

Legal Developments in Relation to Concurrent Delay: The Position of the English and Scottish Courts

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Abstract

In the UK over the last 50 years, legal developments in relation to extensions of time and/or monetary compensation for delays in construction and engineering projects, have been both cautious and incremental. In order to contend with the practical difficulties inherent in these industries, the courts have established various common law concepts and principles. The efficacy of many of those principles remains to a degree intractable, perhaps none more so than those relating to concurrent delays.

Abstracted from wider doctoral research into how extension of time and/or monetary claims are dealt with in the UK courts, this paper explores the concept of concurrent delays and explains (through analysis of case law and legal commentary) how recent court decisions have, in effect, confirmed a doctrinal split between English and Scots Law. The paper also identifies the reasons for those differences, and poses further questions which require to be investigated and addressed, in order to move towards a more satisfactory and consistent approach as to how the UK courts deal with concurrent delay.

Unless and until more is done to stabilise the common law concepts and principles relating to concurrent delay, such as arriving at a definitive working definition, determine conclusively the ratio for adopting the dominant cause test (or otherwise), adequately clarify why the prevention principle should (or should not) prevail, elaborate on critical path methodologies and justify which approach to causation to apply and why, then confusion over how concurrent delay will be dealt with by the judiciary will remain unsettled.

Perhaps the most expeditious and pragmatic way to settle issues relating to concurrent delay should, in the first instance, be dealt with in the various standard forms of contract. This is justified as a reliance on common law principles to provide an equitable solution to concurrent delays, has had limited success. Indeed the current approach has witnessed UK judges struggling to harmonise their decisions, given under differing contract conditions and compounded by often opaque evidential constraints on projects which are factually complex. It is suggested that until concurrent delay clauses are incorporated into the standard forms, the current approach engendered by the courts, will be susceptible to imprecise, unreliable and incorrect judgements, which may not reflect the original contractual intentions of the parties.

Keywords: Construction Law, Prevention Principle, Concurrency, Apportionment.

1. Introduction

Complex building and engineering projects are susceptible to delays. In 2008 the Chartered Institute of Building conducted a survey of more than two thousand schemes and found that over two thirds, were delayed beyond the original completion date, and around a fifth of those projects were late by over 3 months¹. There are a myriad of reasons why construction projects are delayed such as: labour shortages, contractor errors, poor management, employer variations to the original work scope, unforeseen ground conditions, design delays/omissions and adverse weather conditions. The list is interminable.

In construction and engineering projects, delays can be divided into both excusable delays (either with or without compensation), or culpable or non-excusable delays. Excusable delays are the contractual responsibility of the employer and entitle the contractor to an extension of time, and/or compensation depending on the event and the specific contract terms. Culpable or non-excusable delays are the contractual responsibility of the contractor, and do not entitle the contractor to an extension of time or any compensation.

Where excusable delays are identified, the standard forms of construction and engineering contracts such as the JCT, NEC and FIDIC suites, entitle the contractor, under certain criteria and conditions, a right to an extension of time and/or compensation. By definition, an extension of time clause revises the original contract completion date set out in the contract, which has been affected by delaying events which are the contractual responsibility of the employer.

Extension of time clauses protect and provide, a benefit to both the contractor and the employer. They are primarily regarded as being a benefit to the employer in that “*it establishes a new contract completion date, and prevents time for completion of the works becoming ‘at large’*”². They are also a benefit to the contractor as they “*relieve the contractor of liability for damages for delay (usually LD’s)*”³

Notwithstanding the standard forms attempts to provide the parties with cohesive guidance and clear obligations with respect to the management of delays and/or the associated compensation, unfortunately they are often unable to deal effectively with many of the inherent complexities which exist in construction and engineering projects of scale. In consequence, there have been various common law interventions, where the courts have been compelled to establish various dicta and principles and formulate dicta, necessitated by the limitations of the standard forms. An area where both the standard forms of contract, and the common law have struggled to provide unanimity, is in relation to concurrent delay⁴ (hereinafter referred to as ‘concurrency’).

