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CAUSATION IN CONSTRUCTION LAW: THE DEMISE OF THE 'DOMINANT CAUSE' TEST

INTRODUCTION

In the seemingly eternal debate over which test of causation to apply in claims under building contracts based on concurrent causes of delay or loss and expense, we seem to have reached something of a hiatus.

A consensus has developed, derived from recent authority, updated editions of practitioner works and academic articles, to the effect that:

1. The expression 'concurrent delay' denotes a period of project overrun which is caused by two or more effective causes of delay which are of *approximately equal causative potency*¹.
2. A contractor is entitled to an extension of time (at least under the JCT forms) notwithstanding that the matter relied upon is not the dominant cause of delay, as long as it has at least 'equal causative potency' with all other matters causing delay².
3. However, if one of the competing causes can be identified as the dominant cause it alone is taken to be legally effective, applying the dominant cause test³.
4. In contrast, a contractor is not entitled to any related money claim for loss and expense unless it can satisfy the more stringent 'but for' test of causation by showing that, absent the employer risk event relied upon, the postulated loss or expense would not have been incurred⁴.

However, this summary masks a number of remaining questions. What, if any, continuing relevance should the 'dominant cause test' have for considering time and money claims under construction contracts where there are concurrent causes? Is the apparent requirement for a true concurrent cause to be of 'approximately equal causative potency' comprehensible or still relevant? Should there simply be an 'effective cause' test in concurrency situations, at least in extension of time claims? If so, what is an effective cause for these purposes and can it be something less than a cause of approximately equal causative potency with some other relevant cause?

1. John Marrin QC's SCL paper "Concurrent Delay" (February 2002) at page 3 and (2002) Const LJ 18(6), 436; as approved in *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm), [2011] BLR 384 per Hamblen J at paragraph 277; and adopted in Keating on Construction Contracts (9th edn) at paragraph 8-025.

2. Keating at para 8-026; *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [1999] 70 Con. L.R. 32; *Steria v Sigma* [2008] BLR 79 at paragraphs 131-132; *Royal Brompton Hospital National Health Trust v Hammond (No. 7)* 76 Con. L.R. 148; *De Beers UK Ltd v Atos Origin IT Services UK Ltd* [2011] BLR 274 at [177]; *Walter Lilly & Co Ltd v Mackay & DMW Ltd* [2012] EWHC 1773 (TCC), [2012] BLR 503 at paragraphs 362-370; *Greenwich Millenium Village v Essex Services Group Plc* [2013] EWHC 3059 (TCC); The SCL Delay and Disruption Protocol at www.eotprotocol.com.

3. John Marrin QC's paper "Concurrent Delay" (2002) at page 2; Lord Osborne's summary of the position in English law in *City Inn v Shepherd Construction* [2010] BLR 473 at paragraph 42; and the BLR editors' agreement with the latter at [2010] BLR 475-476.

4. Keating at para [9-062]; *Hudson's Building and Engineering Contracts* (12th edn) at paragraph 6-059; *De Beers* at para 178

CAUSATION IN CLAIMS FOR DAMAGES FOR BREACH OF CONTRACT

The position at common law is relevant to this discussion because (i) it has been suggested in the past as a specific reason for importing the dominant cause test into claims under construction contracts, (ii) the approach to causation in the law of contract may potentially inform what the parties can be taken to have intended as the applicable causation test under building contracts, and (iii) it focuses attention on the importance of first construing the purpose/scope of the rule of law imposing liability as part of the causation analysis.

At the outset, it should be kept in mind that causation is a mixed issue of fact and law, or as Lord Hoffman put it⁵:

“..One decides, as a matter of law, what causal connection the law requires and one then decides, as a question of fact, whether the claimant has satisfied the requirements of the law. There is, in my opinion, nothing more to be said”.

Lord Hoffmann has also emphasised the importance of focusing upon the purpose of the rule of law that imposes liability as central to this process - which in the context of construction claims means a purposive construction of the relevant contractual provision under consideration⁶:

“...the reason why courts get the wrong answer on questions of causation is not usually because they have misunderstood the facts or lack common sense but because they have got the law wrong. They have misconstrued the proper scope of the rule which imposes liability, the rule which provides the context in which the question of causation is being asked...”

In addition to this starting point, some further general causation principles can be identified.

Thus, in order to establish ‘causation in fact’ it is still normally a necessary (but not sufficient) requirement in the law of contract that the but for test can be satisfied on the facts of any particular case⁸; also, the law of causation usually operates in an all or nothing way, save where a statutory basis for apportionment on the basis of respective fault applies⁹; and finally, although reference is often made to causation in law being based upon or simply reflecting the application of “common sense”¹⁰, such an approach is often considered too imprecise and therefore may be misleading.

The existence of a dominant cause test of universal application in claims for damages for breach of contract is not supported by authority and, it is suggested, there is no reason to assume it should be of general application¹¹.

Historically, the dominant or proximate cause approach has been limited to resolving proximate cause issues in insurance cases¹² and even here its application may be open to debate (see the discussion of the recent decision of the Supreme Court in the *Petrofina* case below).

Although it has been argued that there is an analogy between the problem of concurrent causes as it arises under insurance contracts and concurrency situations in construction contracts, it is suggested that the basis for the supposed analogy falls down if it is accepted that the relevant provision in a construction contract does not require a choice to be made between competing causes of the same delay/loss in order for an entitlement to relief to arise (which, as explained below, is the contractual reasoning underlying the application of the *Malmaison* approach to concurrency situations).

The seminal decision in *Galoo v Bright Grahame Murray* is sometimes relied upon as authority for the proposition that, to be legally relevant, a cause must be the dominant *and* effective cause of the postulated loss. But in truth this case did not concern a consideration of two accepted effective causes of loss in the way the issue of concurrency arise in building claims.

5. Lord Hoffmann’s article “Causation” (2005) LQR, volume 121, page 592, at 603.

6. Lord Hoffmann’s paper dated 15 June 1999 for a lecture given to the Chancery Bar Association entitled “Common Sense and Causing Loss”.

