. Green, *Causation in Negligence* (Hart Publishing: 2015), p.58.

¹⁰ J. Collins, N. Hall and L.A. Paul, “Causation and Counterfactuals: History, Problems and Prospects” in J. Collins, N. Hall, and L.A. Paul (eds), *Causation and Counterfactuals* (Cambridge, MA: The MIT Press, 2004), pp.32-33.

¹¹ Green, *Causation in Negligence* (2015), p.65.

affect the project (so they must cause actual—as opposed to potential – delay). To continue the example above, if Billy’s rock shattered the window and Suzy subsequently threw her rock through an empty window, the cause of the window breaking is not over-determined because Suzy’s actions did not actually affect the condition of the window. The requirement that the causal event must actually delay the project suggests there is a distinction between “one-off” and “continuing” events. A one-off event is an event which happens once and is not part of a regular sequence (for example, an employer’s instruction) while a continuing event is an event which exists over a period of time (for example, inclement weather). This can be summarised, for the purposes of delay analysis, as follows:

- Where a one-off event (e.g. an employer’s instruction) causes delay to the project, and a subsequent event then causes delay to the project while the effects of the first event are still being felt, the problem of over-determination does not arise: the delay is caused by the first event.
- Where a continuing event (e.g. inclement weather) causes delay to the project, and a subsequent event then causes delay to the project while the effects of the first event are still being felt, the problem of over-determination does arise. Both events actually and simultaneously affect the project.

The causal events must be independent of one another. Where a prior event (for example, an employer’s acknowledgement that it will not provide materials by a stipulated date), causes the contractor to reduce its labour or planning resources as a consequence, the contractor’s decision was caused by the employer’s prior delay and is not independent of it. The delay to the project is caused by the employer, not the contractor.

The key to resolving disputes involving causal over-determination can only be found through a close examination of the extension of time and loss and expense provisions, and therefore the parties’ objectively ascertained intentions, in the contract in question. The principles of interpretation of contracts have generated important works,¹² though they are simple enough to state in outline terms. In *Rainy Sky* Lord Clarke stated that

“the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant”.¹³

The reasonable person is privy to all the background knowledge “which would reasonably have been available to the parties in the situation in which they were at the time of the contract”.¹⁴ As the Supreme Court recognised, however, language is often ambiguous. Where a term of a contract admits of more than one interpretation, “it is generally appropriate to adopt the interpretation which is most consistent with business common sense.”

¹² K. Lewison, *The Interpretation of Contracts*, 5th edn (London: Sweet & Maxwell, 2011).

¹³ *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 W.L.R. 2900; [2012] 1 All E.R. 1137 at [14].

¹⁴ Save for the usual exceptions, for example prior negotiations.

In construction cases however the parties often use standard forms which do not offer much in the way of guidance as to the parties' intended solution to problem of over-determination. Clause 2.24.1 of the JCT Design & Build Contract 2011 addresses the contractor's entitlement to an extension of time.

"If and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith give notice to the Employer of the material circumstances, including the cause or causes of the delay, and shall identify in the notice any event which in his opinion is a Relevant Event."

Clause 2.25.1 goes on to provide

"[i]f on receiving a notice and particulars under clause 2.24: (1) any of the events which are stated to be a cause of delay is a Relevant Event; and (2) completion of the Works or of any Section is likely to be delayed thereby beyond the relevant Completion Date, then, save where these Conditions expressly provide otherwise, the Employer shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as he then estimates to be fair and reasonable."

This says nothing as to the contractor's entitlement in cases where the cause of the delay is over-determined, an enquiry which requires the tribunal to ask itself which test of causation the parties intended should apply in order for it to establish whether "completion of the Works ... is likely to be delayed" by a Relevant Event.

III. Suggested solutions

How should a tribunal approach its task of interpreting extensions of time clauses in cases of over-determination where the parties' intentions are difficult to discern? The first possible solution is to apply the "dominant cause" test. This test has its roots in insurance law¹⁵ but was applied in the construction context by the Outer House in *City Inn*.¹⁶ Lord Drummond Young considered the situation where the contractor was claiming loss and expense on a global basis, some of which had been caused by events at the contractor's risk and some of which had been caused by events at the employer's risk. His Lordship explained that

"the question of causation must be treated by the application of common sense to the logical principles of causation, and if it is possible to identify an act of the employer as the dominant cause of the loss that will suffice".

