

WHAT IS THE MALMAISON APPROACH?

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“Come, there’s half my plan done now! How puzzling all these changes are! I’m never sure what I’m going to be, from one minute to another! However, I’ve got back to my right size; the next thing is, to get into that beautiful garden – how is that to be done, I wonder.”¹

1. INTRODUCTION²

Few construction law topics have generated as much debate and controversy as the issue of concurrent delay. This arises from the conceptual difficulty of applying the principles of legal causation to complex delays in construction projects, and the commercial consequences arising from contractors’ applications for extension of time to contract completion dates, relief from liquidated damages for delay, and compensation for delay costs.

Commentators and construction professionals often cite various authorities in support of their respective positions on concurrent delay. Unfortunately, the courts have not always been clear in their approach to concurrent delay, including in articulating their views on the principles to be applied.

The preferred approach to treatment of concurrent delay under English law is the Malmaison approach (the “Malmaison Approach”),³ stemming from Dyson J’s decision in *Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Ltd.*⁴ The Malmaison Approach has been described as the “English law benchmark” and “the general principle of English law on concurrent delay”, and is said to be enshrined in the “Society of Construction Law Delay and Disruption Protocol”⁵ (the “Protocol”), “Core Principle 9” (the “SCL View”).⁶ In practice,

¹ Lewis Carol, “*Alice in Wonderland*”.

² The writer gratefully acknowledges the assistance of Philip Allington of Driver Trett (Hong Kong) Ltd, who provided valuable comments on an earlier draft of this article.

³ See Marrin, John QC, “*Concurrent Delay Revisited*”, Society of Construction Law Paper 179, February 2013.

⁴ (1999) 70 Con LR 32.

⁵ “*Society of Construction Law Delay and Disruption Protocol*”, Society of Construction Law, United Kingdom, October 2002.

contractors, when claiming extensions of time, frequently rely upon the Malmaison Approach, as interpreted in the SCL View, and employers, in assessing entitlement, frequently rely upon the critical path approach (the “Critical Path View”),⁷ which allows an extension of time only if there is a delay to the completion date (viewed retrospectively) or is likely to delay the current anticipated completion date (viewed prospectively).

The writer examines in this article the English authorities usually cited in support of the SCL View and the Critical Path View respectively, assesses the extent to which they provide support for each, and in conclusion, attempts to answer the question posed by the title to this article, that is, what is the Malmaison Approach?

2. THE CRITICAL PATH VIEW

The Critical Path View is the principle that a contractor is only entitled to an extension of time to the prevailing contract completion date where:⁸

- (1) there is an actual delay in an activity caused by an event for which the contractor is entitled to an extension of time, that is, an employer’s risk event; and
- (2) the delay in the activity affects the current critical path for performance of the work as a matter of fact such that it delays the completion date (viewed retrospectively) or is likely to delay the current anticipated completion date (viewed prospectively).⁹

⁶ Cocklin, Matthew, “*International Approaches to the Legal Analysis of Concurrent Delay: Is there a Solution for English Law?*”, Society of Construction Law, United Kingdom, Hudson Prize essay, presented to the Society of Construction Law, London, on 9 April 2013.

⁷ Also referred to as to the “*longest path approach*”, for example, referred to by Akenhead J, at para 98, in *Walter Lilly & Company Ltd v DMV Developments Ltd* [2012] EWHC 1773, in his assessment of the expert delay evidence in the following terms:

“*As for the delay experts, Mr Robinson and Dr Aldridge, I preferred Mr Robinson in almost every respect. He, broadly, logically and conventionally, adopted the approach of establishing critical delay by reference to the “logical sequence(s) of events which marked the longest path through the project”;*”

⁸ For consistency with the nomenclature used in the Protocol, the writer refers in this article to an “*employer’s risk event*” as an event(s) for which a contractor is entitled to an extension to the prevailing contract date for completion. The writer also refers to the “*prevailing contract completion date*” as the specified contract date for completion of the works, as may be adjusted by the employer or employer’s representative.

⁹ The writer also refers to the “*completion date*” as the actual date of completion of the works, and the “*current anticipated completion date*” as the date upon which the contractor is likely to complete the works, in light of the delays to date, and the contractor’s planned rate of progress. Akenhead J was of the view in *Walter Lilly & Company v DMV Developments Ltd* [2012] EWHC 1773, at para 380, referring to an agreement between the respective delay experts in that case, that a “*prospective*” and “*retrospective*” analyses, if carried out properly, should produce the same results.

Apart from the relatively rare instances of true concurrent delay, as discussed below, the Critical Path View seeks to identify the true cause of delay by reference to the effect on the completion date (viewed retrospectively) or the current anticipated completion date (viewed prospectively).¹⁰

The writer's reference above to a "*prospective*" assessment reflects the architect's (or employer's representative's) usual obligation under extension of time provisions, such as the JCT Standard Contract, to assess an extension of time by considering whether an employer's risk event is likely to delay the current anticipated completion date, described by Akenhead J in *Walter Lilly & Company Ltd v DMV Developments Ltd*¹¹ in the context of Clause 25.3.3 of the JCT Standard Contract, as "*effectively a best assessment of what the likely future delay will be as a result of the Relevant Events in question*".¹² The architect's or employer representative's assessment will be imprecise in the sense that his or her assessment will be based on the estimated durations of and linkages between future planned activities.

This is in contrast to a retrospective analysis carried by a court or arbitrator, having the advantage of knowing what actually happened, and obliged to decide on the balance of probabilities what delays have actually been caused by the relevant employer's risk events.¹³

The writer also highlights that the reference above to the prospective analysis carried out by the architect is in contrast to post-completion "*prospective*" analysis carried out by taking time slices at regular intervals to review against the programming logic the actual progress achieved and likely to be achieved in the future. The resulting delay might be adjusted downwards or upwards in future time slices to take account of actual progress in

¹⁰ This is also subject to the inherent inaccuracy of critical path analysis in any prospective assessment by the architect of whether an employer's risk event is likely to delay the current anticipated completion date, since the planned durations of activities are never more than estimates.

¹¹ [2012] EWHC 1773.

¹² *Walter Lilly & Company Ltd v DMV Developments Ltd* [2012] EWHC 1773, per Akenhead J, at para 362. Refer also to the decision of the Hong Kong High Court in *Leighton Contractors (Asia) Ltd v Stelux Holdings Ltd* [2004] HCFI 804, in which the court rejected the contractor's argument that it was entitled to an extension of time by reference to the term "*likely delay*", and that by standing in the architect's shoes at the time of the delay event, if the arbitrator considered an event was likely to cause delay, relevantly, late provision of information, the arbitrator should have granted an extension of time. The court was of the view that there needed to be a causal link between the late information and delay to completion of the works.

¹³ Referred to by Akenhead J in *Walter Lilly & Company Ltd v DMV Developments Ltd* [2012] EWHC 1773, at para 362. He described this analysis as analogous to the architect's obligation under Clause 25.3.3 of the JCT Standard Contract requiring the architect to assess what extension of time is due within 12 weeks of Practical Completion.

relation to the relevant employer's risk event. It was in this context that Akenhead J was of the view in *Walter Lilly*, referring to an agreement between the respective delay experts in that case, that a "*prospective*" and "*retrospective*" analyses, if carried out properly, should produce the same results.¹⁴

3. THE SCL VIEW

The SCL published the Protocol on 16 October 2002,¹⁵ and the SCL View is set out as Core Principle 9 in the following terms:¹⁶

"Where Contractor Delay to Completion occurs concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due."

The Protocol defines "*true concurrent delay*" as "...the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time",¹⁷ and distinguishes true concurrent delay from the "*concurrent effect of sequential delays*" as "...the situation where two or more delay events arise at different times, but the effects of them are felt (in whole or in part) at the same time".¹⁸ The Protocol also defines the terms "*Contractor Delay to Completion*" and "*Employer Delay to Completion*" referred to in Core Principle 9 in terms of a "*delay which will cause a contract completion date not to be met*".

The references in Core Principle 9 to "*concurrently*" and "*concurrent delay*", rather than the narrower terms "*true concurrent delay*" or "*concurrent effect of sequential delays*", together with the reference to delays measured by their effect on the prevailing "*contract completion date*", suggest the SCL drafting sub-committee intended Core Principle 9 to provide contractors with a liberal entitlement to extension of time. Commentators have referred to Core Principle 9

¹⁴ *Walter Lilly & Company Ltd v DMV Developments* [2012] EWHC 1773, per Akenhead J, at para 380.

¹⁵ The SCL made it clear that the purpose of the Protocol was to provide useful guidance on some of the common issues that arise on construction contracts relating to extensions of time and / or compensation for additional time and resources used to complete the project, and to provide a means by which parties can resolve these matters and avoid disputes, at p 3, para A. SCL also made it clear that the text of the Protocol reflects the views of the drafting sub-committee, at p4, para I.

¹⁶ Protocol, at p7.

¹⁷ *Ibid*, para 1.4.4. The SCL, at para 14.4, acknowledges that true concurrent delay is a "*rare occurrence*", and refers to an example of the Employer failing to give access to the site, but the contractor having no resources mobilised to carry out any work.

¹⁸ *Ibid*, at para 1.4.6.

as a reflection of the decision of Dyson J in *Malmaison*, and as “*following*” the Malmaison Approach.¹⁹

The SCL View and the Critical Path View converge in instances of true concurrent delay (as defined in the Protocol), or in instances of concurrent effect of sequential delays, where the concurrent effects are the same, that is, which results in the same actual delay on the critical path of the works. Both of these circumstances fall within the definition of “*true concurrent delay*” proposed by John Marrin QC,²⁰ and accepted by Hamblen J in *Adyard Abu Dhabi v SD Marine Services*²¹ as a “*useful working definition*”, expressed in the following terms:²²

“a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency.”

Much of the debate on concurrent delay has focused on true concurrent delay,²³ a rare occurrence.²⁴ However, the writer submits there is a much more common and significant implication arising from the SCL View by reason of the Protocol allowing the contractor an extension of time for a delay caused by an employer’s risk event which affects the prevailing contract completion date, notwithstanding that:

- (1) the delay is not on the as-built critical path or is likely to affect the current anticipated completion date;²⁵ and
- (2) there exists a concurrent contractor caused delay on the as-built critical path which delays the completion date (viewed retrospectively) or is likely to affect the current anticipated completion date (viewed prospectively).

The Protocol sets out examples of the SCL View in Appendix D of the Protocol, and the situation described above is illustrated in Figure 9 entitled, “*Employer Risk Event on path 2 while*

¹⁹ Tobin, Paul, “*Concurrent and sequential causes of delay*” 2008 BCL 10. Refer also to Wright, John, “*Extension of Time Claims – the Position in England & Wales (and Scotland?)*”, Society of Construction Law, Construction Law International Conference, 18-20 September 2014, Kuala Lumpur, Malaysia, as the Protocol, Core Principle 9, adopting the English law approach in *Malmaison*.

²⁰ Marrin, John QC, “*Concurrent Delay*”, 18 Const LJ No 6 436.

²¹ [2011] EWHC 848.

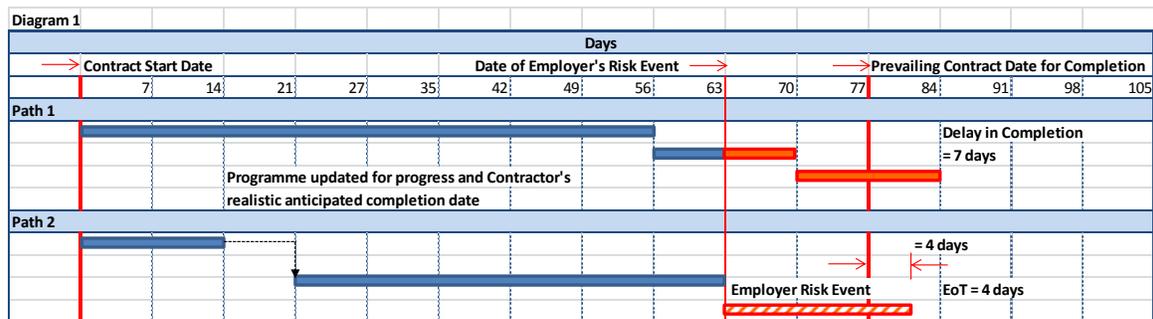
²² *Ibid*, per Hamblen J, at para 277.