7. See also *Environment Agency v Empress Car Co* [1999] 2 AC 22 (HL) per Lord Hoffmann at pages 29-34.

8. See *Orient Express Hotels Ltd v Assicurazioni Generale SVA (UK)* [2010] EWHC 1186 for recent confirmation of the general application of the “but for” test in establishing causation, save in (unidentified) unusual cases; see also *Greenwich Millenium Village Ltd v Essex Services Group Plc* [2013] EWHC 3059 (TCC) for an example of where it is appropriate to disapply the but for test.

9. The Law Commission Report (Working Paper No. 114) on Contributory Negligence (1990) at paragraph 4.24.

10. See, for example, *Yorkshire Dale Steamship Co v Minister of war Transport*[1942] A.C. 691, per Lord Wright at 706, *Stapley v Gypsum Mines Ltd*[1953] A.C. 663 per Lord Reid at 681and *Galoo Ltd v Bright Grahame Murray* [1994] 1 W.L.R. 1360.

11. Although reference could be made to the dicta of Croom Johnson LJ in *Tennant Radiant Heat Limited v Warrington Development Corporation* (1988) Con. L.J. 321 at 324 - but it should be noted that in that case the Court of Appeal decided the case on the basis of an unusual “contractual apportionment” between the claimant/defendant - and in any event this is now considered to be a decision limited to its own facts, as explained below.

12. See Keating at paragraph 9-070 and the cases referred to at foot note 295.

The Court of Appeal in fact decided that there was only one effective cause of the claimants' loss, namely the company's decision to continue trading when insolvent. For that reason, the alleged negligence of the defendant auditors in failing to disclose to the claimant investors the true financial position of the company *was not an effective cause at all*. This was merely the 'occasion' for the loss.

In summary, to be considered legally effective in the law of contract a cause need only be an effective or dominant cause of loss¹³ and where there are two causes of loss it is not necessary to choose which is the dominant or more effective¹⁴.

What exactly amounts to an 'effective' cause in this sense is, however, less clear in the authorities; although it has been held that effective can mean something less than 'of equal causative potency' with another cause¹⁵, or at least there is no clear authority to suggest that it cannot¹⁶.

On another view, each concurrent cause need be of "approximately equal efficacy" for this principle to apply¹⁷.

Thus, in *Heskell v Continental Express Ltd* the Court of Appeal described the contributing causes having to be of equal efficacy¹⁸ as well as each having each to be capable of satisfying the 'but for' test – although in this case contributory concurrent causes, rather than independent concurrent causes¹⁹, appear to have been under consideration²⁰.

However, the Court of Appeal's decision in *Girozentrale* supports the proposition that the Court does not in these situations have to choose between which is the more effective cause and that even the less significant of two contributory causes may be considered an effective cause of loss as a matter of law²¹.

Once again though, it should be noted that the two causes under consideration in *Girozentrale* were each insufficient to cause the loss by themselves and in fact they were *contributory concurrent causes* which had to act in combination to have causal significance²².

Further, *Girozentrale* might also be considered as not really concerned with deciding between competing causes in the way this issue arises in construction claims (i.e. where one cause is the contractual responsibility of the claimant and the other of the defendant) or even deciding the degree of 'effectiveness' required for a cause to be legally recognised as relevant; but rather a case where the intervening act of the claimant was held not to break the chain of causation because it was itself a consequence of the defendant's prior breach of contract²³.

Where the Claimant and Defendant are responsible for the competing effective causes of loss, the dominant cause test does not appear to be relevant at all; in such cases apportionment of liability on the basis of causation is not generally possible, absent the availability of contributory negligence as a defence²⁴.

In *Tennant Radiant Heat Ltd v Warrington Development Corp*²⁵ the Court of Appeal apportioned liability between a claimant and defendant for damage caused by the collapse of a warehouse roof on causation grounds in the context of a landlord and tenant dispute; but note, however, the expressed limitation of this approach to situations where the contemporaneous causes each flow from *breach of a legal duty*²⁶.

In *W Lamb Ltd v J. Jarvis & Sons Plc*²⁷ a similar approach to apportionment was adopted in the context of leaking pipes said to be the joint responsibility of the claimant sub-contractor and defendant main contractor. It was held that there was no rule of law preventing apportionment in such circumstances.

13. Galoo Ltd v Bright Grahame Murray [1994] 1 WLR 1360 per Glidewell LJ at 1374-1375.

14. Chitty on Contracts (31st edn) Volume 1 at paragraph 26-067; *Heskell v Continental Express Ltd* [1950] 1 All E.R. 1033; *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co* [1990] QB 665.

15. *County Ltd v Girozentrale Securities* [1996] 3 All ER 834 CA, per Beldam LJ at 849b-d.

16. *Heskell*; *Banque Keyser Ullmann* [1990] QB 665 at 717H (first instance) and 813E and 814C (Court of Appeal); *J Murphy & Sons Ltd v Johnston Precast Ltd* [2008] EWHC 3024 (TCC) at [179]-[184], per Coulson J.

17. See *J Murphy & Sons Ltd v Johnston Precast Ltd* [2008] EWHC 3024 (TCC) at [179]-[184], per Coulson J.

18. Per Devlin J in *Heskell* at 1048A-B "...It may be that the term 'a cause' is, whether in tort or contract, not rightly used as a term of legal significance unless it denotes a cause of equal efficacy with one or more other causes. Whatever the true rule of causation may be, I am satisfied that if a breach of contract is one of two causes, both cooperating and both of equal efficacy, as I find in this case, it is sufficient to carry judgment for damages". An approach approved in *Banque Keyser Ullmann v Skandia* [1990] QB 665 at 717H (first instance) and 813E and 814C (Court of Appeal).

19. For the distinction between contributory, independent and alternative concurrent causes see Hart & Honore at Chapter VIII.

20. Thus, in *Heskell* Devlin J appears to define an 'effective cause' as one that would by itself have prevented loss occurring if it had not occurred "...the two were equally operative causes in that if either had ceased the damage would have ceased" (at 1047B) and in *Banque Keyser Ullmann* the breach of duty relating to the contributory cause under consideration "would have prevented the loss" if it had not occurred (814 H).