¹ Chartered Institute of Building Website: <http://www.ciob.org/insight/timep-management.htm>, based on the CIOB Report titled *Managing the Risk of Delayed Completion in the 21st Century* conducted between December 2007 and January 2008.

² The Society of Construction Law, Delay and Disruption Protocol, Oct 2002, p. 10

³ *ibid*

⁴ David Barry, *Concurrent Delay in Construction Law: Lord Drummond Young’s Volte Face*, 2011 27 Const.L.J, issue 3. p 1.

Recent jurisprudential developments in the UK have revealed a steady departure in how the English and Scottish courts deal with concurrency. Indeed in 2012, Mr Justice Akenhead took the opportunity to review the relevant body of precedent on this matter and provided an obiter commentary, as to the English courts approach to concurrency, and how it now departs from the Scottish courts approach:-

“The two schools of thought, which currently might be described as the English and the Scottish schools, are the English approach that the Contractor is entitled to a full extension of time for the delay caused by the two or more events (provided that one of them is a Relevant Event) and the Scottish approach which is that the Contractor only gets a reasonably apportioned part of the concurrently caused delay.”⁵

2. Concurrency, a moveable feast?

In the UK, despite a wealth of judicial and professional commentary on the subject, a definitive and workable definition of what constitutes concurrent delay in construction and engineering projects and how it is measured in practice, remains elusive⁶. Learned debate centres on whether concurrency exists where delay events begin at the same time in the project, begin and end at the same time, overlap at the same time, or, as it has been suggested, “...need not involve delays felt at the same time”⁷. Indeed the last 15 years or so have seen many and varied definitions from both the courts and legal commentators alike, none of which have been universally accepted⁸. The difficulty in arriving at a definitive definition has not, however, been a barrier to the courts commenting upon issues of concurrency.

Current literature identifies, at a somewhat summary level, the jurisprudential reasoning as to the underlying reasons why the English and Scottish courts have arrived at their requisite positions⁹. However it is suggested that more should and could be done to challenge the common law principles / concepts relied upon, such as Prevention, Dominant Cause, The Malmaison Approach, Apportionment and Causation, and in particular how those principles interplay with one another in practical terms.

It is important to note that the key common law developments in the UK, in relation to concurrency, have in general, been based on various iterations of the Joint Council Tribunal

⁵ *Walter Lilly & Company Limited v Giles Patrick Cyril McKay and DMW Developments Limited* [2012] EWHC 1773 (TCC) – need to get paragraph.

⁶ Matthew Cocklin, *International Approaches to the Legal Analysis of Concurrent Delay: Is there a solution for English Law*, A paper based on the first prize entry in the Hudson Prize essay competition 2012, presented to a meeting of the Society of Construction law in London on 9th April 2013 p 1.

⁷ Franco Mastrandrea *Concurrent delay: an alternative proposal for attributing responsibility*, CLJ 2014 Vol 30 (3) p 173-181 and Lord Osborne’s view in *City Inn Limited v Shepherd Construction Limited* [2010] CSIH 68 CA101/00, para 49

⁸ Lord Osborne in *City Inn Limited v Shepherd Construction Limited* [2010] CSIH 68 CA101/00 at para 49 provides some guidance on what concurrent delaying events may mean.

⁹ Please refer to references (at p.12) for various commentaries.

(‘JCT’) Standard Forms of Contract¹⁰. Therefore, it is worth reiterating John Marrin QC’s guidance on common law approaches to concurrency when he said:

*“...there is one truth which can scarcely be over-emphasised. The answers to the questions raised will depend on the terms of the contract which governs the relationship between the parties.”*¹¹

Finally, it is also significant that, despite a plethora of literature and obiter commentary, the Scottish case of *City Inn v Shepherd*¹² is somewhat remarkably, the only reported construction case where concurrency was actually found to exist.