The English courts have however declined to apply the "dominant cause" test.¹⁷ An obvious problem with the test is that it may not always be possible to identify a dominant cause. John Marrin's definition of "concurrent delay", it will be remembered, requires the two delay events to be of equal or relatively equal causative potency. The test will not assist in resolving cases of over-determination

¹⁵ *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] A.C. 350; c.f. *ENE I Kos Ltd v Petroleo Brasileiro SA Petrobras (The Kos)* [2012] UKSC 17; [2012] 2 A.C. 164; [2013] 1 C.L.C. 1.

¹⁶ *City Inn* [2007] CSOH 190; [2008] B.L.R. 269.

¹⁷ *H Fairweather & Co Ltd v Wandsworth LBC* (1987) 39 B.L.R. 106.

where the two delay events are of equal or relatively equal causative potency because it cannot be said that either is dominant.

This problem was recognised by the Inner House in *City Inn* which suggested a different solution for such cases:

“it will be open to the decision-maker, whether the architect, or other tribunal, approaching the issue in a fair and reasonable way, to apportion the delay in the completion of the works occasioned thereby as between the relevant event and the other event”.¹⁸

But as explained below, the English courts have rejected the submission that prolongation costs should be apportioned by reference to the competing causes of delay, at least in the absence of a contrary indication in the contract.¹⁹

An alternative approach is to apply the test known as the “Malmaison test” (after the eponymous decision). In *Malmaison*,²⁰ the parties agreed that an architect could not refuse to grant an extension of time for inclement weather “on the grounds that the delay would have occurred in any event by reason of the [contractor’s] shortage of labour”. A tribunal which applies the Malmaison test will decline to reject the claim for an extension of time if the relevant event was operative when the delay occurred. John Marrin QC supports the application of the Malmaison test in cases of over-determination where the two delay events are of equal or relatively equal causative potency.²¹ The application of the Malmaison test in such circumstances was also accepted by Akenhead J in *Walter Lilly*

“where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time”.²²

In order for the Malmaison test to apply in cases of over-determination, the relevant events must therefore be “effective” causes of the delay.

It is thought however that a stricter approach applies to cases of over-determination where the contractor seeks prolongation costs incurred as a result of the delay. The problem of over-determination in such cases has been upheld as an insurmountable hurdle for a contractor who cannot satisfy “but for” causation: in *De Beers*,²³ Edwards-Stuart J explained that

“[t]he general rule in construction and engineering cases is that where there is concurrent delay to completion caused by matters for which both employer and contractor are responsible, the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by the delay.”

This position is reflected in the SCL Delay & Disruption Protocol:

¹⁸ *City Inn* [2007] CSOH 190; [2008] B.L.R. 269 at [42].

¹⁹ *Hi-Lite Electrical Ltd v Wolseley UK Ltd* [2011] EWHC 2153 (TCC); [2011] B.L.R. 629; *Walter Lilly & Co Ltd v Mackay* [2012] EWHC 1773 (TCC); [2012] B.L.R. 503; 143 Con. L.R. 79 at [370].

²⁰ *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con. L.R. 32.

²¹ Marrin, “Concurrent Delay” (2002) 18(6) Const. L.J. 436.

²² *Walter Lilly* [2012] EWHC 1773 (TCC); [2012] B.L.R. 503 at [370].

²³ *De Beers UK Ltd (formerly Diamond Trading Co Ltd) v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC); [2011] B.L.R. 274; 134 Con. L.R. 151.

“If it would have incurred the additional costs in any event as a result of Contractor Delays, the Contractor will not be entitled to recover those additional costs”.²⁴

The Protocol defines “Contractor Delay” by reference to “Contractor Risk Event”, which means “an event or cause of delay which under the contract is at the risk and responsibility of the Contractor”. Logically this approach must also apply to the situation where there is concurrent delay to completion caused by a matter for which the employer is responsible (for which the contractor could recover its prolongation costs) and a matter for which the contractor is entitled only to an extension of time. In such a situation the contractor would not be able to prove that “but for” the employer’s actions it would not have incurred its prolongation costs.