²³ The writer adopts Mr Marrin QC’s definition of “*true concurrent delay*” for the purpose of this article.

²⁴ Many construction professionals consider “*true concurrent delay*” to be such a rare occurrence that it does not merit consideration.

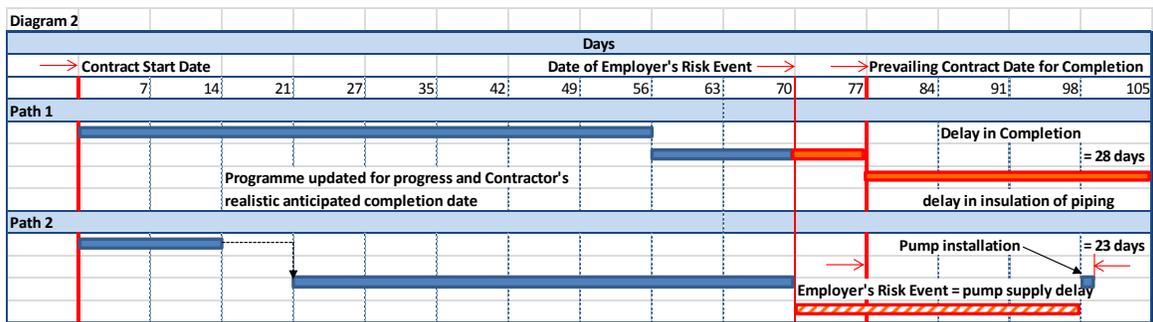
²⁵ For consistency, the writer refers in this article to the “*as-built critical path*” as the as-built critical path viewed retrospectively.

Contractor in unrecoverable critical delay on path 1 (“Figure 9”), where the contractor is in unrecoverable critical delay on “*path 1*”, resulting in anticipated completion seven days after the prevailing contract completion date, concurrent with delay caused by an employer’s risk event on “*path 2*”, which extends until four days after the prevailing contract completion date. The Protocol allows an extension of time of four days by application of Core Principle 9, notwithstanding the employer’s risk event did not cause any delay on the as-built critical path (viewed retrospectively) or is likely to delay the current anticipated completion date (as illustrated on Diagram 1 below).²⁶



The Critical Path View and the SCL View are therefore in conflict in situations such as those illustrated in Figure 9. To take an example of fabrication of a process plant, where the contractor is in critical delay on path 1 by reason of its delay in insulation of piping, with an anticipated completion date 28 days after the prevailing contract completion date. Path 2, an independent path, involves the contractor installing a pump to be supplied by the employer, and therefore, an employer’s risk, seven days prior to the prevailing contract completion date. The contractor plans to take two days to install the pump, with completion five days prior to the prevailing contract completion date. Liquidated damages for delay are payable at US\$20,000 per day, capped at US\$2m. The employer delays in supplying the pump by 28 days, an employer’s risk event, with the pump supplied 21 days after the prevailing contract completion date, and the contractor completes installation two days later, on the 23rd day after the prevailing contract completion date, as illustrated in Diagram 2 below.

²⁶ The example illustrated in Figure 9 may also be an application of the SCL’s guidance note in para 1.4.7 of the Protocol, which provides: “Where Employer Risk Events and Contractor Risk Events occur sequentially but have concurrent effects, here again any Contractor Delay should not reduce the amount of EOT due to the Contractor as a result of Employer Delay”, indicating also in para 1.4.7 that it will be necessary to carry out analysis of each delay separately.



Applying the SCL View, as illustrated in Figure 9, the contractor would be entitled to an extension of time of 23 days, and relief from liability for liquidated damages of US\$460,000, but applying the Critical Path View, the contractor is not entitled to an extension of time, and is liable for payment of full liquidated damages for 28 days of US\$560,000, a significant difference in outcome. On one view, applying the Critical Path View results in windfall benefit to the employer of US\$460,000 because the employer would not have been able to levy liquidated damages of this amount by reason of its own delay in supplying the pump.

The essence of the “*prevention principle*” is that a party cannot insist on performance of a contractual obligation by the other if it is itself the cause of non-performance.²⁷ The consequence of enlivening the prevention principle is that time is said to be “*at large*”, that is, the contractor is no longer obliged to complete by the prevailing contract completion date, and the employer loses his right to recover liquidated damages for delay. The contractor’s obligation for completion reverts to completing the works within a reasonable time. Extension of time provisions are intended to provide the employer protection from enlivening the prevention principle by allowing the prevailing contract completion date to be adjusted for delay caused by employer’s risk events.²⁸ The SCL supports the SCL View by reference to the prevention principle, as set out in paragraph 1.4.12 of the Protocol (emphasis added):²⁹

“The position the Protocol takes on concurrency is also influenced by the English law ‘prevention principle’, by virtue of which an Employer cannot take advantage of the non-fulfilment of a condition (for example, to complete the works by a certain date), the performance of which the

²⁷ Refer to Winsor C, “*Shutting Pandora’s Box: The Prevention Principle After Multiplex v Honeywell*”, (2007) Const LJ 511.

²⁸ Employer’s risk events may include both events arising from the employer’s acts or defaults, and neutral events, for example, specified weather events and unforeseen ground conditions. The prevention principle applies only to the former. To enliven the prevention principle the employer’s acts or defaults do not have to also be breaches of contract.

²⁹ Refer also to Bailey, Julian, “*The SCL Delay & Disruption Protocol: A Retrospective Analysis*”, Society of Construction Law, Construction Law International Conference, Kuala Lumpur, Malaysia 19-20 September 2014.

Employer has hindered. Where there has been Employer Delay, this may prevent the Employer charging the Contractor with LDs for failure to achieve a contract completion date. Time for completion of the works may become “at large” until a new contract completion date is set by the granting of an EOT. The Protocol’s wording avoids this danger and also prevents arguments as to whether an Employer Delay that acts concurrently with a Contractor Delay does actually hinder the progress of the Contractor in any way.”

Commentators have also suggested that the explanation for the approach taken by the English courts on the issue of concurrent delay can be found in the prevention principle.³⁰ In light of this, the writer considers in Section 5 of this article whether the SCL View is supported by the prevention principle.

Not surprisingly, contractors in a number of jurisdictions frequently rely upon the SCL View, particularly Figure 9, in their extension of time claims, supported by arguments on the prevention principle, as proposed in the Protocol, and arguments that the situation illustrated in Figure 9 reflects the Malmaison Approach. Also not surprisingly, the SCL View, as illustrated in Figure 9, has not been universally accepted by employers, because it allows contractors to ignore their own overall critical delay on the as-built critical path (viewed retrospectively) or the critical path for the current anticipated completion date (viewed prospectively), and allows contractors to rely on non-critical delay paths as having prevented the prevailing contract completion date from being achieved.

The question examined in this article is whether the SCL View, including the situation illustrated in Figure 9, is supported by English law on concurrent delay, including the decision in *Malmaison* itself, handed down some two years before the Protocol was published, and the development of English law since publication of the Protocol.

4. ENGLISH COURTS’ APPROACH TO CONCURRENCY

*Balfour Beatty Ltd v Chestermount Properties Ltd*³¹

Turning to examine the relevant English cases on concurrent delay, there are a number of relatively recent decisions in which the courts have examined the issue.³² The starting point is

³⁰ Refer, for example, to Curtis, Michael QC, “*Time for completion and concurrent delay: Adyard Abu Dhabi v SD Marine Services*”, (2011) Const LJ No 7 560.

³¹ [1993] 62 BLR 1.

Colman J's decision in *Balfour Beatty Ltd v Chestermount Properties Ltd*,³³ subsequently referred to with approval by Dyson J in *Malmaison* itself.

The contract in *Balfour Beatty* was for construction of the shell and core of a seven storey office block in London under the JCT 1980 Standard Form of contract. All of the English cases which consider the issue of concurrent delay, with the exceptions of Edwards-Stuart J's decision in *De Beers UK Limited v Atos Origin IT Services UK Limited*,³⁴ and Hamblen J's decision in *Adyard Abu Dhabi v SD Marine Services*,³⁵ do so in the context of versions of the JCT Standard Contract. Relevantly, clause 25.3 provides as follows:³⁶

“25.3

If in the opinion of the Architect, upon receipt of any notice, particulars and estimate under clauses 25.2.1.1 and 25.2.2:

25.3.1.1

any of the events which are stated by the Contractor to be the cause of the delay is a Relevant Event and

25.3.1.2

the completion of the Works is likely to be delayed thereby beyond the Completion Date the Architect 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.”

The contractor, Balfour Beatty Ltd (“Balfour Beatty”), did not complete the works by the prevailing contract completion date of 24 November 1989 for reasons for which it was responsible under the contract. As at January 1990, Balfour Beatty was expected to complete in July 1990. The architect, during the period between February and July 1990, while Balfour Beatty was in culpable delay, issued instructions for the carrying out of fit-out works as variations to the scope of work. The prevailing contract completion date as at the date of the first instruction was 9 May 1989. The works were completed on 25 February 1991, over fifteen months later than

³² *Balfour Beatty Ltd v Chestermount Properties Ltd* [1993] 62 BLR 1, *Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32, *Royal Brompton Hospital NHS Trust v Hammond* (2001) 76 Con LR 148, *Great Eastern Hotel Company Ltd v John Laing Construction Ltd* [2005] EWCH 181, *De Beers UK Limited v Atos Origin IT Services UK Limited* [2010] EWCH 3276, *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848, *Jerram Falkus Construction Limited v Fenice Investments Inc* [2011] EWHC 1935, and *Walter Lilly & Company Ltd v DMV Developments Ltd* [2012] EWHC 1773.

³³ [1993] 62 BLR 1.

³⁴ [2010] EWCH 3276.

³⁵ [2011] EWHC 848.

³⁶ *Balfour Beatty Ltd v Chestermount Properties Ltd* [1993] 62 BLR 1, at p18.

24 November 1989, for which Chestermount Properties Ltd claimed £3,840,000 liquidated damages.

Colman J considered the approach to calculating an extension of time in these circumstances, rejecting the “*gross*” approach argued by Balfour Beatty, that is, by re-fixing the contract completion date by starting at the date when the variation instruction was given, calculating the additional time, if any, which ought to be allowed by reason of the instruction and then projecting forward from the date of the instruction by adding on that additional time period to establish a new contract completion date after the date of instruction.³⁷ For example, if a variation was ordered on 1 February 2009 and would take two months to carry out, the contract completion date should be extended by two months to 1 April 2009.³⁸

Colman J held the “*net*” approach to be applicable, that is, calculating the revised contract completion date by taking the date currently fixed and adding the number of days which the architect regards as fair and reasonable to carry out the ordered variations. Relevantly, Colman J expressed his opinion as to how the architect should assess extensions of time in the following terms:³⁹

“...his [The Architect’s] objective must be the same: to assess whether any of the relevant events has caused delay to the progress of the Works and, if so, how much. He must then apply the result of his assessment of the amount of delay caused by the relevant event by extending the contract period for completion of the works by a like amount and this he does by means of postponing the completion date.”

He also expressed his view that variation works may not be critical to progress of the works, and therefore no extension of time would be warranted.⁴⁰

Colman J’s approach was therefore to first consider whether the employer’s risk event “*caused delay to the progress of the Works and, if so, how much*”, that is, whether the event had any effect on the completion date (viewed retrospectively), or was likely to affect the current anticipated completion date (viewed prospectively), as distinct from whether the employer’s risk event

³⁷ *Ibid*, at p14.

³⁸ An example given by Hamblen J in *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848, at para 268, in considering Colman J’s decision in *Balfour Beatty*.