3. Concurrency in the English Courts: The Current Position

Perhaps the most widely accepted definition of concurrency in England, first proposed by John Marrin QC, in 2002¹³, referred to in *Keating on Construction Contracts*¹⁴ and echoed in the case of *Adyard Abu Dhabi v SD Marine Services*¹⁵, is as follows:

“the expression ‘concurrent delay’ is used to denote a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency”

There are three important points that can be derived from this definition:-

- The “*two or more effective causes of delay*”, must relate to both employer¹⁶ and contractor events for concurrency to exist¹⁷;
- The causes do not have to be concurrent in time; and
- Where on examination, the effective causes of delay are not of “*approximate equal causative potency*”, i.e. one is effective and the other is not, the minor cause will be treated as not causative¹⁸. Where an event has greater causative potency, notwithstanding it may be co-critical¹⁹, it has sometimes been referred to as the dominant event or cause. Whether the use of the ‘dominant cause’ to separate causes, which do not have equal

¹⁰JCT is the English version of the Standard Forms, the Scottish equivalent is the Scottish Standard Building Contracts (‘SBCC’).

¹¹John Marrin QC *Concurrent Delay Revisited*, A paper presented to the Society of Construction Law at a meeting in London on 4th December 2012, p 19

¹²*City Inn Ltd v Shepherd Construction Limited* [2007] CSOH 190

¹³John Marrin QC *Concurrent Delay*, A paper given at a meeting of the Society of Construction in London on 5th February 2002, p 3

¹⁴*Keating on Construction Contracts*, Chapter 8, Section 3, Sub-section (c), para 8-025.

¹⁵*Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm), [2011] 384, 136 Con LR 190, para 277.

¹⁶Causes of employer delay are known as Relevant Events in JCT Contracts. See note 28 below.

¹⁷*Walter Lilly & Co Ltd v MacKay & DMW Ltd* [2012] EWHC 1773, [2012] BLR 503, para 366.

¹⁸John Marrin, note 11, page 3.

¹⁹Co-critical – both delay events are identified on the critical path and have the same effect on the completion date when either one is omitted, often calculated using Critical Path Analysis Techniques.

causative potency, but could still be deemed effective causes of the delay, is still good law in England has been subject to increasing debate²⁰.

The genesis of the current English approach to concurrency was first established in 1999, in the case of *Henry Boot v Malmaison*, where Mr Justice Dyson J (as he was then) stated:-

*"... 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."*²¹

This approach, commonly referred to as the 'Malmaison Approach', has been adopted in subsequent English cases²², culminating in what can be considered the most recent decision in the UK courts, *Walter Lilly v McKay*, where Mr Justice Akenhead said, *obiter*²³:

*"...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...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."*²⁴

Therefore in terms of 'delay' to the works, where concurrency is deemed to exist, the contractor will be entitled to an extension of time to completion for that period, notwithstanding his own delays which may also have delayed completion of the works by the same period.

²⁰Support for the dominant cause test is found in *Keating on Contracts* 9th Edition, Chapter 8, Section 3, Sub-section (c) 8-022, and *City Inn v Shepherd Construction Ltd* [2010] CSIH 68, [2010] BLR 473, para 42. However there has been increasing criticism of whether the dominant test is still applicable in England, Jeremy Winter, Matthew Totman and Sunil Mawkin, *Concurrent Delay 2011 at http://www.whitepaperdocuments.co.uk/index.php?option=com_docman&task=doc_download&gid=1544&Itemid=2* and John Marrin QC note 11 page 13, Vincent Moran QC *Causation in Construction Law: The Demise of the 'Dominant Cause' Test?*, A paper presented to the Society of Construction law at meetings in reading 8th May and Glasgow on 15th May 2014.