These principles can therefore be summarised as follows:

- Where the project is delayed by reason of an event which is at the contractor’s risk under the contract (non-excusable delay) and by reason of an event which is at the employer’s risk under the contract (excusable delay), “the Contractor’s concurrent delay should not reduce any EOT due”.²⁵
- Where the project is delayed by reason of an event for which the contractor is entitled to its prolongation costs (excusable delay) and by reason of an event which is either (i) at the contractor’s risk under the contract (non-excusable delay) or (ii) for which the contractor is only entitled to an extension of time (excusable delay), the contractor is only entitled to an extension of time and cannot recover its prolongation costs.

IV. The prevention principle

The Malmaison test therefore offers different solutions to the problem of over-determination in cases of loss and expense and cases involving extensions of time (to adopt a shorthand explanation: time, but no money). In *Walter Lilly*, Akenhead J recognised that if he did not apply the Malmaison test to the extension of time claim

“many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to construe [the clause] on the basis that the Contractor should be denied a full extension of time in those circumstances”.²⁶

This is a reference to the prevention principle, which holds that the employer cannot hold the contractor to a specified completion date if the employer has prevented the contractor from achieving that date, in which case

²⁴ SCL Delay & Disruption Protocol, 10.10.4.

²⁵ SCL Delay & Disruption Protocol, 1.4.1.

²⁶ *Walter Lilly* [2012] EWHC 1773 (TCC); [2012] B.L.R. 503 at [370].

“time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time”.²⁷

If there were no mechanism for extending time in cases of over-determination where one of the relevant events was the employer’s fault and one of the relevant events was the contractor’s fault, then the prevention principle would deny the employer’s right to levy liquidated damages.²⁸ The parties must have intended the contractor to be entitled to an extension of time in such circumstances because the extension of time clause exists for both of their benefits. The contractor is granted extra time, while the employer is saved the expense of having to prove a claim for loss of profits.²⁹

As John Marrin has argued, the *Malmaison* test therefore also avoids the “obverse problem”. The obverse problem arises because a claim for an extension of time may be met by a counterclaim for liquidated damages for failing to complete by the specified completion date, yet if the claim for an extension of time succeeds, the counterclaim for liquidated damages must fail.

“It would be nonsensical if the contractor and the employer each had valid cross claims against each other for the whole of [the period of delay]”.³⁰

It is not immediately apparent however that this problem is insurmountable. As the Supreme Court of Victoria highlighted in *SMK Cabinets*

“whatever the correct theory may be as to the basis of the doctrine of prevention in relation to liquidated damages, the parties can effectively manifest by their contract an intention that the contractor shall be liable notwithstanding the prevention”.³¹

The “obverse problem” also overlooks the prophylactic effect of encouraging the parties to take steps to guard against the risk of that injury materialising in the first instance.

The theory nonetheless explains why there are different solutions to the problem of over-determination in cases involving extensions of time and in cases of loss and expense: the prevention principle is engaged in the former case but not the latter.³² This is also one of the commonly cited objections to the apportionment approach³³: if a period of delay were to be apportioned between an event for which the contractor was responsible and an event for which the employer was responsible, the prevention principle would rob the employer of his right to levy liquidated damages.³⁴

Commentators and tribunals who support the *Malmaison* test therefore assume that the prevention principle applies unless it has been expressly excluded, and

²⁷ *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No.2)* [2007] EWHC 447 (TCC); [2007] B.L.R. 195; 111 Con. L.R. 78 at [48].

²⁸ But cf. *Jerram Falkus Construction Ltd v Fenice Investments Inc* [2011] EWHC 1935 (TCC); [2011] B.L.R. 644; 138 Con. L.R. 21.

²⁹ This explanation is accepted in the SCL Delay & Disruption Protocol 1.4.12.

³⁰ Marrin, “Concurrent Delay Revisited”, a paper presented to the Society of Construction Law at a meeting in London on 4 December 2012.