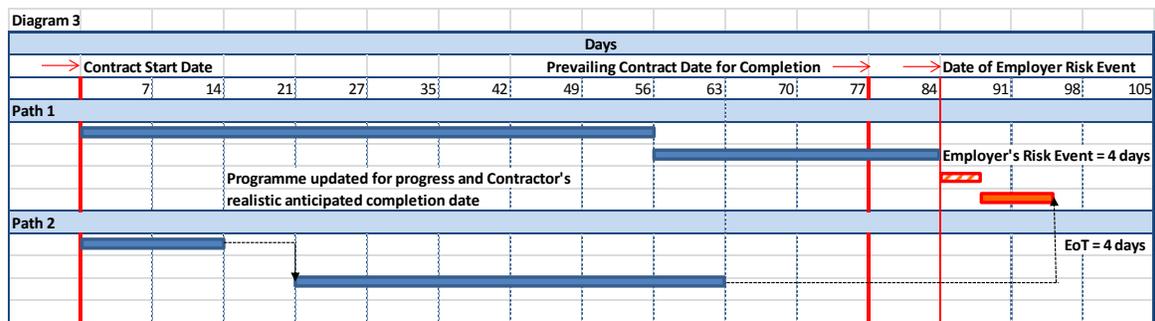
³⁹ *Balfour Beatty Ltd v Chestermount Properties Ltd* [1993] 62 BLR 1, at p29. Colman J was considering the interpretation of clause 25.3.3, pursuant to which allows the architect to retrospectively adjust the contract completion date, which he considered the architect’s function and objective to be the same as under clause 25.3.1.

⁴⁰ *Ibid*, at p31.

caused delay to the prevailing contract completion date, as in path 2 on Figure 9. If the employer’s risk event has no effect, the contractor is not entitled to an extension of time. If the employer’s risk event did or would affect the current anticipated completion date, the prevailing contract completion date should be extended by this period.⁴¹

Concurrent delays were not an issue in *Balfour Beatty*. However, Colman J appears to have considered his approach to assessing entitlement to extensions of time to be of general application. The effect of his analysis of discounting any delay caused by an employer’s risk event which did not or would not affect the current critical path for performance of the works as a matter of fact during a period of contractor culpable delay is analogous to discounting concurrent, non-critical delays as a matter of general principle, consistent with the Critical Path Approach.

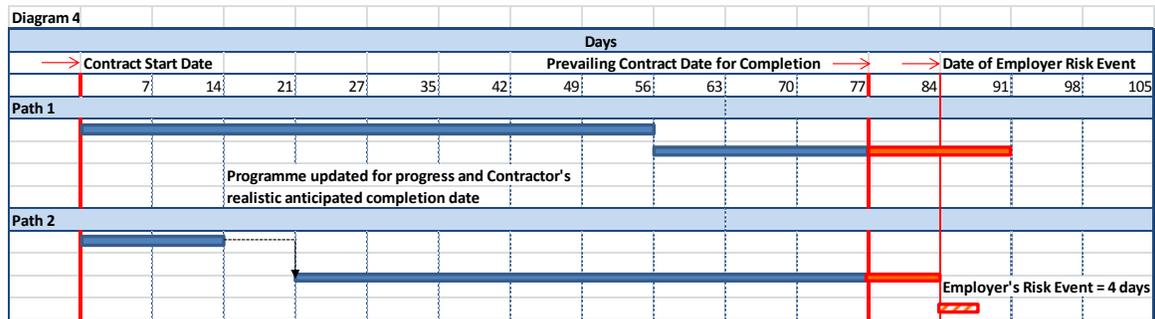
The Protocol is also consistent with Colman J’s decision in *Balfour Beatty* relating to the “net” approach in a period of contractor culpable delay. The SCL illustrates this situation in Figure 6 of Appendix D of the Protocol entitled, “*Employer Risk Event while Contractor working after Contract Completion Date*”, and grants the contractor an extension of time of four days arising from an employer’s risk event of four days duration on the critical “*path 1*”, as illustrated in Diagram 3 below.



However, the SCL does not provide an example of the situation analogous to that illustrated in Figure 9 where an employer’s risk event occurs on the non-critical path 2, except, unlike the situation in Figure 9, commences after the prevailing contract completion date, during a period of contractor culpable delay on path 1, as illustrated in Diagram 4 below. Applying the SCL View to calculate the contractor’s entitlement by ignoring the contractor caused delay on path 1, the contractor would be entitled to an extension of time equivalent to the period of delay caused by

⁴¹ This is also the interpretation of Colman J’s decision by the editors of the Building Law Reports [1993] 62 BLR 1, at p10, subsequently referred to with approval by Hamblen J in *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848.

the employer’s risk event on path 2, that is, four days, as illustrated in Diagram 4 below. If this were not the case, there would be an element of arbitrariness in the SCL View, because it would mean the contractor would be entitled to an extension of time of four days for an employer’s risk event which occurs prior to the prevailing contract completion date, as illustrated in Figure 9, but not entitled to an extension of time for an employer’s risk event having the same effect occurring after the prevailing contract completion date. This is unlikely to have been the SCL’s intention.



The writer submits the application of the SCL View to this situation, as illustrated in Diagram 4 above, is inconsistent with Colman J’s analysis because the employer’s risk event has no effect on the completion date (viewed retrospectively) nor is likely to affect the current anticipated completion date.

A situation analogous to that illustrated in Diagram 4 above was referred to by Hamblen J in *Adyard*, discussed below, and he concluded, in what appears to be an application of the Critical Path Approach, analysed in terms of causation, that the delay caused by the employer’s risk event on path 2 did not entitle the contractor to an extension of time.⁴²

*Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Ltd*⁴³

The second case in this chronological review is Dyson J’s decision in *Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Ltd* itself, where the contractor, Henry Boot Construction (UK) Limited (“Henry Boot”), entered into a contract with Malmaison Hotel (Manchester) Ltd (“Malmaison”) for construction of a hotel in Manchester. The prevailing contract completion date was 6 January 1998,⁴⁴ and practical completion was achieved on 13 March 1998. Liquidated damages for delay of amount £250,000 (at £25,000 per week) were

⁴² *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848, per Hamblen J, at paras 258 to 263.

⁴³ (1999) 70 Con LR 32.

⁴⁴ Having been extended by the architect from 21 November 1997.

deducted. Henry Boot claimed in arbitration proceedings an extension of time to 13 March 1998 arising from delays caused by, among other things, the employer's nominated subcontractor, and variations and late information (the "EOT/I claim"). Malmaison pleaded in its defence that the alleged variations did not cause any delay because they were not on the critical path and also (at paragraph 37 of its defence) that the true cause of the delay was matters for which the contractor was responsible. Henry Boot contended that the matters pleaded by Malmaison at paragraph 37 were outside the jurisdiction of the arbitrator and "*irrelevant to the Claimant's entitlement to an extension of time in this Reference (since they relate to alleged progress of the works and not to the effect of relevant events upon the completion date or the Architect's obligation to determine that)*".⁴⁵ The arbitrator found that the matters were within his jurisdiction, and Henry Boot appealed.

Dyson J recorded the parties' agreement where there are two concurrent causes of delay in the following terms (emphasis added):⁴⁶

"...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 it 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."

Dyson J then rejected Henry Boot's argument, reasoning as follows:⁴⁷

"It seems to me that it is a question of fact in any given case whether a relevant event has caused or is likely to cause delay to the works beyond the completion date in the sense described by Colman J in the *Balfour Beatty* case. In the present case, the respondent has what Miss O'Farrell calls both a negative and positive defence to the EOT/I claim. The negative defence amounts to saying that the variations and late information etc relied on by the claimant did not cause any delay because the activities were not on the critical path, and on that account did not cause delay. The positive defence is that the true cause of the delay was other matters, which were not relevant

⁴⁵ *Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32, at para 4.

⁴⁶ *Ibid*, per Dyson J, at para 13.

⁴⁷ *Ibid*, per Dyson J, at para 15.

events, and for which the respondent was responsible....In my judgment it is incorrect to say that, *as a matter of construction of clause 25*, when deciding whether a relevant event is likely to cause or has caused delay, the architect may not consider the impact on progress and completion of other events.”

In light of Dyson J’s references in the above passage to “*delay to the works...in the sense described by Colman J in the Balfour Beatty case*”, suggesting delay to the works as a whole, and “*the claimant did not cause any delay because the activities were not on the critical path, and on that account did not cause delay*”, the writer suggests Dyson J was referring to delay to the completion date or current anticipated completion date.

Although Dyson J’s statement of principle in the first sentence of the first passage set out above was agreed, he noted this without adverse comment, and with apparent endorsement.⁴⁸ Dyson J’s statement of principle, considered in isolation, is consistent with the SCL View because it encompasses the situation illustrated in Figure 9, that is, where there are two concurrent causes of delay, the contractor’s culpable delay on path 1, and the employer’s delay on path 2, the contractor should be entitled to an extension of time for the delay on path 2 caused by an employer’s risk event, notwithstanding the contractor is in critical delay on path 1.

However, the writer submits Dyson J was referring only to the situation of either:

- (1) true concurrent delay, as defined in the Protocol set out above; or
- (2) the same period of concurrent delay caused by two or more effective causes of delay which are of approximately equal causative potency (as proposed by John Marrin QC).

both of which cause a delay to progress on the critical path (being a reference to the as-built critical path, viewed retrospectively).⁴⁹

First, the parties had agreed that Colman J’s analysis in *Balfour Beatty* should be applied as a valuable interpretation of clause 25 of the JCT standard conditions, the relevant extension of time

⁴⁸ As noted by Akenhead J in *Walter Lilly & Company Ltd v DMV Developments Ltd* [2012] EWHC 1773, at para 367. HHJ Stephen Davies in *Steria Ltd v Sigma Wireless Communications Ltd* [2008] BLR 79 also stated the fact that Dyson J, a judge with wide experience in the field, noted the agreement without adverse comment is a strong indication that he considered it correctly stated the position, at para 131. Lord Osborne, with Lord Kingarth in agreement, also noted in *City Inn Ltd v Shepherd Construction Ltd* [2010] ScotCS CSIH_68 (at para 32) that Dyson J appeared to accept this principle agreed to by the parties.

⁴⁹ Tobin, Paul, “*Concurrent and sequential causes of delay*” 2008 BCL 10.

provision.⁵⁰ As noted above, Colman J’s analysis in *Balfour Beatty* involved discounting non-critical delays caused by employer’s risk events, consistent with the Critical Path View.

Secondly, Dyson J’s reference in the first passage set out above that “*it is a question of fact*” whether an employer’s risk event “*has caused or is likely to cause delay to the works beyond the completion date in the sense described by Colman J in the Balfour Beatty case*” appears to be an endorsement of Colman J’s analysis.

Thirdly, the very issue in dispute between the parties was Malmaison’s defence that its alleged variations did not cause any delay to the works because they were not on the critical path, the situation illustrated on path 2 in Figure 9. It seems unlikely that Malmaison would concede an agreement contrary to its own pleaded defence.

Fourthly, Henry Boot pleaded that it was entitled to an extension of time until 13 March 1998, and Malmaison pleaded that Henry Boot was responsible for delays to the same date. The parties’ agreement is likely to have been to the effect that if each was successful on the facts on these issues, Henry Boot would be entitled to the full extension of time.

Fifthly, the example given by Dyson J in the above passage concerning exceptionally inclement weather and shortage of labour, each causing a one week delay suggests he was referring only to true concurrent delay in his statement of principle, rather than the situation in Figure 9 where the delays on paths 1 and 2 are not truly concurrent, and path 1 does not affect the completion date or anticipated completion date

The learned authors of *Keating* have, with respect, correctly interpreted Dyson J’s decision in *Malmaison* as being authority only for situations of true concurrent delay in the sense that both delays start and finish at the same time, and neither competing cause is a dominant cause.⁵¹

*Royal Brompton Hospital NHS Trust v Hammond*⁵²

The next case in the chronology of cases is the decision of HHJ Richard Seymour QC in *Royal Brompton Hospital NHS Trust v Hammond*, which is again a decision handed down prior to

⁵⁰ *Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32, per Dyson J, at para 12.

⁵¹ “*Keating on Construction Contracts*” (9th edition), at para 9-067.

⁵² [2000] EWHC 39.

publication of the Protocol in October 2002. The case involved construction by Taylor Woodrow Construction Ltd of a six storey hospital in London. Progress of the works was delayed. The architect engaged by the claimant, Royal Brompton Hospital NHS (“Royal Brompton”), issued various extensions of time for completion of the works to 22 May 1990, and issued a certificate of practical completion for the same date. Royal Brompton alleged that the architect had been negligent in granting the extensions of time.