21. Per Beldam LJ at 849b-d.

22. Per Hobhouse LJ at 856j.

23. Per Hobhouse LJ at 856j to 859b.

24. *Hi-Lite Electrical Ltd v Wolseley UK Ltd* [2011] EWHC 2153 (TCC), [2010] BLR 225.

25. [1988] 1 EGLR 41; (1988) 11 EG 71

26. Per Croom Johnson LJ "where one is dealing with two contemporaneous causes, each springing from the breach of a legal duty but operating in unequal proportions, the solution should be to assess the recoverable damages for both on the basis of causation" (my emphasis).

27. (1998) 60 Con. L.R. 1

However, in *Hi-Lite Electrical Ltd v Wolseley UK Ltd*²⁸ the decision Tennant was considered to be one limited to its own facts and distinguishable. It was held that the apparent application and extension of the *Tennant* decision in *Lamb* was not justified and that, absent a right of contribution under the Law Reform (Contributory Negligence) Act 1945²⁹, there is no general ability to apportion damages between parties - and that to the extent that *City Inn*³⁰ decided otherwise it did not represent the current position in English law.

THE TEST FOR CAUSATION IN CLAIMS FOR DAMAGES IN NEGLIGENCE

In the tort of negligence, the position is more settled and straightforward. If there are two or more causes of a loss, one of which is a defendant's responsibility and the other not the claimant's, the claimant is entitled to recover damages in full against the defendant as long as that cause materially contributed to the loss³¹.

The but for test is applied less strictly and is subject to more exceptions than in the context of liability in contract³². The but for test can be too restrictive and is departed from in unusual tort cases³³. In certain circumstances a 'contributory cause' does not have to be capable in itself of causing the whole injury complained of, so long as it 'materially contributed' to the same³⁴. But this is not a general rule: it represents one of the exceptions to the normal requirement to satisfy the but for test³⁵ and is limited to cases where there is only one possible cause or agent of loss³⁶.

If one of the causes of the loss is the claimant's responsibility, then the claim will fall to be reduced to reflect any contributory negligence. Thus, the need to consider apportionment of responsibility on causation grounds does not arise.

THE CAUSATION PROBLEM IN CLAIMS UNDER CONSTRUCTION CONTRACTS

The starting point for the consideration of the required test of causation in any extension of time or loss and expense claim should be the relevant express terms of the building contract. This is part of the agreed scheme of risk allocation between the parties under the contract.

The correct test of causation to apply in time and money claims under construction contracts is therefore a question of law and requires a consideration of the 'purpose of the rule of law' that imposes liability - which in this context means a purposive construction of the relevant contractual provision³⁷.

As to identifying the correct legal test, no necessary or automatic relevance of common law concepts of causation should be assumed to apply and, in any event, as summarised above the precise nature of the common law test of causation in claims for breach of contract where there are concurrent independent causes is not clear.

The difficulty of interpreting the presumed intention of the parties in this context is compounded in practice by the fact that typically the words used in the relevant clauses of standard form building contracts do not contain a clear explanation of what the parties have agreed as the applicable test of causation or how the assessment should be conducted by the contract administrator.

28. [2011] EWHC 2153 (TCC), [2010] B.L.R. 225

29. See the statement of principle per Beldam LJ in *Barclays Bank Plc v Fairclough Building Ltd* [1995] Q.B. 214 at p.230.

30. *City Inn v Shepherd* [2010] CSIH 68, [2010] B.L.R. 473, Inner House, Ct of Session.

31. *IBA v EMI and others* [1980] 14 B.L.R. 1, HL.

32. Thus, (i) a contributory cause need not be capable of causing injury by itself (see *McGhee*) and (ii) the law of tort has developed its own risk based analysis to causation in certain categories of personal injuries claim (see *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 A.C. 32).

33. *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 A.C. 883 per Lord Nicholls at [73-74].

34. *McGhee v National Coal Board* [1973] SC 37 at 53, HL and *IBA v EMI and others* [1980] 14 B.L.R. 1, HL. Although it is not clear that the *IBA v EMI* case is even really authority for this proposition in a non-personal injury situation.

35. Although *Chester v Afshar* [2005] 1 A.C. 134 probably extended this further in the context of medical negligence cases - but this authority is not thought to be of general application (see *McGregor on Damages* (18th edn) at para. 6-027).

36. See *McGregor on Damages* (18th edn) at para. 6-020.

37. See Lord Hoffmann's paper dated June 1999 given to the Chancery Bar Association entitled "Common Sense and Causing Loss" and *Environment Agency v Empress Car Co* [1999] 2 AC 22 (HL) per Lord Hoffmann at 29-31.

Thus, for example, clause 26.1 of the JCT Standard Form of Building Contract (1998 edn) which states in respect of money claims (emphasis provided):

“If the Contractor makes written application....stating that he has incurred or is likely to incur direct loss and expense...because the regular progress of the Works or any part thereof has been or is likely to be materially affected by any one or more of the matters referred to in clause 26.2...”³⁸

And in relation to time, see clause 25.3.1 of the JCT Standard Form of Building Contract (1998 edn) which states (emphasis provided.):

“If, in the opinion of the Architect/the Contract Administrator...any of the events which are stated by the Contractor to be the cause of delay is a Relevant Event and...the completion of the Works is likely to be delayed thereby beyond the Completion Date, the Architect/Contract Administrator shall in writing to the Contractor give an extension of time by fixing such later date as the Completion Date as he then estimates to be fair and reasonable...”³⁹

Nevertheless, as a matter of legal analysis the answer to the question ‘what test of causation applies?’ must arise simply out of a proper construction of the words used in these provisions – as must any legal basis to distinguish between the test of causation applicable under extension of time and loss and expense provisions respectively.

What is slightly odd in the light of this, is that there is a marked absence of reasoning in practitioner works, academic articles and even authority to justify the different causation tests typically applied under the current consensus to time and money claims.

It is suggested that the fact that an extension of time clause is more obviously intended to be for the benefit of both contracting parties (compared to one for loss and expense) is potentially a matter of some importance for a purposive construction of the causation test required to be satisfied under both types of provision.