³¹ *SMK Cabinets v Hili Modern Electrics Pty* [1984] VR 391 at 398.

³² Although it should be noted that it says nothing as to whether the “but for” test is appropriate for claims for loss and expense.

³³ Another is that it is uncertain or unworkable.

³⁴ Marrin, “Concurrent Delay” (2002) 18(6) Const. L.J. 436.

they conclude from this that any solution to the problem of over-determination which cuts across this premise must be rejected. This assumption is questionable. It is an open question as to whether the prevention principle applies when the employer's actions are "a cause" of the delay, or whether the contractor must prove on a "but for" basis that "the employer's conduct made it impossible for him to complete within the stipulated time".³⁵ In the latter case, the prevention principle would not assist in explaining the Malmaison approach.

More importantly, the theory underpinning the Malmaison test cannot govern where the parties have expressly provided for what should happen if the prevention principle were engaged. If the parties have expressly stated that the prevention principle is inapplicable in circumstances where the contractor has also caused or contributed to the period of delay, then the rationale of maintaining the employer's right to levy liquidated damages by sidestepping the prevention principle is undermined. Thus, clause 10.1 of PC-1 (an Australian standard form contract) provides for apportionment by allowing the contract administrator to reduce any extension of time to reflect the extent that the contractor "failed to take all steps necessary both to preclude the cause of the delay and to avoid or minimise the consequences of the delay". If the theory collapses in the face of an express apportionment clause, it equally cannot survive if the parties have impliedly provided for what should happen if the prevention principle were engaged. If therefore the parties intended the tribunal to apportion delay when considering the enforceability of the liquidated damages clause, the parties must have excluded the prevention principle as it is traditionally understood. The US Court of Appeals, Fifth Circuit has recognised that the "underlying policies" of the prevention principle are "old" and

"do not remain in full force. One of the dominant reasons underlying it is early judicial hostility to the use of privately agreed upon contract damage remedies ... As long as the owner's own delay is not incurred in bad faith, it is not unjust to allow proportional fault to govern recovery [of liquidated damages]".³⁶

As such, the explanation for the Malmaison approach offered above does not provide a normative reason, rooted in the parties' objectively expressed intentions, to prefer it to the apportionment approach. The reality is that it rests on the assumption that all other matters being equal, the parties intend the prevention principle (as traditionally understood) to apply to their contract to the exclusion of an apportionment solution to the problem of over-determination even though the parties may not have considered the matter at all. Even then, it does not explain why the parties would intend the Malmaison test to apply to cases where none of the delaying events would otherwise amount to an act of employer prevention. It is not, therefore, a complete explanation.

³⁵ *Jerram Falkus* [2011] EWHC 1935 (TCC); [2011] B.L.R. 644.

³⁶ *EC Ernst Inc v Manhattan Construction Co* (5th Cir.1977), 551 F.2d 1026.

V. Default rules

The problem of over-determination can only resolve itself by reference to which “default rule” the parties intended to apply to their contract. A “default rule” forms part of the legal background and, absent an express contrary indication, will apply to the parties’ contract: “[d]efault rules fill the gaps in incomplete contracts; they govern unless the parties contract around them”.³⁷ An example of a default rule is the first limb of the rule in *Hadley v Baxendale*³⁸: a claimant can only recover damages which are not unlikely to happen as a result of a breach of contract in the ordinary course of events, unless the parties provide otherwise (for example by inserting a liquidated damages clause). This paper suggests that the default rule to resolve the problem of over-determination in delay analysis should be to apportion the delay (and the costs thereof) between the contractor and the employer.

Default rules are important because it takes effort to contract around them. It follows that they should be useful, for example, by allocating risk where it is most easily avoided³⁹ or by reflecting what the majority of contracting parties in the same position would wish to happen, so that they can avoid transaction costs.⁴⁰ An analogy can be drawn with attempts to reduce damages for breach of a strict contractual obligation by relying on the defendant’s contributory negligence, an argument considered but rejected by the High Court of Australia in *Astley v Austrust Ltd*.