²¹ *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32, para 13

²² *Steria Ltd v Sigma Wireless Communications Ltd* [2008] EWHC 3454, *De Beers UK Ltd v Atos Origin IT Services UK Ltd* [2010] EWHC 3276, [2011] BLR 274, 134 Con LR 151, *Adyard Abu Dhabi v SD Marine Services* [2011] BLR 384, *Walter Lilly & Co Ltd v MacKay & DMW Ltd* [2012] EWHC 1773, [2012] BLR 503.

²³ In relation a contract let under a JCT Standard Form of Building Contract 1998 Edition, Private without Quantities (with various amendments)

²⁴ *Walter Lilly*, note 5, para 370

How the contractor's 'loss and expense' associated with concurrent delay, is to be dealt with by the English courts, was clarified in *De Beers V Atos Origin*, where Mr Justice Edwards-Stuart said:

*"The 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."*²⁵ [emphasis added]

Taking precedent into consideration, the following statements can be concluded as to how the English courts will deal with concurrent delay and the associated loss and expense:

- Where there are two or more effective causes of delay which are the contractual responsibility of both the employer and the contractor, but have unequal causative potency the dominant cause may prevail. Murrin QC, however argues that the lack of judicial support, among other things, may provide room for doubt as to whether the dominant cause approach would be adopted by the English Courts²⁶.
- Where there are two or more effective causes of delay, which are the contractual responsibility of both the employer and the contractor, and have equal causative potency, then the contractor will be awarded an extension of time for the concurrent delay. The reasoning behind Mr Justice Akenhead's decision is two-fold:-
 - Firstly, that to deny the contractor an extension of time would amount to an act of prevention²⁷; and
 - Secondly, the contract expressly provides that the contractor is entitled to an extension of time, for a Relevant Event²⁸. There is nothing in the contract, which states that the contractor will be denied an extension of time, should he be responsible for a concurrent delaying event.
- Where there are two or more effective causes of delay, which are the contractual responsibility of both the employer and the contractor, and have equal causative potency, then the contractor will not be entitled to claim loss and expense for that period²⁹. The logic here is that the contractor cannot recover damages, because he would have suffered the same loss and expense due to the delays for which he is responsible³⁰. Loss and expense in this instance would generally take the form of prolongation costs, such as site management, site accommodation, transportation and the like.

²⁵ *De Beers v Atos Origin IT Services UK Ltd* [2011] BLR 274, para 177.

²⁶ Murrin note 12 p. 13.

²⁷ See p. 5 above – Mr Justice Akenhead's decision in *Walter Lilly* – note 24 refers..

²⁸ Relevant Events are risk events which are the contractual responsibility of the employer, and depending on the circumstances, allow the contractor extensions of time, and or monetary compensation. The specific term 'Relevant Event' is particular to the JCT Standard Forms of Contract, but can and often is, understood in a similar manner, in any of the standard forms, where events/actions are the contractual responsibility of the employer.

²⁹ This is relevant if the contractor cannot satisfy the "but-for test" of causation that his losses would not have occurred in any event during the concurrent period. Keating on Contracts, Section 5, para 9-062.

³⁰ *De Beers*, note 25 para 178.

4. Concurrency in the Scottish Courts: The Current Position

In light of recent case law, it is considered that the closest current definition of concurrency as it is understood in Scotland defined in the case of *City Inn*, is as follows: “*true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first...*”³¹. However in the appeal to the Inner House to this decision, Lord Osborne widened the definition of “true concurrency” by saying: “*the focus of attention has moved, rightly in my opinion, from events themselves and their points and durations in time to their consequence upon the completion of the works*”.³²

Until 2004, there was no material inconsistency in how the Scottish and English courts dealt with concurrent delay and/or the associated loss and expense. However Lord Drummond Young’s judgement in *John Doyle Construction v Laing Management (Scotland)* began what is now seen, as a departure between the Scottish and English courts.³³ Although predominantly known as a case concerning global claims, the learned judge had some interesting and diverging opinions on losses incurred due to concurrent delay: “*...even if it cannot be said that events for which the employer is responsible are the dominant cause of the loss, it may be possible to apportion the loss between the causes for which the employer is responsible and other causes.*”³⁴[emphasis added]