An extension of time clause is in both contracting parties’ interest in that it permits the contractor to get an adjustment to the completion date for the works and simultaneously preserves the employer’s right to claim liquidated damages; whereas a loss and expense provision has, at least in one sense, a more one sided function and benefit: creating a right on the part of the contractor to be compensated as a consequence of certain relevant matters under the contract - in addition to any parallel right to claim damages for breach of contract that may arise.

It is suggested that this distinction between the intended purpose of the respective provisions provides at least some contextual justification for both (i) a more relaxed test of causation in extension of time clauses (applying the *Malmaison* approach and departing from the traditional dominant cause test), and (ii) an interpretation that distinguishes between the relevant test for extensions of time and loss and expense clauses (the more stringent but for test), despite the similarity in the wording of the relevant clauses in the JCT form⁴⁰.

THE MEANING OF ‘CONCURRENT DELAY’

In situations where there is a single effective cause of the relevant period of critical delay which amounts to a relevant event at the employer’s risk, establishing an entitlement to some extension of time on the part of the contractor under the building contract should be relatively straightforward.

Difficulties arise where, as is often the case in major projects, the claims are based on a number of events or where the alleged claim is presented either entirely or in part on a global basis; or where there are two concurrent independent causes of delay/loss, one the responsibility of the employer but the other that of the contractor, the position is most difficult.

There are a number of points to be kept in mind when considering the correct approach to extension of time claims and alleged concurrent causes of delay in these circumstances.

38. See also the similar wording in clause 4.23 of the JCT SFC 2005.

39. See also, for example, the similar wording in clause 2.28 of the JCT SFC 2005.

40. See Keating at paragraph 9-061.

First, it is always necessary to distinguish between cases involving truly concurrent causes of loss and cases which, upon proper factual analysis, involve sequential or separate aspects of loss attributable to the various competing causes⁴¹. In the latter situation, it is still necessary for the claimant to satisfy the orthodox but for test of causation and to determine which part of the claimed loss is attributable to each cause⁴².

Second, JCT and other standard form contracts do not define what, for the purposes of the administration of the contract, concurrent delay actually means or how concurrent causes of delay are to be treated.

Third, there is no clear legal authority defining what should be considered as the meaning of concurrency or concurrent delay in this context⁴³.

A suggested narrow definition of concurrency, requiring both the timing of the events relied upon and their delaying effect to coincide⁴⁴, would appear on any view to be too limited.

The current consensus as to the meaning of concurrent delay reflects an amalgam of academic comment, practitioner articles/works and *obiter dicta* in the few cases that have addressed the question.

Thus, there is only considered to be true concurrency where both events cause delay and project overrun, the delaying effect of the two events is felt at the same time and (crucially) the period of project overrun which is caused by two or more effective causes of delay *which are of approximately equal causative potency*⁴⁵.

It is suggested that this last proviso is really an unnecessary and unjustifiable restriction on the approach to causation in concurrent delay situations.

The effect of the adoption of this restricted definition as part of the consensus view is the assumption that where there are two effective causes that are not of 'equal causative potency', the dominant cause test should still be applied to decide which of the effective causes should have contractual significance.

Further, as a result of this restricted definition of concurrency, it has come to be accepted that only in exceptional factual situations is 'true concurrency' of this kind likely to occur⁴⁶.

This conflation of, in effect, the dominant cause test and the *Malmaison* approach in concurrency situations (as to which see further below) was explained as follows in John Marrin QC's SCL paper entitled "*Concurrent Delay*" in 2002⁴⁷:

"...where there are two competing causes of delay, they often differ in their causative potency. Even where both causes are effective causes of the delay in the sense that each taken on its own would be regarded as the cause of the whole delay, the two may be of unequal causative potency. It is common place to find that during the course of the factual enquiry, it becomes obvious as a matter of common sense that the two supposed causes of delay are of markedly different causative potency. One is then regarded as effective and the other ineffective. In other words the minor cause is treated as if it was not causative at all ..."

This seminal paper is therefore significant not just because it challenged the application of the prevailing dominant cause test in concurrent delay situations – but because it expressly limited the challenge to factual situations where the competing causes were of approximately equal causative potency.

In the result, the combined effect of the decision in *Malmaison* and John Marrin's analysis has been to lead the construction law industry and practitioner works (although not, it should be noted, any English authority) to conjoin what are really two separate tests of causation.

This new hybrid test of causation involves a preliminary enquiry to see whether the dominant cause test could apply on the facts to negate the legal significance of one of the other competing effective causes – and only the application of the less onerous *Malmaison* test if a dominant cause cannot be identified.

However, the contractual reasoning for, in effect, grafting the *Malmaison* test onto the dominant cause test in this way has never been adequately explained.

41. For an American perspective on these issues, see "A View from across the pond..." by Lowe, Barber and Love: UK SCL paper D78, May 2007.

42. See for example the approach taken by HHJ Seymour QC in *Freemans Plc v Park Street Properties Ltd* [2002] 2 P&CR 30 at [71-73].

43. Although it should be noted that the John Marrin QC definition of 'true concurrency' was adopted in *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm), [2011] BLR 384 per Hamblen J at paragraph 277 - albeit in obiter dicta and merely as "a useful working definition".

44. See the definition of concurrency in Appendix A of the SCL Delay and Disruption Protocol and *The Royal Brompton Hospital NHS Trust v Hammond* (2001) 76 Con. L.R. 148per HHJ Seymour QC at [31].

45. See the article *Concurrent Delay* by John Marrin QC (2002) 18 Const LJ No 6, 436, as approved in *Adyard Abu Dhabi v S.D. Marine Services* [2011] EWHC 848 (Comm), [2011] B.L.R. 384 per Hamblen J at [277].

46. See, for example, the article *Concurrent Delay* by John Marrin QC (2002) 18 Const LJ No 6, 436; Bailey on Construction Law at Volume 2, paragraph 11.70.