“Rarely do contracts apportion responsibility for damage on the basis of the respective fault of the parties. Commercial people in particular prefer the certainty of fixed rules to the vagueness of concepts such as ‘just and equitable’. That is why it is commonplace for contracts to contain provisions regulating liability for breach of a duty to take reasonable care, whether by excluding liability altogether or limiting it in some other way”.⁴¹

The apportionment approach has been criticised on the basis that it is uncertain⁴² and is therefore a less helpful default rule. On closer inspection, however, the current default rule is just as uncertain (if not more so) than the apportionment approach but has greater potential to cause injustice.

As Glenn Grenier has explained, an all-or-nothing approach may leave one party “shouldering a disproportionate burden of the cost of delay by happenstance”.⁴³ This can be illustrated by the following three examples:

(a) An employer is contractually obliged to provide its contractor with an electricity supply for a continuous supply of electricity. The employer, in breach of the contract, allows an interruption in the supply. This delays the project because the contractor has to re-lay a large volume of concrete.

³⁷ I. Ayres and R. Gertner, “Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules”, Paper 1545, *Yale Faculty Scholarship Series*, 1989.

³⁸ *Hadley v Baxendale* (1854) 9 Ex 341.

³⁹ R. A. Posner, “Let Us Never Blame a Contract Breaker” in O. Ben-Shahar and A. Porat (eds), *Fault in American Contract Law* (Cambridge: CUP, 2010).

⁴⁰ This can be termed the “majoritarian” view.

⁴¹ *Astley v Austrust Ltd* [1999] HCA 6 at [85].

⁴² V. Ramsey, “Claims for Delay & Disruption: the impact of City Inn”, a paper presented at the annual TECBAR conference in January 2011 and in the TECBAR Review for Spring 2011.

⁴³ G. Grenier, “Evaluating Concurrent Delay—Unscrambling The Egg”, 53 *Construction Law Reports* (3d) 47, 52.

“Another casual factor was that the contractor failed to take reasonable steps to see that a back-up system was available before beginning a task for which a continuous supply of concrete was indispensable.”⁴⁴

(b) An employer’s negligent use of equipment on site causes a fire, the effects of which were “exacerbated by the contractor’s fuel which was not contained in accordance with contractual requirements regarding hazardous materials”.⁴⁵ The fire delays the project.

(c) An employer negligently fails to inform a contractor of “geological obstacles” that become known to it during the course of a contract, resulting in a delay to the completion date, in circumstances where the contractor is also delayed by its own labour shortages.⁴⁶

In the third example the employer’s conduct may not amount to a breach of a duty of good faith (if one exists) or release the contractor from its obligation to meet the specified completion date but it would still be “unfair” for the contractor to bear the whole consequences of the delay. In each of the three examples, the employer is, at least in part, the author of its own misfortune and “where a man is part author of his own injury he cannot call upon the other party to compensate him in full”.⁴⁷

Commentators have duly recognised that the default rule requires moderation to ensure it is not relied upon as an instrument of oppression. John Marrin defines concurrent delay as existing where one or more events are “effective causes” of a period of delay, and that it is common during the course of a factual enquiry for it to become “obvious as a matter of common sense that the two supposed causes of delay are of markedly different causative potency”.⁴⁸ Hudson adopts a similar approach by stating that the tribunal must first seek the “dominant” cause of the delay, but “if no cause could be identified as the dominant cause a claim for extension of time should not fail”.⁴⁹

Delay is measured in time so from a causal perspective it may logically arise as a result of two events but if one of those events is to be treated as if it were causally irrelevant to the delay then the reason for its rejection should be clearly articulated. Concepts like “effective” and “dominant” are difficult to analyse in terms of causation. The problem of over-determination only arises where an outcome has multiple causal events, each of which is severally sufficient and independent of one another. Each of these causal events could fairly be described as an “effective” or a “dominant” cause.⁵⁰ There are no clear guidelines to calculate degrees of causation: the courts simply weigh up the causative potency of the claimant’s actions against the defendant’s actions as best they can.⁵¹ This approach

⁴⁴ Scottish Law Commission, Report on Remedies for Breach of Contract (Scottish Law Com No 174, Edinburgh: The Stationary Office, 1999), §4.10.

⁴⁵ P Tobin, “Concurrent and Sequential Causes of Delay”, (2007) International Construction Law Review 142, 152.