The architect relied upon the decisions in *Balfour Beatty* and *Malmaison* as confirming the approach taken by the architect where relevant and non-relevant events operate concurrently, that is, the employer’s risk events and their effect on the contract completion date should be viewed separately from the contractor’s responsible delays.

HHJ Seymour QC disagreed, and expressed his view as to what is meant by concurrent delays in the following terms:⁵³

“However, it is, I think, necessary to be clear what one means by events operating concurrently. It does not mean, in my judgment, a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a Relevant Event and which, had the contractor not been delayed would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a Relevant Event, “*the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date*”.

The Relevant Event simply has no effect upon the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, the works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a Relevant Event, while the other is not. In such circumstances there is a real concurrency of causes of the delay. It was circumstances such as these that Dyson J. was concerned with in the passage from his judgment in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* at paragraph 13 on page 37 of the report which Mr. Taverner drew to my notice. Dyson J. adopted the same approach as that which seems to me to be appropriate to the first type of factual situation which I have postulated when he said, at paragraph 15 on page 38 of the report:-

⁵³ *Royal Brompton Hospital NHS Trust v Hammond* [2000] EWHC 39, per HHJ Seymour QC, at para 31.

“It seems to me that it is a question of fact in any case whether a relevant event has caused or is likely to cause delay to the works beyond the completion date in the sense described by Colman J. in the Balfour Beatty case.”

HHJ Seymour QC also expressed his support for critical path analysis to establish the cause of the delay to the *“ultimate completion of the work”* in the following terms (emphasis added):⁵⁴

“In order to make an assessment of whether a particular occurrence has affected the ultimate completion of the work, rather than just a particular operation it is desirable to consider what operations, at the time the event with one is concerned happens, are critical to the forward progress of the work as a whole.”

The writer submits that the example given by HHJ Seymour QC in the first paragraph of the above passage is analogous to the situation illustrated in Figure 9 (and Diagram 1 above), that is, the contractor is already in culpable delay on path 1, with an actual or anticipated completion date seven days later than that the prevailing contract completion date, in parallel with a delay caused by an employer’s risk event on path 2 which *“would have caused him to be delayed”* (beyond the prevailing contract completion date), but which either had no effect on the completion date (viewed retrospectively) or is likely to affect the current anticipated completion date (viewed prospectively).

It has been suggested that this example can be explained as not giving rise to an extension of time because the employer’s risk event commences after the delay for which the contractor is responsible, and therefore, the latter should be regarded as the cause of the delay.⁵⁵ With respect, in light of HHJ Seymour QC’s view that one must consider what operations are critical to the forward progress of the work as a whole, the writer submits it is more likely he considered not the sequence of events to be relevant to causation, but rather, which resulting delay falls upon or is likely to fall upon the critical path for the works, thereby affecting the completion date (viewed retrospectively) or is likely to affect the current anticipated completion date (viewed prospectively). This appears to be consistent with the Critical Path View, rather than the SCL View.

⁵⁴ *Ibid*, per HHJ Seymour QC, at para 32.

⁵⁵ Refer, for example, to Curtis, Michael QC, *“Time for completion and concurrent delay: Adyard Abu Dhabi v SD Marine Services”*, (2011) Const LJ No 7 560.

The writer submits that HHJ Seymour QC, in the second paragraph set out above, interpreted Dyson J's dicta in *Malmaison* as a reference only to true concurrent delay, which he described as “*real concurrency of causes of delay*”.⁵⁶

In light of HHJ Seymour QC's emphasis on the effect of events on the critical path for the works, and thereby, the effect on the completion date, rather than the time when the events actually occur, in the writer's view, the writer submits HHJ Seymour QC's reasoning overall is consistent with the wider definition of true concurrent delay proposed by John Marrin QC referred to above. The writer submits the question in each case, regardless of the timing of the events, is whether the resulting delay affected the critical path for progress of the works as a whole, and thereby affected the completion date (viewed retrospectively), or is likely to affect the current anticipated completion date.⁵⁷

*Great Eastern Hotel Company Ltd v John Laing Construction Ltd*⁵⁸

HHJ David Wilcox's decision in *Great Eastern Hotel Company Ltd v John Laing Construction Ltd* in February 2005 was the first judicial reference to the Protocol in the context of concurrent delay.⁵⁹ The case involved John Lang Construction Ltd's (“John Laing”) obligations under a Construction Management Agreement entered into with Great Eastern Hotel Company Ltd (“Great Eastern”) for the extension and refurbishment of the Great Eastern Hotel in London. John Laing was responsible under the Construction Management Agreement to plan, programme and organise the project, with trade contractors responsible for carrying out the works under contracts directly with Great Eastern. The project was delayed by 44 weeks, and Great Eastern alleged that the delay was caused by John Laing's breaches of its obligations under the Construction Management Agreement.

John Laing asserted that they were not responsible for the delay, and relied on the actions of other parties and causes of delay, including alleged late provision of design information by Great

⁵⁶ As noted earlier, John Marrin QC proposed a wider definition of true concurrent delay which focuses on the point in time the delay caused by the event impinges upon progress of the works, rather than Dyson J's reference in the first paragraph to both the events and periods of delay being concurrent.

⁵⁷ Marrin, John QC's definition was subsequently approved by Hamblen J in *Adyard*, as discussed below.

⁵⁸ [2005] EWHC 181.

⁵⁹ HHJ Humphrey Lloyd QC referred to the Protocol (in its current version) in his decision in *Balfour Beatty Construction Ltd v The Mayor of the London Borough of Lambeth* [2002] EWHC 597 in the context of an adjudicator's selection of the “as-built collapsed” methodology for analysis of the delays, having referred to the methods of delay analysis proposed in the Protocol.

Eastern. John Laing's delay expert characterised these as "*concurrent delays*", and relied upon the Protocol in respect of calculation of delay where there is concurrent delay.

HHJ Wilcox, upon assessing the delay evidence, concluded that John Laing was responsible for all critical delays. He acknowledged that there were periods of delay to activities which were not critical, but concurrent with periods of critical delay. HHJ Wilcox was also critical of the evidence of John Laing's delay expert as lacking in thoroughness, having not taken into account contemporary evidence, and unreliable as a result of uncritical acceptance of John Laing's favourable account. He therefore attached little weight to John Laing's delay expert's evidence, save where it coincided with Great Eastern's delay expert evidence.

HHJ Wilcox did not refer to the decisions in *Balfour Beatty*, *Malmaison*, or *Royal Brompton Hospital*, but analysed the issue of causation in equivalent terms to *Malmaison*, relying upon the authorities on legal causation, as follows:⁶⁰

"If a breach of contract is one of the causes both co-operating and of equal efficiency in causing loss to the Claimant the party responsible for breach is liable to the Claimant for that loss. The contract breaker is liable for as long as his breach was an "effective cause" of his loss. See Heske v. Continental Express Limited [1995] 1 All Eng 1033 at page 1047A. The Court need not choose which cause was the more effective. The approach of Devlin J in Heskell was adopted by Steyn J (as he then was) in Banque Keyser SA v. Skandia [1991] QB page 668 at page 717 and accepted by the Court of Appeal see page 813A to 814C.

Each claim or group of claims must be examined on their own facts and in the context of the specific contractual provisions such as variations which may give rise to a consideration of the comparative potency of causal events and to apportionment. In the absence of such provision the appropriate test is that if GEH [Great Eastern] prove that Laing were in breach and the proven breach materially contributed to the loss then it can recover the whole loss, even if there is another effective contributory cause provided that there is no double recovery.

This approach connotes no injustice, because the Defendant who pays is protected, because it was open to him to seek contribution from any other contract breaker.

As to category one losses, the delay losses there were no other critical causes of delay. Such losses as may be proved are thus wholly the responsibility of Laing. They comprise the net revenue lost

⁶⁰ *Ibid*, per HHJ Wilcox, at paras 314 to 317.

by virtue of the delay in opening the hotel available for business as a profitable revenue earning business on the completion date agreed. “

Whilst John Laing’s case relied on the SCL View, John Laing’s delay expert did not reflect in his analysis the delays to actual progress from information in contemporaneous records, and hence did not present a concurrent path analysis as illustrated in Figure 9. Nevertheless, it is clear from HHJ Wilcox’s assessment of the evidence that by considering the relevant question to be which event or events caused delay to the critical path, and discounting non-critical path concurrent delays, that he was applying the Critical Path View.

*City Inn Ltd v Shepherd Construction Ltd*⁶¹

The next relevant case in this chronological review is the Scottish decision of the Inner House in *City Inn v Shepherd Construction Ltd*. The court upheld Lord Drummond Young’s first instance decision that where two causes are operative, one of which is an employer’s risk event, neither of which could be described as the dominant cause, the architect can apportion delay in completion of the works between the employer’s risk event and the other event (the “Apportionment Approach”).⁶² The Apportionment Approach was subsequently held not to reflect English law by Hamblen J in *Adyard*,⁶³ and by Akenhead J in *Walter Lilly & Company Ltd v DMV Developments Ltd*,⁶⁴ both of which are discussed below. However, the Inner House’s decision is relevant for the court’s interpretation of the decisions in *Balfour Beatty*, *Malmaison*, and *Royal Brompton Hospital*.

With respect to the decision in *Balfour Beatty*, Lord Osborne, delivering the majority judgment,⁶⁵ did not consider Colman J’s decision helpful because “...he does not address the problem created by concurrent delays having their origin in “relevant events” as defined in clause 25.4, and other events”,⁶⁶ notwithstanding Lord Osborne’s description of Colman J’s judgment as “illuminating” on the issue of “the net as opposed to the gross basis of the assessment of delay caused by a variation.”⁶⁷

⁶¹ [2010] ScotCS CSIH_68, handed down on 22 July 2010, some five months prior to the subsequent English decision in *De Beers UK Limited v Atos Origin IT Services UK Limited* [2010] EWHC 3276.

⁶² [2007] ScotCS CSOH_190.

⁶³ [2011] EWHC 848.

⁶⁴ [2012] EWHC 1733.

⁶⁵ With Lord Kingarth being the other member of the majority.

⁶⁶ *City Inn Ltd v Shepherd Construction Ltd* [2010] ScotCS CSIH_68, per Lord Osborne, at para 30.

⁶⁷ *Ibid*, at para 30.

The writer respectfully submits Lord Osborne’s view of Colman J’s analysis in *Balfour Beatty* is particularly narrow, since, as noted above, in reaching his decision regarding the “net” effect of a variation instructed during a period of contractor culpable delay, Colman J’s analysis was to the effect that non-critical concurrent employer’s risk events did not affect the completion date, viewed retrospectively, or were likely to affect the current anticipated completion date, and therefore, the prevailing contract completion date should not be extended.

Lord Osborne then considered the decision in *Malmaison*. His Lordship noted Dyson J’s decision in favour of the employer, set out Dyson J’s dicta concerning concurrent delays set out above,⁶⁸ but did not analyse the decision further. He then referred to *Royal Brompton Hospital*, disagreeing with HHJ Seymour’s view that Dyson J’s observations concerning concurrent delay were limited to the situation of true concurrent delay, that is, where both a relevant event and a shortage of labour occur simultaneously, stating “it appears to me that there is no evident reason to consider that his observations were so limited”.⁶⁹ In light of Lord Osborne’s five propositions discussed below, it is unlikely his Lordship was suggesting Dyson J was proposing the wider view of concurrency advocated in the SCL View, as illustrated in Figure 9.

Lord Osborne then set out five propositions regarding the proper approach to the application of clause 25.3, as follows (emphasis added):⁷⁰

“In the first place, before any claim for an extension of time can succeed, it must plainly be shown that a relevant event is a cause of delay and that the completion of the works is likely to be delayed thereby or has in fact been delayed thereby. In the second place, the decision as to whether the relevant event possesses such causative effect is an issue of fact which is to be resolved, not by the application of philosophical principles of causation, but rather by the application of principles of common-sense. In the third place, the decision-maker is at liberty to decide an issue of causation on the basis of any factual evidence acceptable to him. In that connection, while a critical path analysis, if shown to be soundly based, may be of assistance, the absence of such an analysis does not mean that a claim for extension of time must necessarily fail. In the fourth place, if a dominant cause can be identified as the cause of some particular delay in the completion of the works, effect will be given to that by leaving out of account any cause or causes which are not material. Depending on whether or not the dominant cause is a relevant event, the claim for extension of time will or will not succeed. In the fifth place, where a situation exists in which two causes are operative, one being a relevant event and the other some event for which the contractor is to be

⁶⁸ Per Dyson J, *Henry Boot Construction (UK) Ltd Malmaison Hotel (Manchester) Ltd* [1999] 70 Con LR, at para 13.