47. As repeated in John Marrin QC's recent SCL paper entitled "*Concurrent Delay Revisited*" 2013.

If there are two competing causes each of which would have caused a given delay had they occurred by themselves, shouldn't they always be considered 'concurrent causes' with sufficient causative potency to satisfy the causation requirement in JCT worded provisions⁴⁸ – whether or not one can be described as dominant⁴⁹?

It may be that, on the facts of a particular case, it is nevertheless not "fair and reasonable" to grant an extension of time to an equivalent extent (perhaps due to the timing of the relevant event during a period of culpable contractor delay), but that should not effect the consideration of whether the (separate) causation requirement under the applicable clause has been satisfied.

On analysis, it is really only necessary to retain such a restricted definition of contractually significant causes of concurrent delay (i.e. as only applying to competing causes of approximately equal efficacy) if it is assumed that the dominant cause test is the starting point of the causation analysis and to be applied as the first level of the causation assessment.

If, however, the 'dominant cause' approach is inapplicable in the first place or cannot survive the rise of the *Malmaison* approach and the contractual reasoning on which it rests, it is suggested that there is no need for such a restrictive definition and that a more natural definition for legally significant concurrent delay in this context is simply: a period of delay caused by two or more events, whatever their respective efficacy.

THE DOMINANT CAUSE APPROACH

The dominant cause test prevailed during the 1980s and 1990s in the world of construction claims.

It originated, however, not in authority but as a result of its inclusion in the leading practitioner work in this field⁵⁰ and was summarised as follows:

"If there are two causes, one the contractual responsibility of the Defendant and the other the contractual responsibility of the Plaintiff, the Plaintiff succeeds if he establishes that the cause for which the Defendant is responsible is the effective, dominant cause. Which cause is dominant is a question of fact, which is not solved by the mere point of order in time, but is to be decided by applying common sense standards".

The underlying contractual rationale for this approach was based upon (i) the presumed intention of the parties and a proper interpretation of the relevant terms of the contract - to the effect that the parties must have intended that any delay should be attributed by the contract administrator to only one cause, (ii) in light of the foregoing, an analogy drawn with the approach to causation taken in the common law insurance cases referred to above, and (iii) the need to be able to resolve the supposed conundrum of the "*obverse problem*": namely, that both the contractor and employer cannot be allowed (by whatever causation test is applied) to both win their money claims arising from a period of delay (one for loss/expense and the other for LADs).

There are now, of course, well documented problems with adopting the dominant cause test generally to extension of time, loss and expense and damages claims under building contracts.

First, the dominant case test does not resolve the problem created where there is no one dominant cause of the relevant delay or loss (i.e. where there are two or more concurrent causes of equal or approximately equal causative potency).

Second, the dominant cause test is inconsistent with the but for test since there is no need to identify a "dominant" cause unless there is some other cause of the delay/loss which, but for the dominant cause, would have resulted in the same delay/loss being sustained.

Thus, notwithstanding the fact that the claimed delay or loss/expense would have been incurred anyway, if the dominant cause test is applicable the contractor would nevertheless become entitled to a further extension of time/payment as long as the employer risk event is construed as the dominant of the competing causes.

Such an inconsistency does not sit well with the typical interpretation of JCT type loss and expense provisions, as usually these are construed as importing the more stringent but for test of causation.

Third, although the dominant cause approach is (or at least was) well established in the law of insurance contracts and, in principle, could be of wider application in other contractual situations, there would not appear to be any compelling reason why this should be taken to be of general application as representing the causation test under JCT worded construction contracts.

48. By analogy with the position in law for damages claims - see the discussion of the key decisions of the Court of Appeal in *Heskell and Girozentrale* above.

49. For support of this proposition, see "Walter Lilly - a case for all seasons?" By Tony Dymond and Michael Mendelblat [2013] ICLR, Pt2, p234.

50. See Keating on Building Contracts (5th ed, 1991) at p195.

Fourth, the marked absence of specific support in any authority for the application of the dominant cause test in construction claims (especially in the form of the post *Malmaison* hybrid test for extension of time provisions described above) is becoming more telling with time.

There is Scottish authority, albeit only in *obiter dicta*, to the effect that the dominant cause approach should apply to loss and expense claims under the JCT form⁵¹ and extension of time claims⁵², albeit potentially in conjunction with the apportionment approach (see below) where no dominant cause can be identified; but there is no English authority in support of its application to such claims under construction contracts – either by itself or in combination with the *Malmaison* approach in the form of the hybrid test discussed above.

In fact, there is only English authority refusing to follow the dominant cause approach in an extension of time claim⁵³.

Notwithstanding these difficulties, under the current consensus the dominant cause test has survived to operate in conjunction with the *Malmaison* approach to concurrent causes of delay.

THE MALMAISON APPROACH

So named after the decision in *Henry Boot Construction (UK) Ltd v Malmaison Hotel*⁵⁴ the *Malmaison* approach was described as follows by Dyson J (my emphasis):

“...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. Thus, to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event) and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour”.

In spite of the fact that, as indicated in the first highlighted piece of text above, this analysis was based upon an agreement between the parties rather than a reasoned decision of the Court, this represents the now generally accepted approach to resolving issues of ‘true concurrency’⁵⁵ (i.e. in the event of delay events of approximately equal causative potency) in the context of extension of time claims - at least in the JCT form/wording⁵⁶.

The rationale for such an approach is that where the parties have expressly provided in their contract for an extension of time caused by certain events, the parties must be taken to have contemplated that there could be more than one effective cause of delay (one of which would not qualify for an extension of time) but nevertheless by their express words agreed that in such circumstances the contractor is entitled to an extension of time for an effective cause of delay falling within the relevant contractual provision⁵⁷.

THE PROBLEM WITH THE CURRENT CONSENSUS

As explained above, the current consensus as to the test of causation under extension of time clauses in (at least the JCT contract wording) is that there should be a *combination* of the dominant cause test and the *Malmaison* approach – whereby the latter only provides a route to relief where there is true concurrency, i.e. competing causes of approximately equal causative potency.