⁴⁶ This is based on an example offered by A Porat, “A Comparative Fault Defense in Contract Law”, Paper 88, Tel Aviv University Law School Papers, 2008.

⁴⁷ *Tompkins Hardware Ltd v North Western Flying Services Ltd* (1982), 139 DLR (3d) 329 (Ont HCl) per Saunders J at 340.

⁴⁸ Marrin, “Concurrent Delay” (2002) 18(6) Const. L.J. 436, 437.

⁴⁹ N. Dennys, M. Raeside, R. Clay (eds), *Hudson’s Building and Engineering Contracts*, 12th edn (London: Sweet & Maxwell, 2010), para.6-061.

⁵⁰ Law Commission, *Contributory Negligence as a Defence in Contract* (HMSO 1993), Law Com No.219, 3.14.

⁵¹ Law Commission, *Contributory Negligence as a Defence in Contract* (HMSO 1993), Law Com No.219, 4.19.

inevitably produces differences of opinion. This can be illustrated by reference to a recent UK Supreme Court case concerning insured risks in the shipping industry. In *The Kos*,⁵² the shipowner withdrew the vessel from the charterparty for non-payment of hire. The charterer's cargo remained on board for several days afterwards. The question was whether the charterer was obligated to indemnify the owner for the additional storage costs once the vessel had been withdrawn. This turned on whether the charterers' order to load cargo was the "effective cause" (to quote Lord Sumption and Lord Clarke) of the owners having to bear a risk they had not contractually agreed to bear. By a majority, the Supreme Court held that the charterers' order was the effective cause of the loss. Lord Mance, dissenting, said that the search was for the "proximate" or "determining" cause, and concluded that the losses were caused by the withdrawal of the vessel not by the charterers' order. If and insofar as tribunals are making determinations on the basis of what is an effective or a dominant cause, they are likely to produce answers which are just as uncertain as the apportionment approach.

The apportionment approach would focus the tribunal's mind on the reasons for its decision without allowing it to obfuscate those reasons by reference to a troublesome causation analysis. In *City Inn*, Lord Drummond Young pointed to the "degree of culpability" as an important factor in the apportionment exercise. Culpability has been objected to on the ground that it is not immediately apparent why fault should be relevant to the parties' contractual entitlement.⁵³ It is true that fault may be irrelevant to questions of liability in principle, as it would to the occurrence of so-called "neutral" delay events for which neither party was responsible, but it may be relevant to the question of which party bears more blame for causing the delay.⁵⁴ In other words

"[t]he fact that the party in breach is liable notwithstanding absence of fault does not necessarily mean that liability should extend to loss or damage which was partly caused by the aggrieved party".⁵⁵

An analogy can be drawn with mitigation, where the claimant is only entitled to recover damages which a reasonable claimant in its position would have incurred. Apportionment on this basis "cannot be a precise calculation"⁵⁶ but it is a more finely tuned tool for doing justice than the current default rule and would reflect the relative degree of culpability in bringing about the delay to the project.

It has been 16 years since the decision in *Malmaison* and 13 years since the publication of the SCL's Delay & Disruption Protocol. It does not follow from this, however, that parties are content with the default rule. They may never have turned their minds to it, particularly if they relied on a standard form of contract written by an industry body⁵⁷: indeed, similarly worded contractual provisions have been interpreted differently in different jurisdictions, so that the parties' choice of a given standard form cannot sensibly be said to reflect a positive choice

⁵² *The Kos* [2012] UKSC 17; [2013] 1 C.L.C. 1.

⁵³ Law Commission, *Contributory Negligence as a Defence in Contract* (HMSO 1993), Law Com No.219, 3.24. It would not be relevant in cases of neutral delay events.

⁵⁴ S. Harder, *Measuring Damages in the Law of Obligations* (Hart Publishing, 2010), p.164.

⁵⁵ Scottish Law Commission, *Report on Remedies for Breach of Contract*, (Edinburgh: The Stationery Office, 1999), Scottish Law Com No.174, 4.6.

⁵⁶ *Convert-A-Wall Ltd v Brompton Hydro-Electric Commission* [1988] OJ 1444; 32 C.L.R. 289.