⁶⁹ *City Inn Ltd v Shepherd Construction Ltd* [2010] ScotCS CSIH_68, per Lord Osborne, at para 36.

⁷⁰ *Ibid.*, at para 42.

taken to be responsible, and neither of which could be described as the dominant cause, the claim for extension of time will not necessarily fail. In such a situation, which could, as a matter of language, be described as one of concurrent causes, in a broad sense (see para. [48] *infra*), it will be open to the decision-maker, whether the architect, or other tribunal, approaching the issue in a fair and reasonable way, to apportion the delay in the completion of the works occasioned thereby as between the relevant event and the other event.”

The writer makes several observations concerning Lord Osborne’s propositions. First, his Lordship’s first proposition that an employer’s risk event must have caused or likely to cause “*delay in the completion of the works*”, in light of his repeated references to “*delay in the completion of the works*”, appears to be a reference to delay to the completion date, viewed retrospectively, or the current anticipated completion date, as distinct from delay to the prevailing contract completion date. This proposition is consistent with Colman J’s analysis in *Balfour Beatty*, and Judge Seymour QC’s analysis in *Royal Brompton Hospital*, as discussed above, and contrary to the situation illustrated in Figure 9.

Secondly, his Lordship’s second, third, and fourth propositions relate to how causation is to be proved as a matter of fact. He gives qualified support to “*a critical path analysis*” as being of assistance, which, in light of his reference throughout to “*delay in completion of the works*”, should, the writer submits, be construed as a factual critical path analysis showing whether an employer’s risk event would affect the completion date, viewed retrospectively, or is likely to affect the current anticipated completion date. The writer submits this is consistent with Colman J’s and HHJ Seymour QC’s approach to analysis of delay in *Balfour Beatty* and *Royal Brompton Hospital* respectively.

Thirdly, Lord Osborne’s reference to the possibility of the “*dominant cause*” being identified as the cause of “*delay to completion of the works*” and discounting “*any cause or causes where are not material*” is consistent with discounting non-critical delays caused by employer risk events, reflecting the Critical Path View.

Fourthly, as noted earlier, the Apportionment Approach was subsequently found not to reflect English law by Hamblen J in *Adyard*, and Akenhead J in *Walter Lilly*.

Lord Carlway, in a separate judgment, reached the same decision as the majority in dismissing the appeal, but expressed a different approach, relying upon the prevention principle, and as a matter of interpretation of clause 25.3. His Lordship referred to the prevention principle

enunciated by Vaughan Williams LJ in *Wells v Army & Navy Co-operative Society*,⁷¹ and expressed his view on the operation of clause 25.3 in the following terms:⁷²

“The proposition that delay caused by the contractor must also to be taken into account was rejected (p355) [in *Wells*], and rightly so. It is irrelevant so far as the contractual exercise is concerned. That exercise does not involve an analysis of competing causes. It involves a prediction of a Completion Date, taking account that originally stated in the contract and adding the extra time which a Relevant Event would have instructed, all other things being equal.”

His Lordship referred to the decisions in *Peak Construction (Liverpool) v McKinney Foundations*⁷³ and *SMK Cabinets v Hili Modern Electrics Pty*⁷⁴ as demonstrating that “*where there is an excusable cause of delay, an extension must be given for that delay notwithstanding other non-excusable causes.*”⁷⁵

His Lordship then disagreed with Coleman J’s interpretation of clause 25.3.3 in *Balfour Beatty*, expressing his view as to the exercise the architect must carry out to satisfy clause 25.3 as being “*to determine whether there is likely to be, or was, delay in the Completion Date caused by a Relevant Event*”.⁷⁶

Lord Carloway referred to Dyson J’s analysis in *Malmaison* has having “*started well*” by noting Dyson J’s general principle concerning concurrent delays set out earlier in this article, but noted that Dyson J rejected the contractor’s submission that the architect is not permitted to consider the effect of other events in determining whether an employer’s risk event is “*likely to cause delay beyond the Completion Date*”,⁷⁷ which is clearly contrary to Lord Carloway’s reasoning.

Lord Carloway went on to reject the Apportionment Approach as not being warranted under clause 25.3.1, and set out his view on the exercise the architect is obliged to undertake, together with examples of the approach, in the following terms (emphasis added):⁷⁸

“What the architect must do is concentrate solely on the effect of the Relevant Event in the absence of any competing default. If he decides that it was likely to, or did, cause delay beyond

⁷¹ (1902) 2 Hudson’s Building Cases (4th edition) 346, at p354.

⁷² *City Inn Ltd v Shepherd Construction Ltd* [2010] ScotCS CSIH_68, per Lord Carloway, at para 106.

⁷³ [1970] 1 BLR 111.

⁷⁴ [1984] VR 391.

⁷⁵ *City Inn Ltd v Shepherd Construction Ltd* [2010] ScotCS CSIH_68, per Lord Carloway, at para 107.

⁷⁶ *Ibid*, per Lord Carloway, at para 108.

⁷⁷ *Ibid*, per Lord Carloway, at para 108.

⁷⁸ *Ibid*, per Lord Carloway, at paras 112 and 113.

the Completion Date, he must fix a “fair and reasonable” new Completion Date having regard to what he estimates to be the delay caused by the Relevant Event, all other things being equal.

In the example given by the Lord Ordinary (para [16]), if a Relevant Event would have caused a six week delay in the Completion Date, and a shortage of labour caused by a contractors default would also have caused a six week delay in completion, the architect should fix a Completion Date six weeks beyond the existing one. If the Relevant Event would have caused only a two or a four week delay, looked at in isolation, a two or a four week extension would be appropriate. It is not, in short, an apportionment exercise. It is one involving a professional judgment on the part of the architect to determine, as a matter of fact and no doubt using his and not a lawyer's common sense, whether the Relevant Event would have, or did, cause delay beyond the Completion Date and then to estimate a fair and reasonable new Completion Date.”

The writer submits the key distinction between Lord Osborne’s majority judgment, and Lord Carloway’s judgment in relation to the English sequence of cases, is Lord Carloway’s view that the causative effect of an employer’s risk event on the “*Completion Date*” should be assessed in isolation from any contractor default.⁷⁹ The second example given by Lord Carloway in the above passage of granting a two or four week extension if the Relevant Event would have caused a two or four week delay, looked at in isolation, is analogous to the situation illustrated in Figure 9. Lord Carloway’s judgment therefore provides the clearest support for the SCL View, as illustrated in Figure 9.

*De Beers UK Limited v Atos Origin IT Services UK Limited*⁸⁰

The next English case in this sequence of cases is the decision of Edwards-Stuart J in *De Beers UK Limited v Atos Origin IT Services UK Limited*.⁸¹ The case involved a dispute over the development by Atos Origin IT Services UK Limited (“Atos”) of a software system for De Beers UK Limited (“De Beers”), a diamond trading company, to manage its diamond supply chain. The project did not go well; progress fell behind schedule, and eventually Atos suspended work, alleging the work had been delayed by De Beers increasing the scope of work and its lack of cooperation. The work was never resumed, and each party asserted that the termination was the result of repudiatory breach by the other which it accepted.

⁷⁹ Lord Osborne made it clear that he disagreed with Lord Carloway’s majority judgment, “[T]o the foregoing extent only”, at para 115.

⁸⁰ [2010] EWCH 3276.

⁸¹ Handed down on 16 December 2010, some five months after the decision in *City Inn v Shepherd Construction Ltd* [2010] Scot CSIH_68.

Progress on the work fell behind schedule from any early stage, and the parties, in March 2008, agreed for Atos to delivery priority and non-priority software modules, referred to by the parties respectively as “*bundle 2*” and “*bundle 3*”. The parties agreed for bundle 2 to be delivered in accordance with a revised programme by mid-August 2008, and bundle 3 to be delivered on 27 October 2008. Atos did not perform in accordance with the revised programme, and by the first week in June 2008, Atos had suspended work.

Edwards-Stuart J noted that the parties had not undertaken an analysis of the “*critical delays to the project*”, and was therefore obliged to do his best to assess what delays were “*driving completion of bundles 2 and 3*”.⁸² His Honour found that Atos was responsible for critical delays,⁸³ concluding that these delays together would have resulted in the completion date for bundle 2 being mid-December 2008.

Edwards-Stuart J also found De Beers responsible for critical delays to completion of bundle 2.⁸⁴ He was unable to distinguish between the causes of delay to bundle 2 and bundle 3, concluded that both parties were therefore responsible for delays to completion of bundles 2 and 3.⁸⁵

Edwards-Stuart J then set out the principle applicable to concurrent delay in the following terms (emphasis added):⁸⁶

“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. 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.”

Edwards-Stuart J set out the above principle without referring to authority. However, he appears to have been relying on the decision in *Malmaison*, reasoned by reference to the prevention principle. In light of Edwards-Stuart J’s analysis of seeking to identify “*critical delays to the*

⁸² [2010] EWCH 3276, *per* Edwards-Stuart J, at para 171.

⁸³ *Ibid*, *per* Edwards-Stuart J, namely, Atos’ revised programme not being achievable, Atos’ elaboration of De Beers’ requirements not amounting to scope changes, design shortcomings, delays in making decisions on aspects of the design, and lack of effective communication between Atos and Atos India, at paras 170 to 176.

⁸⁴ *Ibid*, *per* Edwards-Stuart J, namely, De Beers’ requirement for “*Splitting*”, described as the process by which aggregated diamonds are split into a number of boxes, being additional work, and De Beers’ delay in providing finance requirements, at para 176.

⁸⁵ *Ibid*, *per* Edwards-Stuart J, at para 176.

⁸⁶ *Ibid*, *per* Edwards-Stuart J, at para 177.

project...driving completion of bundles 2 and 3”, and his finding that “...each party was responsible for critical delays to completion that were operating concurrently...”, the writer submits his statement of principle relating to the contractor’s entitlement to extension of time and associated delay costs was likely to be confined only to the situation of true concurrent delay, rather than the wider SCL View, as illustrated in Figure 9.

*Adyard Abu Dhabi v SD Marine Services*⁸⁷

The decision in *De Beers* was followed five months later by Hamblen J’s decision in *Adyard*. The claimant, Adyard Abu Dhabi (“Adyard”), a shipyard in Abu Dhabi, entered into two contracts with SD Marine Services (“SDMS”) for fabrication of two Moorings and Special Operations Support Vessels. Under the contracts, the vessels were to be ready for sea trials by 30 September and 30 November 2009 respectively, and SDMS had the right to rescind the contracts in the event the vessels were not ready by the agreed dates. It was common ground that the vessels were not ready, and by letters dated 15 October 2009 and 14 December 2009, SDMS purported to exercise its right to rescind the contracts. Adyard alleged that SDMS was not entitled to rescind because it was prevented from completing the vessels for sea trials by SDMS’ acts and / or it was entitled to an extension of time to the sea trials dates for both vessels.⁸⁸

Hamblen J held that the matters complained of by Adyard were not in fact variations. However, he also addressed Adyard’s prevention argument, and concluded that the contracts provided for Adyard to be granted an extension of time for the alleged acts of prevention, and therefore, the prevention principle did not operate.⁸⁹

However, Hamblen J went on to consider that even if Adyard was entitled to rely on the prevention principle this could only assist Adyard if its causation case was sound in law. Adyard submitted that the prevention principle applied, or alternatively, that it was entitled to an extension of time, if the employer’s risk event extended over the prevailing contract completion date. Hamblen J described Adyard’s submission in the following terms:⁹⁰

⁸⁷ [2011] EWHC 848.

⁸⁸ Specifically, Adyard alleged that it was delayed by various new design items imposed by the United Kingdom Maritime Coastguard Agency or instructed by SDMS in June / July 2009.