In England, at that time, in light of the *Malmaison* decision, the contractor was deemed disentitled to any loss or expense associated with events which were concurrent. It was not until 2007, in the seminal case of *City Inn v Shepherd Construction*, that a Scottish court was clear that it was taking a different approach from that in the English courts. Lord Drummond Young (now a pivotal figure on this matter) had some difficulties in agreeing with the English courts view on how concurrency should be dealt with³⁵, both in terms of loss and expense and extension of time claims. Considering mostly English precedent and taking some guidance from the US courts, he said:

In terms of dominance: “*I agree that it may be possible to show that either a relevant event or a contractor’s risk event is the dominant cause of that delay, and in such a case that event should be treated as the cause of the delay*”³⁶

³¹ *City Inn*, note 12, para 18.

³² *City Inn*, note 8, para 52

³³ *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2004] S.C.L.R. 872 B.L.R. 295

³⁴ *ibid*, para 16.

³⁵ His difficulties were based on Judge Richard Seymour QC’s decision in *Royal Brompton Hospital NHS Trust v Hammond* (No.7), (2001) 76 Con LR 148 at paragraph 31, where he had suggested that should a contractor already be in culpable delay, and an employer’s Relevant Event arises (such a inclement weather), is concurrent for a period of time, but does not affect completion, then the Relevant Event should not be considered. Lord Drummond Young, said “*It should not matter whether the shortage of labour developed, for example, two days before or two days after the start of a substantial period of inclement weather, in either case the two matters operate concurrently to delay completion of the works.*”

³⁶ *City Inn*, note 12, para 21. His support for the dominant cause approach is found in *Leyland Shipping Company Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350.

In terms of delay: “Where true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes, obviously, however, the basis for such apportionment must be fair and reasonable”³⁷

In terms of loss and expense³⁸: “In this respect the decision in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd*, supra, may be relevant. In that case it is recognised at paragraphs [16]-[18] that in an appropriate case where loss is caused by both events for which the employer is responsible and events for which the contractor is responsible it is possible to apportion the loss between the two causes. In my opinion that should be done in the present case.”³⁹

His judgement was affirmed by a majority in the Inner House of the Court of Session⁴⁰, notwithstanding a dissenting view from Lord Carloway.

Taking current precedent into consideration, the following statements can be concluded as to how the Scottish courts will deal with concurrency, both from a delay, and loss and expense perspective⁴¹:-

- Where there are two or more effective causes of delay, which are the contractual responsibility of both the employer and the contractor, and have unequal causative potency, the dominant cause will prevail.
- Where there are two or more effective causes of delay, which are the contractual responsibility of both the employer and the contractor, and have equal causative potency, again the dominant cause will prevail and it may be appropriate that the delays will be apportioned between the parties. On analysis of Lord Drummond Young’s decision, the reasoning behind his position is as follows:-
 - Contrary to Judge Seymour QC’s view in *Royal Brompton*, the employer event and the contractor event, do not have to happen simultaneously and both should be treated as concurrent causes whichever happened first⁴².
 - The architect should exercise his judgement to determine what has delayed the works, on a fair and reasonable basis⁴³. Precisely what is fair and reasonable must turn on the facts and circumstances of the case.⁴⁴
 - Apportionment is supported by US law⁴⁵, where he referred to a Board of Contract Appeals case which stated:- “Where a contractor finishes late partly

³⁷ City Inn, note 12 para 18.

³⁸ In this instance, prolongation costs.

³⁹ City Inn, note 12 para 166.

⁴⁰ City Inn, note 8.

⁴¹ Note to facilitate a comparison, the phrasing of concurrency in this instance has been chosen, to be consistent with the conclusions drawn from the English courts.

⁴² City Inn, note 12.

⁴³ Lord Drummond Young attaches “”considerable importance to these words”, see note 12, para 20.