⁵⁷ Most notably the Joint Contracts Tribunal.

in the matter. Thus, the Hong Kong Court of First Instance agreed with the apportionment approach expressed in *City Inn in W. Hing Construction Co Ltd v Boost Investments Ltd*⁵⁸ where clause 23 of the Hong Kong Building Contract containing General Conditions of Contract required the Architect to award a “fair and reasonable” extension of time, the same wording used in the JCT Standard Forms which have been differently interpreted in England and Wales.

It was suggested above that default rules should be useful, for example by allocating risk where it is most easily avoided or by reflecting the wishes of the majority of contracting parties in order to cut down on transaction costs. In the absence of empirical evidence the wishes of the majority of contracting parties are unknown and for the reasons given above the absence of apportionment clauses should not be taken as tacit support for the current default rule. If risks are to be allocated where they are most easily avoided then the default rule should be apportionment. In *Doiron v Caisse Populaire D’Inkerman Ltee*, a case concerning contributory negligence, La Forest J said that “liability should be apportioned on the basis of what might reasonably have been in the contemplation of the parties had an eventuality such as the present occurred to them”,⁵⁹ in the same way that *Hadley v Baxendale* allocates risks where they are most easily avoided by only holding a contract-breaker liable for damages within its reasonable contemplation as a not unlikely result of a breach (special or unusual damaged needing to be brought to its attention at the time of the contract). The focus on the parties’ respective fault may also enable contractors to price bids more accurately. The all-or-nothing approach generates uncertainty because “[m]ost contractors cannot accurately price the risk of owner interference or other unpredictable delays”.⁶⁰ If the contractor knows that the biggest threat to its recovery of time and money in cases of delay will be governed by its blameworthiness, it will be easier for the contractor to produce a risk profile for a given project and to pitch its bid accordingly, and to take steps to guard against those risks.

VI. Conclusions

Concurrent delay, whether “true concurrent delay” or “the concurrent effect of sequential delay events”, raises a problem of causal over-determination. The question for any tribunal faced with claims for loss and expense and prolongation costs where the delay is over-determined is to ascertain, by reference to the parties’ agreement, how they intended to resolve the problem. In the absence of any guidance in the contract, English courts have dealt with the problem of over-determination by allowing the contractor a full extension of time, but denying the contractor its prolongation costs unless it can prove causation on a “but for” basis.

This rule has developed to preserve that the employer’s right to levy liquidated damages in cases of concurrent delay. But the prevention principle can be excluded by the parties’ agreement. The parties may have intended the period of delay to

⁵⁸ *W. Hing Construction Co Ltd v. Boost Investments Ltd* [2009] HKCFI 95. There was no magic in the law of interpretation of contracts in Hong Kong which mandated this result. But c.f. *Leighton Contractors (Asia) Ltd v. Stelux Holdings Ltd* [2004] HKCFI 822.

⁵⁹ *Doiron v Caisse Populaire D’Inkerman Ltee* (1985), 61 NBR (2d) 123.

⁶⁰ CS Beattie, “Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate ‘No Damages for Delay’ Clause” (2005) 46 *Wm. & Mary L. Rev.* 1857, 1872.

be apportioned between the employer and the contractor, allowing proportionate recovery of liquidated damages. The apportionment approach has been criticised on the basis that it promotes uncertainty, but the current default rule of time but not money is just as uncertain because, to avoid the injustice of the all-or-nothing rule, it relies on difficult concepts of “effective” or “dominant” causation to explain the real cause of the delay.

The starting point for solving the problem of over-determination must be the parties’ contract. In the absence of either express wording or legislation permitting apportionment it is likely that the courts will continue to apply the current default rule. Parties remain vulnerable, however, to a change in judicial attitude as to what the current default rule should be. They should give serious thought to how they intend their extension of time and loss and expense provisions to operate. After all, “[i]f parties were clearer, courts would have less work to do”.⁶¹

⁶¹ E. Posner, “Economic Analysis of Contract Law after Three Decades: Success or Failure?”, *John M. Olin Law & Economics Working Paper No.146 (2d Series)*, p.10.