⁸⁹ *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848, per Hamblen J, at para 243, relying upon Jackson J’s formulation of the prevention principle in *Multiplex v Honeywell* [2007] Bus LR Digest D109.

⁹⁰ *Ibid*, per Hamblen J, at paras 258 to 260.

“Adyard’s causation case, both in relation to the prevention principle and any claim for an extension of time, was that causation is established by showing that the duration of the relevant event or act of prevention extended over the original contractual sea trials date.

If, for example, a two day variation was instructed the day before the sea trials date, and was a variation of a type which would need to be completed before sea trials, then, if there was an extension of time clause Adyard would be entitled to a one day extension of time, or, if there was no such clause, Adyard could rely on the prevention principle.”

Adyard relied on Lord Carloway’s minority judgment in *City Inn* with respect to the interpretation of clause 25 of the JCT 1980 Standard Form. Adyard also relied on the example illustrated in Figure 9 of the Protocol.

Hamblen J rejected Adyard’s argument as being wrong in principle and authority, and wrong as a matter of common sense. His Honour considered the approach wrong in principle because if Adyard was correct there would be no need to prove causation in fact, that is, actual delay to the progress of the works.⁹¹

Hamblen J also considered Adyard’s argument contrary to authority, referring to the approach as essentially a variation of the gross entitlement argument rejected by Colman J in *Balfour Beatty*. He also referred to Colman J’s analysis of the principles to be applied in assessing extensions of time referred to earlier in this article,⁹² approving Colman J’s approach that delay to the completion date must be assessed by reference to the progress of the works to the then anticipated completion date.⁹³ Hamblen J also noted with approval comments by the editors of the BLR that Coleman J’s judgment “*should put an end to hypothetical questions about the potential as opposed to the actual effect of causes of delay which entitle a contractor to an extension of time.*”⁹⁴

Hamblen J then considered Dyson J’s decision in *Malmaison* that it “*is incorrect to say that, as a matter of construction clause 25 when deciding whether a relevant event is likely to cause or has caused delay, the architect may not consider the impact on progress and completion of other*

⁹¹ *Ibid*, per Hamblen J, at para 264. He also relied upon the terms of the extension of time provisions as setting out a causation test requiring a reasonable adjustment to be that “*occasioned by or resulting from*” the relevant modification, and to identify the period of delay “*caused by the Buyer’s default or any Permissible Delay*” and extend the period of time to the Sea Trials “*to the same extent*”.

⁹² *Ibid*, at paras 270 to 272.

⁹³ *Ibid*, at para 272.

⁹⁴ *Ibid*, per Hamblen J, at para 273.

events.” His Honour described the contractor’s argument in *Malmaison* as being “essentially the same argument as that advanced by *Adyard* in this case”.⁹⁵

Hamblen J stated that in the *Malmaison* case it was accepted that if the contractor could show that the relevant event caused concurrent delay there would be an entitlement to an extension of time, and referred to the example of true concurrent delay as having delayed progress of the works referred to by Dyson J (at para 13), and agreed that the contractor would be entitled to an extension of time in such circumstances, as follows (emphasis added).⁹⁶

“It is to be noted that this example involves a relevant event which caused a period of actual delay to the progress of the works – no work could be done for a week due to the weather. If that is established then the contractor is entitled to his extension of time even if there is another concurrent cause of that same delay. A useful working definition of concurrent delay in this context is “a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency” – see the article *Concurrent Delay* by John Marrin QC (2002) 18 Const LJ No. 6 436.”

Hamblen J referred to the similar approach taken by Judge Seymour QC in *Royal Brompton Hospital* that there is concurrency if both events in fact cause delay to the progress of the works and the delaying effect of the two events is felt at the same time. He was also of the view that the first example given by HHJ Seymour QC where the employer’s risk event did not in fact cause any delay to the progress of the works was consistent with Colman J’s comments as to the situation in which a variation is instructed during a period of culpable delay.⁹⁷

He then referred to the prevention principle cases, which he considered required a similar “*proof of delay to the actual progress of the works*” as indicated in *Royal Brompton Hospital*,⁹⁸ referring to Lord Denning’s speech on the formulation of the prevention principle in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*,⁹⁹ that “*the other party by his conduct...renders it impossible or impractical for the other party to do his work within the stipulated time*”, concluding as follows:¹⁰⁰

“The conduct therefore has to render it “impossible or impracticable for the other party to do the work within the stipulated time.” The act relied on must *actually prevent* the contractor from

⁹⁵ *Ibid*, per Hamblen J, at para 275.

⁹⁶ *Ibid*, per Hamblen J, at para 277.

⁹⁷ *Ibid*, at paras 277 to 279.

⁹⁸ *Ibid*, per Hamblen J, at para 282.

⁹⁹ [1973] 1 WLR 601, at p607.

¹⁰⁰ *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848, at para 282.

carrying out the works within the contract period or, in other words, must cause some *actual* delay.”

Hamblen J rejected Lord Carloway’s analysis in *City Inn*, relied on by Adyard, as not reflecting English law.¹⁰¹

His Honour was also of the view that the majority in *City Inn* accepted that the issue of whether a relevant event causes delay is to be assessed by reference to the progress of the works as a whole, thereby establishing causation in fact.¹⁰² With respect to Lord Osborne’s fifth proposition, he was of the view that under English law, the approach would be to recognise that the contractor is entitled to an extension of time, not apportionment, and referred to the example of true concurrent delay given in *Malmaison* (at para 13).¹⁰³

With respect to Adyard’s reliance on the Protocol,¹⁰⁴ Hamblen J described the required analysis in the following terms:¹⁰⁵

“That [time impact analysis] means that any extension to the Contract Completion Date is determined by impacting an updated programme showing progress and therefore, the difference between the date upon which the contractor was planning to complete (given progress to date) and any later date caused by the impact of the particular event.”

His Honour also rejected Adyard’s reliance on Figure 9, which His Honour expressed in the following terms:¹⁰⁶

“In so far as reliance was also sought to be placed on Figure 9 of Appendix D of the SCL Protocol, I find that, as put to Mr Swan in cross examination, it can be read as showing that the introduction of the employer’s event on path 2 makes that path critical and causative of concurrent delay in which case again it puts forward the orthodox position.”

The writer makes several observations concerning Hamblen J’s decision. First, Hamblen J construed the decisions in *Balfour Beatty*, *Malmaison*, and *Royal Brompton Hospital* as applying

¹⁰¹ *Ibid*, per Hamblen J at para 286.

¹⁰² *Ibid*, at para 287.

¹⁰³ *Ibid*, at para 288.

¹⁰⁴ Adyard’s expert relied upon clause 3.2.6 of the Protocol, in particular, the reference therein to *“The EOT should be granted to the extent that the Employer Risk Event is predicted to prevent the works being completed by the then prevailing contract completion date”*, at para 291(1).

¹⁰⁵ *Ibid*, per Hamblen J, at para 291(3).

¹⁰⁶ *Ibid*, per Hamblen J, at para 291(4).

a consistent approach to assessment of extensions of time by reference to the effect on the completion date (viewed retrospectively) or the current anticipated completion date (viewed prospectively), and adjusting the prevailing contract completion date by this period.

Secondly, Adyard's argument is analogous to the situation illustrated in Figure 9, and Lord Carloway's analysis in *City Inn*, in the sense that it relies on ignoring the contractor's culpable delay on the critical path, and focuses solely on the effect of an employer's risk event on the prevailing contract completion date.

Thirdly, in light of Hamblen J's reasoning on the approach to assessment of extension of time, he was also of the view that for the prevention principle to apply there must similarly be "*proof of delay to the actual progress of the works*", that is, an effect on the completion date or the current anticipated completion date. However, Hamblen J's formulation of the prevention principle relying on *Trollope & Colls Ltd* in terms of the act relied upon "*must actually prevent the contractor from carrying out the works within the contract period*" is difficult to reconcile with his view that there must be an effect on the completion date or anticipated completion date.

Fourthly, Hamblen J construed the decision itself in *Malmaison* as being contrary to Adyard's submission, and therefore, the writer submits, inconsistent with the SCL View, as illustrated in Figure 9.

Fifthly, Hamblen J expressly referred to the example illustrated in Figure 9 relied upon by Adyard's delay expert, which remains the only judicial reference to Figure 9. Whilst Hamblen J referred to path 2 on Figure 9 as "*critical*" and to Figure 9 as the "*orthodox position*", it is difficult to reconcile his statement with first, his clear rejection of Lord Carloway's analysis in *City Inn*, which is analogous to the situation illustrated in Figure 9, and secondly, his requirement that for the prevention principle to apply it must be shown that "*the variations were likely to or (as the case may be) did cause actual delay to the progress of the works.*"

*Jerram Falkus Construction Limited v Fenice Investments Inc*¹⁰⁷

In *Jerram Falkus Construction Limited v Fenice Investments Inc*, the claimant, Jerram Falkus Construction Limited ("JFC"), was engaged by Fenice Investments Inc ("Fenice") to carry out the development of a residential project in London, under a contract incorporating the JCT Design

¹⁰⁷ [2011] EWHC 1935.

and Build Form 2005, except that two provisions giving Jerram Falkus rights to an extension of time were deleted, namely clause 2.26.5 “Any impediment, prevention or default, whether by act or omission, by the Employer...”, and clause 2.26.6, “The carrying out by a Statutory Undertaker of work in pursuant to its statutory obligations in relation to the Work, or any failure to carry out such work...”. The works were delayed, and disputes arose between the parties as to the causes of delay, which were the subject of three adjudications. The claimant commenced proceedings in the High Court seeking certain declarations.

The original contract completion date was 25 May 2009, which was extended by Fenice’s agents to 15 June 2009. The works were not complete until 9 September 2009, a delay of 86 days, for which Fenice levied liquidated damages. JFC maintained Fenice prevented completion and, by reason of deletions of the extension of time provisions, no extension of time could be granted in relation to such acts of prevention, and therefore, time was set at large. Relevantly, one of the issues considered by the court was if Fenice did prevent completion, but the delay so caused was concurrent with delays which were JFC’s fault, was time set at large?

Coulson J commenced by considering the relevant authorities on the prevention principle, commencing with *Peak Construction (Liverpool) Limited v McKinney Foundations Limited*,¹⁰⁸ which he described in the following terms (emphasis added):¹⁰⁹

“The essence of the principle is that the promise cannot insist upon the performance of an obligation which he has himself prevented the promisor from performing. In construction law, that means that the employer cannot hold the contractor to a specified completion date if the employer by his own act or omission, prevented the contractor from completing by that date.”

Coulson J then approved Hamblen J’s analysis of concurrent causes of delay in *Adyard*,¹¹⁰ in the following terms:¹¹¹

“Hamblen J’s analysis indicated that, if there were two concurrent causes of delay, one which was the contractor’s responsibility, and one which was said to trigger the prevention principle, the principle would not in fact be triggered because the contractor could not show that the employer’s conduct made it impossible for him to complete within the stipulated time. The existence of a

¹⁰⁸ (1970) 1 BLR 111.

¹⁰⁹ *Jerram Falkus Construction Limited v Fenice Investments Inc* [2011] EWHC 1935, per Coulson J, at para 47.

¹¹⁰ [2011] EWHC 848.

¹¹¹ *Jerram Falkus Construction Limited v Fenice Investments Inc* [2011] EWHC 1935, per Coulson J, at para 50.

delay for which the contractor is responsible, covering the same period of delay which was caused by an act of prevention, would mean that the employer had not prevented actual completion. Throughout his analysis, Hamblen J stressed the importance of the contractor proving delay to the actual progress of the work as a result of the alleged act of prevention.”