So, for example in Hudson (12th edn) at paragraph 6-061 the position is summarised as follows, adopting Lord Osborne’s summary of the position in the law of England and Wales in the *City Inn* case:

“...if one of the potential causes of delay could be identified to be dominant then it should be regarded as the cause to the exclusion of other potential causes, if no cause could be identified as the dominant cause a claim for extension of time should not fail...”

51. Laing Management v John Doyle [2004] BLR 295 at paragraphs 14-15.

52. City Inn [2010] BLR 473 at paragraph 42.

53. H. Fairweather & Co Ltd v London Borough of Wandsworth (1987) 39 BLR 106.

54. (1999) 70 Con. L.R. 32.

55. But note the criticism of the simple ‘rule’ as to concurrent causes entitling EOT relief (as summarised at paragraphs 2.1.7, 3.7.1 and 3.7.7 of the SCL Delay and Disruption Protocol) contained in IND Wallace QC’s seminal article “Blinding with Science? Extension of Time and Compensation ‘Protocol’: a Critique” – Construction & Engineering Law, Volume 7, Issue 2, page 5.

56. As confirmed in Walter Lilly & Co Ltd v Mackay & DMW Ltd [2012] EWHC 1773 per Akenhead J at paragraphs 362-370 and also in Greenwich Millenium Village Ltd v Essex Services Group Plc [2013] EWHC 3059 (TCC) per Coulson J at paragraph 176.

57. See Keating at paragraph 8-026.

This hybrid test of causation requires, therefore, a preliminary enquiry to see whether the (old) dominant cause test could still apply to negate the significance of one of the competing effective causes – and only if a dominant cause cannot be identified should the less restrictive *Malmaison* test be applied to generate an entitlement to relief.

However, as summarised above it is now widely accepted that there are many obvious problems with adopting the dominant cause test – certainly as of general application to extension of time, loss and expense and damages claims under building contracts.

In summary, it is difficult to understand why the parties to related contracts should be taken to have intended that this test has any relevance at all to the allocation of the risk of delays between them given (i) the typically opaque wording of the relevant clauses, (ii) the absence of a general rule of law applying the test in common law damages claims, and (iii) the general acceptance of what has become known as the *Malmaison* approach to concurrency issues in extension of time claims – an approach which is, it is suggested, fundamentally at odds with the dominant cause test.

As to the latter, the core rationale for the application of the *Malmaison* approach is that where the parties have expressly provided in their contract for an extension of time caused by certain events, the parties must be taken to have contemplated that there could be more than one effective cause of delay (one of which would not qualify for an extension of time) but nevertheless by their express words to have agreed that in such circumstances the contractor is entitled to an extension of time for an effective cause of delay falling within the relevant contractual provision.

There is, therefore, some tension between the contractual reasoning supporting the application of the dominant cause and *Malmaison* approaches that points toward them really being alternatives: the *Malmaison* approach proceeding on the premise that the parties intended that there would be no need to choose between competing causes of delay – whereas the ‘dominant cause’ approach resting on the presumed intention of the parties to the effect that there cannot be more than one cause of delay for the operation of the extension of time clause.

It is of course possible, in order to justify the hybrid test that represents the current consensus, to articulate a presumed intention of the parties to reflect a combination of these tests (namely to the effect that the dominant cause test should apply unless there is ‘true concurrency’), but it is suggested that this is a rather convoluted presumed intention for the parties to be saddled with – certainly absent express words to indicate that this is what has been agreed.

It is also one that is unnecessary to make the relevant clauses work and it introduces a distinction that it is difficult, if not impossible, to actually understand and predict the application of in practice – namely what is the difference between two competing effective causes of delay of ‘unequal causative potency’ and two competing effective causes of delay of ‘approximately equal causative potency’?

WHAT ABOUT APPORTIONMENT?

There is Scottish authority to the effect that in the event of concurrent causes of delay or loss and expense a Court may apportion the relevant period of delay or loss between the contractor and employer⁵⁸.

In *City Inn Ltd v Shepherd Construction Ltd* both the Outer⁵⁹ and Inner⁶⁰ House of the Court of Session in Scotland took a quite different approach to causation under the JCT form of contract. The Outer House held that where there are concurrent causes of delay *none of which can be described as dominant*, the delay should be apportioned as between the Relevant Events and the contractor’s risk events.⁶¹

The justification for such an approach was said to be the fact that by clause 25 of the JCT Standard Form the architect is required to fix such new completion date as he considers to be “*fair and reasonable*” in the circumstances.

This was taken to indicate that the architect should look at the various events causing delay using a fairly broad approach and that where there is true concurrency apportionment will frequently be appropriate.

58. See *Laing Management (Scotland) Ltd v John Doyle Construction Ltd* [2004] B.L.R. 295 and *City Inn v Shepherd* [2010] B.L.R. 473, [2010] C.I.L.L. 2889, Inner House, Ct of Session.

59. [2008] B.L.R. 269, (2008) 24 Const. L.J. 590, Outer House, Ct. of Session.

60. [2010] B.L.R. 473, [2010] C.I.L.L. 2889, Inner House, Ct of Session.

61. It may be doubted whether, on a careful reading of the case, there was in fact true concurrent delay.

Interestingly, the Scottish Courts have also therefore arrived at a position whereby a hybrid test of causation is taken to apply in construction claims – whereby a new causation test has been grafted onto the dominant cause test, to potentially apply so as to generate a right to relief in situations where no dominant cause can be identified on the facts (albeit in Scotland contractual apportionment is preferred to the *Malmaison* approach as the further test in such situations).

It is also notable that a similar approach appears to have been taken to this issue in most of the common law World to date⁶².

South of the border, however, this approach has attracted much criticism on the basis that (i) too much emphasis has been placed on the words “fair and reasonable” in the relevant clause, (ii) it would be unworkable and unpredictable in practice, (iii) it is unclear why relative culpability should be relevant to assessment of delay, (iv) if adopted it would risk triggering the prevention principle and thereby placing time at large, and (v) apportionment in common law claims for damages is not generally available anyway (absent a statutory right to the same)⁶³.