⁴⁴ City Inn, note 12, para 18. The “*fair and reasonable*” approach is taken from clause 25 of the JCT Conditions, (Private Conditions with Quantities) (1980 edition), with amendments.

⁴⁵ *Chas. I. Cunningham Co*, IBCA 60, 57-2 BCA P1541 (1957) the Board of Contract Appeals.

because of a cause that is excusable under this provision and partly because of a cause that is not, it is the duty of the contracting officer to make, if at all feasible, a fair apportionment of the extent to which completion of the job was delayed by each of the two causes, and to grant an extension of time commensurate with his determination of the extent to which the failure to finish on time was attributable to the excusable one.”

- Causation in practise works in a complex manner, in ways that does not permit the easy separation of causes, meaning the Architect or court must apply judgement, which can take the form of apportionment.⁴⁶
- When an apportionment exercise for delay is carried out, the methodology is similar to that found in contributory negligence among joint wrongdoers.⁴⁷
- Contrary to significant emphasis being placed from the English courts, he does not consider the principle of prevention in any meaningful detail.
- Where there are two or more effective causes of delay, which are the contractual responsibility of both the employer and the contractor, and have equal causative potency, then the losses may be apportioned between the parties⁴⁸. The logic being similar to that adopted for concurrent delays.

5. Discussions

Taking the foregoing into consideration, it is evident that there are inconsistencies in how the Scottish and English Courts approach the matter of concurrency. In order to find a more consistent and satisfactory direction for both jurisdictions, requires further research and discussion into the following areas:

- **Definitions:** Unless and until a definitive definition of concurrency can be commonly understood by both the English or Scottish courts, then it is likely that difficulties in relation to concurrent delay will prevail. For example, it is still to be understood in practice whether “*true concurrency*”⁴⁹ i.e. employer and contractor delay events which overlap in time, as defined in City Inn, will be dealt with any differently to employer and contractor delay events which do not overlap in time, neither of which is dominant, but act together to delay the completion date. If the employer and contractor events are deemed concurrent because they do not overlap in time, but in *effect* cause delay to the completion date, why are these not merely delay events that are calculated as part of the delay analysis. Furthermore, why would they be deemed “*concurrent*” at all?
- **Dominant Cause v Effective Cause:** The advancement of the “*effective cause*” approach in England, may suggest the demise of the dominant cause test, although this remains unconfirmed. It is suggested however, that it is possible in many instances for experienced construction professionals and the courts, to identify the dominant cause

⁴⁶ City Inn, note 12, para 22.

⁴⁷ City Inn, note 12, para 158.

⁴⁸ Although Lord Drummond Young stated that prolongation *costs* “*need not automatically follow success in a claim for extension of time*”, note 12, para 166

⁴⁹ City Inn, note 8 para 50.

between two events which may appear to have approximate equal causative potency, and appear co-critical in the programme. It is important to maintain a differentiation, because if dominance can be established, then it may be the parties could have chosen alternative mitigation strategies, to avoid their delays impacting the completion date. If that is the case, it is suggested that there is no reason, why the dominant cause approach is not adopted in the first instance. It is also respectfully suggested, that the term “*effective cause*”, is too general in description, which may only confuse matters when applied practically. Concurrency should only exist, it is suggested, once dominance cannot be established.