Coulson J also considered the views of the learned authors of Keating,¹¹² who suggest that the prevention principle “*probably applies even if the contractor has by his own delays disabled himself from completing by the due date*”,¹¹³ relying upon the decision of the Supreme Court of Victoria in *SMK Cabinets v Hili Modern Electrics*.¹¹⁴

He distinguished the decision in *SMK Cabinets*, and the other decisions referred to in Keating as not dealing with concurrent delays, but situations where the contractor was in delay part of the time, and employer responsible delays part of the time. He referred with approval to the learned authors of Hudson’s, in commenting upon the decision in *SKM Cabinets v Hili Modern Electrics Pty Ltd*, that for the prevention principle to apply, “[S]ome additional delay in ultimate completion beyond that already incurred by the contractor must be caused by the owner if it is to invalidate the clause.”¹¹⁵ He was of the view that the prevention principle applies to this situation, but for concurrent delays, Hamblen J’s analysis was the correct analysis, concluding (emphasis added):¹¹⁶

“Accordingly, I conclude that, for the prevention principle to apply, the contractor must be able to demonstrate that the employer’s acts or omissions have prevented the contractor from achieving an earlier completion date and that, if that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the contractor’s own default, the prevention principle will not apply.”

Coulson J analysed the delays JFC alleged were Fenice’s responsibility, and concluded that the delays were not critical, but in any event, these delays were JFC’s responsibility. Coulson J also held that even if the delays were critical and Fenice’s responsibility, such delays were concurrent with JFC’s responsible delays, and the prevention principle did not apply.

¹¹² *Ibid*, at para 51.

¹¹³ “*Keating on Construction Contracts*” (8th Edition), at para 9-018.

¹¹⁴ [1984] VR 391, at 398.

¹¹⁵ “*Hudson’s Building and Engineering Contracts*” (12th Edition, 2010), at para 6-029.

¹¹⁶ *Jerram Falkus Construction Limited v Fenice Investments Inc* [2011] EWHC 1935, *per* Coulson J, at para 52.

Coulson J’s analysis involved a situation of true concurrent delay, and therefore, a narrower situation than considered by Hamblen J in *Adyard*, which was analogous to the situation illustrated in Figure 9.

*Walter Lilly & Company Ltd v DMV Developments Ltd*¹¹⁷

The most recent English case is Akenhead J’s decision in *Walter Lilly & Company Ltd v DMV Developments Ltd*, which involved proceedings by Walter Lilly & Company Ltd (“Walter Lilly”) for extensions of time, the return of deducted liquidated damages, loss and expense for delay, wrongly deducted sums for defects, and outstanding unpaid amounts, for works comprising of construction of a residence in London.

Akenhead J had the opportunity to review the current state of the law on concurrent delay, and commenced by describing the exercise to be performed under clause 25.3.1 as follows (emphasis added):¹¹⁸

“Clause 25.3.1, which deals with extensions of time being granted prior to Practical Completion, clearly envisages that the extension must relate to the extent to which "completion of the Works is likely to be delayed" by the Relevant Event or Events.”

His Honour confirmed the “*net*” approach to delay caused by an employer’s risk event during a period of culpable contractor delay, approving Colman J’s dicta in *Balfour Beatty* that the issue is “*whether the relevant event occurring during a period of culpable delay has caused delay to the completion of the Works and, if so, how much delay*”, which Akenhead J considered to be consistent with the wording of clause 25.¹¹⁹ Akenhead J then referred to concurrent causes of delay in the following terms (emphasis added):¹²⁰

“There has been a substantial debate between the parties as to how what is called concurrent (or sometimes concurrent and co-effective) causes of delay should be dealt with. This debate is only germane where at least one of the causes of delay is a Relevant Event and the other is not. It relates to where a period of delay is found to have been caused by two factors. Of course, the debate will depend upon the contractual terms in question but most of the debate in cases in this

¹¹⁷ [2012] EWHC 1733.

¹¹⁸ *Ibid*, per Akenhead J, at para 363.

¹¹⁹ *Ibid*, at para 364.

¹²⁰ *Ibid*, per Akenhead J, at para 366.

country and elsewhere has revolved around extension of time clauses similar to those contained in Clause 25 where the Architect has to grant an extension which is "fair and reasonable".

His Honour described the “*English and Scottish schools*” as being respectively the contractor being 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 Apportionment Approach from *City Inn*.¹²¹

Akenhead J then referred to the dicta of Dyson J at paragraph 13 of his decision in *Malmaison*, and Edwards-Stuart J at paragraph 177 of his decision in *De Beers*, relating to concurrent delays set out earlier in this article.¹²² His Honor also referred to Hamblen J’s reference in *Adyard* “*as good law*” paragraph 13 of Dyson J’s decision in *Malmaison*, setting out paragraph 277 of Hamblen J’s decision set out above, and summarized the law on concurrent delay in the following terms (emphasis added):¹²³

“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.”

The writer submits there are a number of indications from Akenhead J’s judgment which indicates his Honour was referring only to the situation of true concurrent delay in the sense of the definition of concurrency approved by Hamblen J in *Adyard*, as follows:

¹²¹ *Ibid*, per Akenhead J, at para 366.

¹²² *Ibid*, at paras 367 and 368 respectively.

¹²³ *Ibid*, per Akenhead J, at para 370.

- (1) that “*the extension must relate to the extent to which "completion of the Works is likely to be delayed" by the Relevant Event or Events*”;
- (2) that the debate concerning concurrent delays only “*relates to where a period of delay is found to have been caused by two factors*”, one of which is an employer’s risk event;
- (3) the contractor is entitled to a full extension where “*delay is caused by two or more effective causes*”, that is, the same period of delay; and
- (4) “*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*”.

The writer submits Akenhead J’s selection of authorities is also significant. Hamblen J in *Adyard* was clearly of the view that a consistent approach to extensions of time was decided in *Balfour Beatty*, *Malmaison*, and *Royal Brompton Hospital*. Hamblen J also expressly rejected Lord Carlway’s approach in *City Inn*, and impliedly rejected Adyard’s reliance on Figure 9. As noted earlier, the decision in *De Beers*, on the facts, involved a situation of true concurrent delay,

Further, Akenhead J, later in his judgment, clearly applied the Critical Path View in his assessment of the appropriate method for delay analysis,¹²⁴ analysing the delays on a monthly basis, and concluded that all of the delays on the “*longest sequence*” of work were delays for which DMV was contractually responsible.

5. THE PREVENTION PRINCIPLE

The prevention principle forms part of the underlying rationale for the English courts’ approach to the issue of concurrent delay.¹²⁵ As noted in Section 2 of this article, the SCL supports the SCL View by reference to the prevention principle. The rationale is that the prevention principle applies if the contractor is prevented from achieving the prevailing contract completion date by an act or omission of the employer.¹²⁶

¹²⁴ *Ibid*, at para 378.

¹²⁵ *Walter Lilly & Company Ltd v DMV Developments Ltd* [2010] EWHC 1733, *per* Akenhead J, at para 370.

¹²⁶ As illustrated by the four day delay arising from the “*employer’s risk event*” shown in Figure 9, and an extension of time of four days prevents this outcome.

Hamblen J in *Adyard* was of the view that the prevention principle only applied if there was “*proof of delay to the actual progress of the works*”, that is, an effect on the completion date (viewed retrospectively) or the current anticipated completion date (viewed prospectively). The corollary of his Honour’s reasoning is that the prevention principle does not apply where a non-critical employer’s risk event does not prevent the completion date or anticipated completion date from being achieved, as illustrated in path 2 on Figure 9. Coulson J in *Jerram Falkus* applied Hamblen J’s reasoning to true concurrent delay.

Stephen Furst QC is critical of Coulson J’s conclusion in *Jerram Falkus* that the prevention principle only applies if the contractor can demonstrate that the employer’s acts or omissions prevented the contractor from achieving an earlier completion date.¹²⁷ He submits Coulson J’s reasoning is inconsistent with the prevention principle, and the proposition that a contractor is entitled to an extension of time (or a reasonable time within which to complete) where an act of prevention is a cause of delay, concurrent with a delay caused by the contractor’s default.¹²⁸ His view therefore supports the SCL View, as illustrated in Figure 9.

Mr Furst QC’s criticism is applicable to both decisions. Their Honours’ respective reliance on the formulation of the prevention principle in *Trollope & Colls Ltd* (in the case of Hamblen J) and *Peak Construction and Multiplex v Honeywell*¹²⁹ (in the case of Coulson J) in terms of the acts or omissions having prevented the contractor from completing “*within the contract period*”, by “*a specified completion date*”, or having “*caused delay beyond the contractual completion date*”, is difficult to reconcile with their view that for the prevention principle to apply there must be an effect on the completion date or anticipated completion date.

Prakash J, in the Singapore High Court, also recently examined the prevention principle in her Honour’s decision in *Lin Chin San Contractors Pty Ltd v LW Infrastructure Pte Ltd*.¹³⁰ LW Infrastructure Pte Ltd (“LW”) was the main contractor for construction of an industrial building in Singapore, and engaged Lin Chin San Contractors Pty Ltd (“LCS”) as the design and build subcontractor. The works were delayed, and LW terminated the contract on the ground that LCS failed “*to proceed regularly and diligently*” with performance of the works. LW commenced arbitration proceedings against LCS, and the arbitrator found that there was delay to the progress

¹²⁷ *Jerram Falkus Construction Limited v Fenice Investments Inc* [2011] EWHC 1935, per Coulson J, at para 52.

¹²⁸ Furst, Stephen QC, “*Global Claims and Concurrence*”, Construction Update, Winter 2013, Keating Chambers.

¹²⁹ [2007] Bus LR Digest 109.

¹³⁰ [2011] SGHC 162. The decision was handed down on 5 July 2011, just 16 days prior to the decision in *Jerram Falkus Construction Limited v Fenice Investments Inc* [2011] EWHC 1935.

of the works arising from two events for which LW was responsible.¹³¹ However, the arbitrator found that LCS had failed to prove that these incidents caused a “*delay in the completion of the sub-contract works*”. LCS appealed against this finding, with the issue for the court to decide expressed in the following terms:¹³²

“[W]here there were acts of prevention which caused delay in the progress of the works and which were not extendable [*sic*] under the sub-contract, whether it was necessary for [the contractor] to have been prevented from completing the works by a prescribed date in order for time to be set at large.”

Prakash J examined the decisions in *Dodd v Churton*,¹³³ *Holme v Guppy*,¹³⁴ *Peak v McKinney*,¹³⁵ *Percy Bilton Ltd v Greater London Council*,¹³⁶ and various commentators’ views,¹³⁷ all of which formulate the prevention principle in terms that the acts or omissions must have delayed the contractual completion date, and answered the issue in the affirmative.¹³⁸ Prakash J’s decision therefore supports the proposition that notwithstanding that a contractor is not entitled to an extension of time because delay caused by employer’s risk events is non-critical, the prevention principle applies where the contractor has nonetheless been prevented from completing the works by “*a prescribed date*”, that is, the situation illustrated in path 2 on Figure 9.

John Marrin QC is also critical of Coulson J’s decision *Jerram Falkus* in the narrower sense that the prevention principle does not apply in cases of true concurrent delay, preferring the view of the learned authors of Hudson’s that there is no reason why the prevention principle should not apply in such cases.¹³⁹ He suggests that Hamblen J in *Adyard* did not go so far as to hold that the prevention principle was inapplicable in this situation.¹⁴⁰

¹³¹ Namely, late payments and under-allocation of entitlements relating to employment of labour.

¹³² *Ibid*, para 12.

¹³³ [1897] 1 QB 566.

¹³⁴ (1838) 150 ER 1195.

¹³⁵ (1970) 1 BLR 114.

¹³⁶ [1982] 1 WLR 794.

¹³⁷ “*Keating on Construction Contracts*” (8th Edition, 2006), at para 9-018, “*Hudson’s Building and Engineering Contracts* (12th edition, 2010), at para 6-009, Pickavance, Keith, “*Delay and Disruption in Construction Contracts*” (4th edition, 2010), at para 6-120, and Chow Kok Fong, “*Law and Practice of Construction Contracts*” (3rd edition, 2004), at p401.

¹³⁸ This was notwithstanding some passages in her Honour’s judgment appeared to indicate that the prevention principle was enlivened where the employer “*delayed completion of the works*”, as distinct from having delayed the prevailing contract completion date, at paras 24 and 36.

¹³⁹ Marrin, John QC, “*Concurrent Delay Revisited*”, Society of Construction Law Paper 179, February 2013, referring to “*Hudson’s Building and Engineering Contracts*” (12th edition, 2010), at para 6-060.