It is of course possible to provide expressly for apportionment in such circumstances (although plainly the JCT clauses under consideration do not do so) but, in the absence of such a provision, it must be doubted whether a power to grant a “fair and reasonable” extension of time, whilst giving a wide discretion to the contract administrator, is sufficient to give the power of apportionment in the context of the causation assessment required under another part of the provision.

In the construction context, *Peak Construction Ltd v McKinney Foundations Ltd*⁶⁴ is sometimes referred to as an example of a similar approach being approved, although it is probable that the apportionment contemplated in this case related to splitting a period of delay between different causes, rather than of a situation where there were concurrent causes of a single period of delay as contemplated in the passages above.

If responsibility for a period of concurrent delay were to be apportioned between the parties, the contractor would not receive its full EOT and the prevention principle may then come into play. For this reason many commentators have rejected the application of apportionment approach as a matter of principle⁶⁵.

In English law, even in claims for damages the viability of this approach has been seriously doubted⁶⁶ and there is no authority extending it to the assessment of concurrent causes of loss and expense and extension of time entitlements under the express provisions of building contracts.

In fact in the recent decision of *Walter Lilly* (as to which see below) it was expressly decided that the approach taken in *City Inn* did not reflect the law in England.

A NEW TEST?

A pattern can be discerned from a number of recent authorities that suggests a possible move away from the relevance of the dominant cause test and, on any view, a marked reluctance even to recognise the existence of the hybrid test.

In fact, on the contrary, support for a more causally relaxed test can be detected – an effective cause test.

Thus, in *De Beers UK Ltd v Atos Origin IT Services UK Ltd*⁶⁷, the general rule in construction claims was described in a manner that would not appear to leave much room or need for the concept of a prevailing dominant cause as follows by Edwards-Stuart J at [177]:

“The general rule in construction and engineering cases is that where there is concurrent delay to completion 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. In the case of the former, this is because the rule where delay is caused by the employer is that not only must the contractor complete within a reasonable time but also the contractor must have a reasonable time within which to complete. It therefore does not matter if the contractor would have been unable to complete by the contractual completion date if there had been no breaches of contract by the employer (or other events which entitled the contractor to an extension of time) because he is entitled to have the time within which to complete which the contract allows or which the employer’s conduct has made reasonably necessary”.

62. In HC of HK, see *Witting Construction Co Ltd v Boost Investments Ltd* [2009] BLR 339 9 (per DHJ Westbrook SC at paragraph 61 adopting *City Inn* analysis). See also Mathew Cocklin’s SCL paper No. 182.

63. See generally the discussion of this issue by Ramsey J in the papers entitled “Claims for Delay & Disruption: the impact of *City Inn*” presented at the annual TECBAR conference in January 2001 and in the TECBAR Review for Spring 2011.

64. (1970) 1 B.L.R. 111 (CA) per Salmon LJ at 119.

65. Ramsey J in the paper entitled “Claims for Delay & Disruption: the impact of *City Inn*” at page 15; Hudson at paragraphs 6-060 and 6-062; and see now the decision in *Walter Lilly* (below).

66. In *Bank of Nova Scotia v Hellenic Mutual Risks Association (Bermuda) Ltd* [1990] 1 QB 818 the principle of apportionment in these situations was doubted. It should also be noted that the Law Commission Report (Working Paper No. 114) on Contributory Negligence (1990) referred to the decision in *Tennant Radiant Heat Ltd* as “an unusual application of causation principles...”, although the report concluded by recommending that apportionment be available under all forms of contract, save “where the contract excludes it, whether expressly or by implication from the nature and extent of the contractual duty undertaken by D” (see paragraphs 3.20, 4.24 to 4.26 and 5.1); see now the decision of the TCC in *Hi-Lite Electrical Ltd* referred to above.

67. [2011] B.L.R. 274.

There is also no reference to the relevance of the dominant cause test in obiter dicta in other recent authorities that have adopted the De Beers summary above and confirmed that the *Malmaison* approach represents the now generally accepted approach to resolving issues of concurrency in the context of extension of time claims - at least in the JCT form⁶⁸.

Thus, in *Walter Lilly v DMW* the general approach to causation in extension of time clauses was described as follows⁶⁹ (my emphasis):

"In any event, I am clearly of the view that, where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time. Part of the logic of this is that many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to construe Clause 25 on the basis that the Contractor should be denied a full extension of time in those circumstances. More importantly however, there is a straight contractual interpretation of Clause 25 which points very strongly in favour of the view that, provided that the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question. There is nothing in the wording of Clause 25 which expressly suggests that there is any sort of proviso to the effect that an extension should be reduced if the causation criterion is established. The fact that the Architect has to award a "fair and reasonable" extension does not imply that there should be some apportionment in the case of concurrent delays. The test is primarily a causation one. It therefore follows that, although of persuasive weight, the City Inn case is inapplicable within this jurisdiction."

It is suggested that this passage is significant for three reasons. First, it expressly rejected *City Inn* and the apportionment approach to dividing responsibility on causation grounds in concurrency situations under JCT extension of time clauses. Second, once again no reference was made to a role for the dominant cause test in this context at all. Third, however, it also implicitly supports the emergence of what I have called the effective cause test - by reference merely to the need for "two or more effective causes".

Note also in the context of a loss and expense claim the summary of the general position by Coulson J, omitting any reference to the dominant cause test, in *Greenwich Millennium Village Ltd v Essex Services Group Plc* [2013] at paragraph 176:

*"And some caution is necessary when referring, in this context, to cases in the construction field addressing the particular problem of delays where there are two competing causes, one of which is the contractor's fault and one which is the employer's fault. The usual answer, as Edwards-Stuart J pointed out in **De Beers UK Limited v Atos Origin IT Services UK Limited** [2010] EWHC 3276 (TCC), is that the contractor was entitled to an extension of time but not entitled to financial compensation. As the judge put it: "...the contractor cannot recover damages for delay in circumstances where he would have suffered exactly the same loss as a result of causes within his control or for which he is contractually responsible."....."*

Further, the demise of the dominant cause test (at least outside the field of insurance cases) is perhaps now confirmed by the recent decision in *Petroleo Brasileiro v ENS 1 Kos Ltd*⁷⁰.