- **Prevention Principle:** In England, prevention is the first of two ratios in support of the Malmaison Approach; however there are conflicting judgments as to whether prevention actually exists in relation to concurrent delays⁵⁰. In Scotland, there is ongoing debate as to whether the judge’s ability to apportion concurrent delay and/or loss actually offends this principle in any event?
- **Express terms of the Contract:** In England the second and main ratio, in support of the Malmaison Approach centres on a literal interpretation of the contract (at least a JCT contract), which expressly allows an extension of time for employers Relevant Events. However, it must be explored as to why the architect or contract administrator should be precluded from taking other events (not expressly stated) into consideration, which also have an impact on the completion date. One must consider the original intention of the parties, and what would the outcome be for standard forms of contract, other than the JCT suite, which requires the architect to act fairly and reasonably? In Scotland it would appear that in evaluating concurrent delay and its effects on the completion date, the architect should do what is fair and reasonable, taking into consideration Relevant Events and events which are not expressly stated in the contract.
- **Causation:** The standard causation criteria, commonly referred to as “*but for analysis*” is suspended adopting the Malmaison Approach in England, and is also suspended in Scotland if the dominant cause approach is accepted. It must be asked, have the courts decided suspend the standard criteria for causation as a matter of Policy, if so on what basis?
- **Contributory Negligence:** The apportionment of concurrency in Scotland has been likened to contributory negligence between (joint wrongdoers (tortfeasors)⁵¹. There are conflicting arguments as to why a similar approach cannot be adopted in the law of Contract, which require further analysis?
- **Obiter commentary:** As mentioned previously, apart from one reported construction case, both English and Scottish courts commentary on concurrency has been given in obiter dicta. Indeed in *City Inn*, the judge merely suggested that apportionment “*may*” be appropriate. It is obvious therefore that the issue of concurrency is far from settled, and divergence between the English and Scottish courts may not be as immobile as is generally considered?

⁵⁰ *Jerram Falkus Construction Ltd v Fenice Investments Inc* (No 4) [2011] EWHC 1935 (TCC), [2011] BLR 644, 138 Con LR 21, [2011] CILL 3072.

⁵¹ *City Inn*, note 12, para 158.

- **CPA: Programme Analysis / CPA.** It is inadequate to consider the legal understanding and application of concurrency without considering the forms of delay analysis which may be adopted to evidence same. It is imperative that more should be done to align how the legal principles will actually work in practise.
- **Redrafting of the Standard Forms:** Workable definitions could and should be provided by the standard forms of contract, such as JCT, NEC3 or FIDIC suites⁵². Admittedly, it is possible that the definitions of concurrency when included in the standard forms may be different⁵³, but at least the parties would have more certainty on what terms they were entering into. Furthermore it would be helpful if the delay analysis methodology was outlined, because it is an integral and perhaps inseparable element in analysing delays to completion.
- **Policy considerations:** Given the relatively low profit margins of contractors of scale, it may be of benefit to acquire a deeper understanding of whether in matters of concurrency, is it fairer to award time, but no money, or apportion both time and money. For example in general, liquidated damages would be considerably higher than prolongation costs, should that influence the decision making process?
- **Hybrid Solution:** Considering all of the above, is there a viable argument to suggest that the contractor is entitled to an extension of time, but only a proportion of the money for concurrent delays? This is significant because, by way of example, if a project overruns because of a number of employer events, but only one contractor event, then there is no incentive or control for the contractor to mitigate his delays, if he is in the knowledge that he will not be able to recover or reduce his prolongation costs in any event, due to delays caused by concurrent employer events. A form of pacing delay which brings its own complexities.

6. Conclusions

This paper has identified the jurisprudential differences between the English and Scottish Courts, and how they may deal with concurrent delay in construction and engineering projects in the future, and how these differences manifest themselves in the decision making process.

It is essential that first and foremost the parties involved in construction and engineering projects, must refer to the particular terms of their contract, to understand their immediate rights and obligations in relation to how concurrency is to be administered. More often than not, the parties will have contracted using one of the standard forms, which are in general silent on how concurrency is to be dealt with. In consequence, divergences in how the English and Scottish courts deal with concurrency, will prevail and common law solutions will have limited efficacy. It is suggested that unless and until the aforementioned considerations are addressed, it is likely that problems articulating and measuring concurrency will persist for the foreseeable future.

⁵² Currently the only standard form of contract to define concurrency is found in the CIOB Complex Contract Conditions, 2013.

⁵³ Indeed the current common law differences on concurrency between the Scottish and English Courts may require a departure between the JCT suite in England and its SBCC equivalent in Scotland.

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