¹⁴⁰ Marrin, John QC “*Concurrent Delay Revisited*”, Society of Construction Law Paper 179, February 2013

The writer respectfully agrees. Hamblen J’s reasoning in *Adyard* that proof of delay to the actual progress of the works was required for the prevention principle to apply extended from his reasoning for the requirements to establish an extension of time, referring to *Balfour Beatty*. In light of the manner in which he developed his reasoning, it is not obvious that his Honour intended for the prevention principle also not to apply in instances of true concurrent delay where the right to an extension of time is well established.

There are also conflicting views in the leading construction texts as to whether the prevention principle applies in situations of concurrent delay, as noted by Coulson J in *Jerram Falkus*. The learned authors of Keating are of the view that the principle “*probably applies even if the contractor has by his own delays disabled himself from completing by the due date*”, relying upon the decision in *SKM Cabinets*, whereas the learned authors of Hudson’s are of the view, also relying on *SKM Cabinets*, that *[S]ome additional delay in ultimate completion beyond that already incurred by the contractor must be caused by the owner if it is to invalidate the clause.*”¹⁴¹

The learned authors of Hudson’s support their view by reference to the New Zealand High Court’s decision in *Baskett v Bendigo Gold Dredging Co*,¹⁴² which involved construction by Baskett of a gold dredger. The defendant, Bendigo Gold Dredging Co, was obliged to give access to the site for erection of the dredger, and was late in doing so. However, Baskett was also not ready to begin the work at the time they were given possession of the site due to the non-arrival of timber. The court held that the prevention principle applied for other delays caused by the defendant, but in relation to the delay caused by late access, the court stated:¹⁴³

“There is nothing whatever in the evidence to show or to suggest that the operations of the plaintiffs were in any way hindered or delayed by their not getting the site until October, or that if they had got it earlier their operations would have been in any way accelerated.”

The writer submits it is not clear from the judgment whether the court was referring to the failure to give access as not having critically affected completion of the works, but having affected the contract completion date, that is, the situation illustrated in Figure 9, or whether the court was referring to the failure to give access as not having delayed completion of the works, the proposition for which the learned authors of Hudson’s cite the decision. The writer respectively

¹⁴¹ “*Hudson’s Building and Engineering Contracts*” (12th edition, 2010), at para 6-029.

¹⁴² (1902) 21 NZLR 166.

¹⁴³ (1902) 21 NZLR 166.

submits therefore that the decision in *Baskett* is not a clear authority for the proposition referred to in Hudson's.

If the decisions in *Adyard* and *Jerram Falkus* are correct, the SCL's argument that the situation illustrated in Figure 9 is justified by the prevention principle is questionable. However, in light of commentators' criticisms of *Jerram Falkus*, the conflicting views in leading texts, and Prakash J's decision in *Lin Chin San Contractors Pty Ltd*, there is a significant risk that the prevention principle applies to situations such as illustrated in Figure 9. This gives rise to a particular difficulty, because the JCT Standard Form extension of time provisions do not entitle the contractor to an extension of time in such circumstances. This results in the extension of time provisions having failed to protect the employer from the consequences of the prevention principle.¹⁴⁴

6. CONCLUSION

Turning to consider the question posed by the title of this paper, what is the Malmaison Approach?

The Critical Path View

The series of English cases discussed in this article, together with the majority in *City Inn*, support assessing extensions of time by reference to the effect on the completion date (viewed retrospectively) or the current anticipated completion date (viewed prospectively), and adjusting the prevailing contract completion date by this period.¹⁴⁵

The practical implication for contractors and employers arising from this approach to assessing extensions of time is the potential for managing concurrent delays to ensure that delays do not fall upon the critical path for performance of the works, or are likely to fall upon the critical path for performance of the works. This of course requires contractors and employers to maintain sufficient information and management tools to assess which delays, if any, are operating at any particular time, and their likely effects.

¹⁴⁴ The prevention principle applies unless the contract expresses a contrary intention, and in such circumstances, the employer is left to argue that the extension of time provisions express such an intention, which is likely to be difficult to establish.

¹⁴⁵ Also the interpretation of *Balfour Beatty v Chestermount Properties* (1993) 62 BLR 1, *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 33, and the majority in *City Inn Ltd v Shepherd Construction Ltd* [2010] Scot CSIH_68 by the learned authors of "*Keating on Construction Contracts*" (9th edition, 2012), at para 8-023.

There are of course practical difficulties in applying the Critical Path View,¹⁴⁶ such as being able to identify the planned critical path, together with changes to the critical path as the project is executed, and delays arise. HHJ Humphrey Lloyd QC referred to the requirement to establish cause and effect by an analysis of the facts in *Balfour Beatty Construction Ltd v The Mayor of the London Borough of Lambeth*.¹⁴⁷ In that case, the applicant did not prepare or maintain a proper programme for execution of the works, which comprised of the refurbishment and remodelling of Falmouth House in London, and did not present a critical path analysis in the first instance adjudication. The adjudicator carried out his own delay analysis using the “*collapsed as-built*” methodology without advising the parties of his analysis, and HHJ Humphrey Lloyd QC held that the adjudicator exceeded his jurisdiction. In the course of his judgment, HHJ Humphrey Lloyd QC referred to the requirement for a factual analysis of delay in the following terms:¹⁴⁸

“By now one would have thought that it was well understood that, on a contract of this kind, in order to attack, on the facts, a clause 24 certificate for non-completion (or an extension of time determined under clause 25), the foundation must be the original programme (if capable of justification and substantiation to show its validity and reliability as a contractual starting point) and its success will similarly depend on the soundness of its revisions on the occurrence of every event, so as to be able to provide a satisfactory and convincing demonstration of cause and effect. A valid critical path (or paths) has to be established both initially and at every later material point since it (or they) will almost certainly change. Some means has also to be established for demonstrating the effect of concurrent or parallel delays or other matters for which the employer will not be responsible under the contract. BB and its claims consultants, whilst recognising that the critical path would constantly fluctuate (see the referral notice), nevertheless decided that not only was it not practicable but that it was unnecessary to determine a constantly changing critical path.”

The writer submits that HHJ Humphrey Lloyd QC’s reference to the establishment of a valid critical path, initially and subsequently at every material point during execution of the project, is clearly consistent with the Critical Path View.

There is also the risk that evidence of all relevant facts will not be available at the time the analysis is carried out, and the associated risk of the parties’ delay experts relying upon untested

¹⁴⁶ Refer to Allington, Philip, “*The Society of Construction Law Delay and Disruption Protocol – How far can you go*”, delivered at the Society of Construction Law, Construction Law International Conference in Kuala Lumpur, 18-20 September 2014.

¹⁴⁷ [2002] EWHC 597.

¹⁴⁸ *Ibid*, per HHJ Humphrey Lloyd QC, at para 30.

facts in complex critical path delay analysis, and therefore, the risk of hypothetical results being presented.¹⁴⁹

True Concurrent Delay

The English cases also support the position that a contractor is entitled to an extension of time for true concurrent delay,¹⁵⁰ consistent with the SCL View. The rationale for the contractor being entitled to an extension of time notwithstanding the employer's risk event not being the dominant cause of delay is that where the parties have expressly provided in their contract for an extension of time caused by certain employer's risk events, the parties are 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 the contractor is entitled to an extension of time for an effective cause of delay falling within the relevant contractual provision.¹⁵¹

The writer submits neither the English cases, nor the majority in *City Inn*, support a contractor's entitlement to an extension of time in situations of non-critical delay as illustrated in Figure 9. Lord Carloway's minority reasoning in *City Inn* provides the strongest support for the contractor's extension of time for this situation, but his reasoning is inconsistent with the English courts' approach to assessing extensions of time, and was expressly rejected by Hamblen J in *Adyard*.

The writer submits the Malmaison Approach is therefore confined only to the rare situation of true concurrent delay. Whilst the Malmaison Approach is "enshrined" in the SCL View, the Protocol extends significantly further than the Malmaison Approach, as reflected in the situation

¹⁴⁹ Refer, for example, to the comments of HHJ David Wilcox in his decision in *Skanska Construction UK Limited v Egger (Barony) Limited*, in his criticism of the delay expert relying upon factual evidence provided by individuals who did not give evidence, at para 415.

¹⁵⁰ As defined by Marrin, John QC, in "*Concurrent Delay*" (2002) 18 Con LJ 436, and approved by Hamblen J in *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848.

¹⁵¹ "*Keating on Construction Contracts*" (9th edition, 2012), at para 8-026. The learned authors' rationale was adopted and described as "*compelling*" by HHJ Stephen Davies in *Steria Ltd v Sigma Wireless Communications Ltd* [2008] BLR 79, at para 131. The Malmaison Approach also involves a relaxation of the "*but-for*" test of causation, which is generally considered a necessary but not sufficient test of causation ("*McGregor on Damages*" (17th edition, 2003), a para 6-006, and *Orient-Express Hotels Ltd v Assicurazioni General SA* [2010] Lloyds Reports IR 531, at para 2. The same rationale as noted by the learned authors of "*Keating on Construction Contracts*" (9th edition, 2012) is applied that the parties can be taken to have intended relaxation of the but-for test.

illustrated in Figure 9.¹⁵² Contractors' reliance on Figure 9 can have significant consequences in terms of claimed extensions of time and associated delay costs, and employers' entitlement to levy liquidated damages for delay, as illustrated in Diagram 2 earlier in this article.

The Prevention Principle

There is a significant risk that the SCL View, as illustrated in Figure 9, is contrary to the prevention principle, and as a consequence, the JCT Standard Form extension of time provisions fail to protect the employer from the consequence of enlivening the prevention principle, namely, time being "*at large*", the employer losing his right to recover liquidated damages, and the contractor's obligation reverting to completing the works within a reasonable time.

Putting aside the application of the prevention principle, the allocation of extension of time and cost in Figure 9 is arguably equitable. If the situation in Figure 9 was reversed, and the employer was responsible for the critical delay and the contractor responsible for the concurrent non-critical delay, the contractor would be entitled to time related delay costs only for the period of non-concurrency. The rationale for this is that the contractor cannot recover damages which he would have suffered in any event, as noted by Edwards-Stuart in *De Beers*, albeit in the context of true concurrent delay, in the following terms:¹⁵³

“By contrast, 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.”

The parties could agree a similar rationale by allowing the contractor an extension of time and relief from liquidated damages for delay, as illustrated in Figure 9, for the period in which the employer delayed completion of the works as a matter of fact beyond the prevailing contract completion date. This prevents the employer from arguably recovering a windfall amount of liquidated damages as a result of its own delay, and it avoids the adverse implications to the employer of time being at large.

¹⁵² It should also be noted that the SCL made it clear in the Protocol that the SCL's approach to concurrent delay avoids issues as to whether an employer delay actually causes a delay to progress of the works, and therefore, completion (para 1.4.12), and describes its approach as a "*compromise*" (at para 1.4.3).

¹⁵³ *De Beers UK Limited v Atos Origin IT Services UK Limited* [2010] EWCH 3276, per Edwards-Stuart J, at para 178.

As noted frequently in the cases, the contractor's entitlement to extension of time depends critically on the terms of the extension of time provisions.¹⁵⁴ The prevention principle applies unless the contract expresses a contrary intention,¹⁵⁵ and therefore, the parties are free expressly to agree on issues such as the circumstances in which the principle applies, and whether the contractor is entitled to an extension of time for non-critical delay caused by employer risk events, including the situation illustrated in Figure 9.¹⁵⁶ The writer submits it would be prudent for parties expressly to stipulate these matters in their contracts to avoid the risk of the prevention principle applying.

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Note: This publication is not intended to be a substitute for legal advice.

¹⁵⁴ For example, noted by Akenhead J *Walter Lilly & Company v DMV Developments Ltd* [2012] EWHC 1773, at para 366.

¹⁵⁵ *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111, per Salmon LJ, at p123, and cited more recently in *Lin Chin San Contractors Pty Ltd v LW Infrastructure Pte Ltd*, per Prakash J, at para 291.

¹⁵⁶ Refer to Tobin, Paul, "Concurrent and sequential causes of delay" 2008 BCL 10, for a discussion of the terms of Australian Standards' forms of contract on issues of concurrent delay and criticality.