In this case a majority of the Supreme Court held, in relation to the operation of an indemnity clause under a charter party, that delay/loss associated with unloading cargo after the owner's decision to withdraw a vessel due to non-payment of hire was not an ordinary incident of service caused by the charter coming to an end, but caused by the charterer's prior order to load the cargo on the vessel and therefore covered by the indemnity.

68. See *Walter Lilly* per Akenhead J at paragraphs 362-370 and *Greenwich Millennium Village Ltd* per Coulson J at paragraph 176.

69. [2012] Per Akenhead J at paragraph 370.

70. [2012] UKSC 17.

Lord Sumption described the issue under consideration as the proper interpretation and purpose of the contractual provision and the causation question as follows (my emphasis) (para 12):

“Like all questions of causation, this one is sensitive to the legal context in which it arises. It depends on the intended scope of the indemnity as a matter of construction, which is necessarily informed by its purpose. We are not therefore concerned with questions of remoteness and foreseeability of the kind which would arise in the law of damages, where the object is to limit the range of consequences for which a wrongdoer may be said to have assumed responsibility in the eyes of the law..... The real question is whether the charterers’ order was an effective cause of the owner having to bear a risk or cost of a kind which he had not contractually agreed to bear. I use the expression “effective cause” in contrast to a mere “but for” cause which does no more than provide the occasion for some other factor unrelated to the charterers’ order to operate. If the charterers’ order was an effective cause in this sense, it does not matter whether it was the only one.”

In his speech Lord Clarke, like Lord Sumption, expressly adopted and applied ‘an effective cause test’ and in doing so even disparaged the usefulness of the concept of a ‘dominant’ cause (my emphasis):

“61. I further agree with Lord Sumption that the real question under clause 13 is whether the charterers’ order to load the cargo was an effective cause of the owners having had to bear a risk or cost of a kind which they had not contractually agreed to bear and that, if the charterers’ order was an effective cause in the sense that it was not a mere “but for” cause which did no more than provide the occasion for some other factor unrelated to the charterers’ order to operate, it does not matter whether it was the only effective cause.

62. It is not I think helpful to use other adjectives to describe the cause. Different adjectives have been used over the years, including “proximate cause”, “dominant cause” and “direct cause”. To my mind they are somewhat misleading because they tend to suggest that the cause must be the most proximate in time or that the search is for the sole cause. Lord Mance says at para 37 that the search is for “the ‘proximate’ or ‘determining’ cause”. However, I respectfully disagree because such a formulation suggests that there can be only one such cause, whereas there may, depending upon the circumstances, be more than one effective cause.”

According to Lord Clarke an ‘effective cause test’ applied whether in the context of contracts of indemnity or insurance (paras 70-71):

“70.As I see it, the question in each case, whether under a contract of insurance or under a contract of indemnity, is whether an effective cause of the alleged loss or expense was a peril insured against or an indemnifying event.....

*71. It is true that the authorities do not contain much discussion of the circumstances in which there may be two effective causes. However, in my opinion, they clearly show that two effective causes can, in principle, exist. To my mind this can be clearly seen from **Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corpn Ltd** [1974] QB 57, **Lloyd (JJ) Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)** [1987] 1 Lloyd’s Rep 32 and **Midland Mainline Ltd v Eagle Star Insurance Co Ltd** [2004] EWCA Civ 1042, [2004] 2 Lloyd’s Rep 604.”*

If of no or doubtful assistance in a claim under an indemnity (or even possibly in the insurance context) it is difficult to see why the concept of the ‘dominant’ cause should continue to cast a shadow over construction law.

CONCLUSION

In approaching the question of causation in time and money claims under construction contracts one should first decide, as a matter of law, what causal connection the contract requires and then consider, as a question of fact, whether the claimant has satisfied this legal requirement.

It is suggested that (i) the dominant cause test should no longer be considered as relevant at all to such claims (at least in the JCT form and absent clear wording indicating an intention to apply the same), (ii) the very concept of concurrent effective causes of 'approximately equal causative potency' is difficult to understand, unhelpful and unnecessary, (iii) a new, less restrictive, approach to the test of causation in concurrent delay claims can be justified on a proper construction of the relevant provisions, is more soundly based in analogous claims for damages for breach of contract and can even be detected in recent authority – what I call *the effective cause test*, (iv) an effective cause is one that operates by itself or combines with another to cause critical delay to the completion date of a project, and (v) an effective concurrent cause for these purposes is simply one that, had it operated in the absence of the delay event(s) that the contractor is responsible for, would have nevertheless caused the same period of critical delay to the Works in the circumstances that the parties would or should have found themselves in under this hypothesis⁷¹.

The latter could be established in practice by the application of a 'reverse but for test', namely one where the claimant must show that, even absent the effect of the delay events that it is contractually responsible for, the same period of actual critical delay would have occurred to the project at the relevant time. Analogous hypothetical exercises are routinely applied by Courts in different areas of the law and would not be beyond contract administrators.

The recognition of a more comprehensible approach to causation and concurrency in construction law may indeed herald a reconsideration of preconceptions as to what amounts to 'actual' as opposed to 'theoretical' causes of delay⁷² – but ultimately the answer to that question depends upon where one starts from as the applicable legal test of causation for any particular claim under the contract.

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71. This approach would be consistent with the decision of Colman J in *Balfour Beatty v Chestermount Properties* 62 BLR 12 to the effect that under the JCT wording there could be an entitlement to an extension of time even during a period of culpable delay and that any right to an extension of time generated in a period of contractor culpable delay after the completion date for the Works should be assessed on a 'net' rather than a 'gross' basis.

72. It is notable that the discussions contained in many of the well known cases in this field as to the nature of the causation requirement, albeit always in obiter dicta, proceed on the basis that a relevant event must as a matter of fact be an 'actual cause of delay' without really first deciding as a matter of law precisely what test of causation should be applied to establish this (see, for example, that of Colman J in *Balfour Beatty v Chestermount Properties* 62 BLR 12 at page 31 and Hamblen J in *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm), [2011] BLR 384 paragraphs 264-280).