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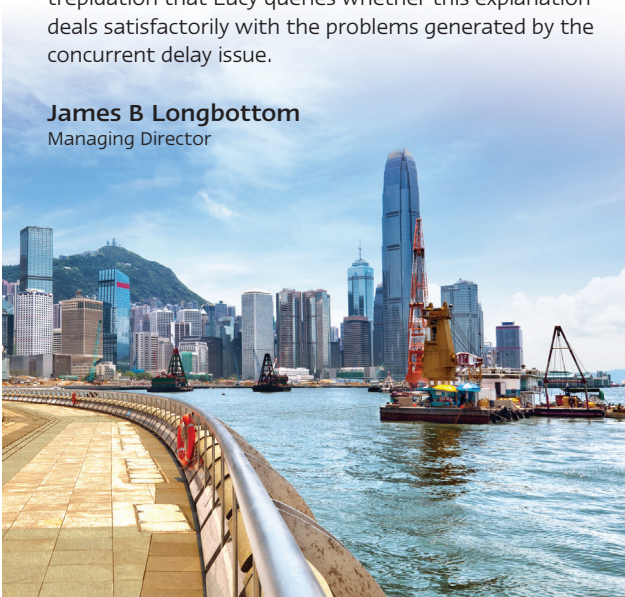
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Welcome

In this edition of the *ADR Digest*, Patrick O'Neill, Director of ADR considers the concept of *Daubert* challenges in the US courts. These challenges allow expert evidence to be tested in advance of any hearing, by the court, to ensure that the evidence is both relevant and reliable. Pat considers if there are any lessons to be learnt for expert witnesses in Hong Kong from such challenges.

We are pleased to have Lucy Garrett, a barrister with Keating Chambers, as our guest writer. Lucy provides a comprehensive review of the authorities on concurrent delay and the effects of the wording in modern contracts. In particular she considers the effects of the prevention principle, which John Marrin QC in his paper *Concurrent Delay Revisited*, used to provide a contractual explanation for the Malmaison approach to concurrent delay. Given John Marrin's status and reputation, it is with some trepidation that Lucy queries whether this explanation deals satisfactorily with the problems generated by the concurrent delay issue.

James B Longbottom
Managing Director



Defending Against *Daubert* Type Challenges as an Expert Witness...



By **Patrick J O'Neill**
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Introduction

Expert witnesses, by virtue of the very nature of them being "experts", have the ability to play a significant and influential role in the outcome of Court trials or arbitration references. In the US, the American Judiciary had, up until the mid 1990s, adopted a fairly relaxed attitude as regards the admissibility of expert evidence. However, all that was to be radically altered in 1993 by virtue of the now infamous case of *Daubert v Merrell Dow Pharmaceuticals Inc.* 509 U.S. 579 (1993). The case was responsible for introducing the concept of pre-trial reliability testing for the admissibility of expert evidence and thus was born what has now become commonly known (in the US at any rate) as the "*Daubert* challenge".

The US Supreme Court's 1993 decision in *Daubert* introduced the concept of the Court playing the role as expert witness "gatekeeper", whereby expert evidence that was proposed to be introduced by a party would be tested, in advance of any hearing, by the Court, in order to ensure that the proposed evidence was both relevant and reliable. Only on having successfully survived a *Daubert* challenge would the evidence then be permitted to be adduced at trial. *Daubert* challenges were originally instigated in order to challenge expert evidence of a scientific nature, however, over the last decade or so, and as a result of subsequent case law, the challenge has gradually been expanded to cover other areas of litigation involving

technical or specialised knowledge, such as environmental, commercial and construction law, and where the Court is requested by either the prosecuting or defending party to determine the admissibility and quality of proposed expert evidence in advance of any trial or hearing actually commencing.

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In broad terms, the *Daubert* challenge requires expert evidence to be subjected to a non-exclusive checklist analysis by the Court as regards the principles and methodology that are proposed to be adopted by the expert, albeit not on the conclusions which the principle or methodology might generate, based on:

- (i) Reliability; whether sound methodologies and accepted protocols are proposed to be adopted by the expert; and
- (ii) Relevance; whether the proposed expert opinion is likely to "fit" the facts of the case and whether it is likely to be helpful to the Judge (or arbitrator).

In Hong Kong, expert evidence may be introduced at trial with leave of the Court or the tribunal. Albeit in a typical construction arbitration, the Arbitrator may set out within his Directions a general outline of what expert evidence he requires to be provided in order to assist him, he thereafter plays no role in acting as a *Daubert*-type "gatekeeper" in assessing whether the experts' proposed methods are likely to be acceptable or even whether the proposed expert evidence is likely to fit the facts of the case. In Hong Kong, the bulk of the expert evidence review is only undertaken at the merits stage of the trial during the actual hearing itself. If the expert opinions are found to be defective, it is during the hearing that these weaknesses or shortcomings will then be exposed, but not as part of any pre-trial investigation.



Notwithstanding the absence in Hong Kong of any formal pre-hearing challenges regarding the reliability and/or relevance of proposed expert evidence, *Daubert* style challenges are nevertheless an interesting concept and there is nothing wrong with an expert implementing ad-hoc *Daubert* style evidentiary screening in order to help ensure the robustness of his expert evidence once it eventually arrives at the trial or hearing. Shoring up *Daubert* style proof in advance of actually preparing and presenting expert evidence to a Court or tribunal can be considered as providing a useful checklist against many of the obvious pitfalls that should be avoided when preparing and presenting such evidence, and which pitfalls have been the subject of numerous *Daubert* challenges as documented in US case law, and which have been played out under the following general headings (amongst others).

Running Conflicts Checks

Running thorough conflict checks is an essential first step for the expert witness and should be one of the initial priority orders of business when an appointment is being considered (or accepted). The last thing that is wanted by either the expert or his instructing solicitor is an opinion being called into question or being diminished as a consequence of some aspect of conflict that exists and which could have, and should have, been dealt with at day one. The RICS publication *Surveyors Acting as Expert Witnesses* provides useful practice statements and guidance notes in dealing with all aspects of potential conflicts and in dealing with how experts should continually monitor themselves for potential conflict of interest matters becoming an issue after the expert appointment. There should be no excuse therefore for conflict of interest matters becoming an issue after the expert has been appointed.

Is the Expert Qualified?

Professional qualifications alone are not the only prerequisite for being able to practice as an expert witness. Technical or other specialist knowledge relevant to the matter in issue is also required. The expert must be competent in the subject matter and, whereas experts may be qualified through knowledge, skill, practical experience, training or, more likely, a combination of these factors, it is nevertheless necessary for the expert to restrict his opinions to matters that are within his area of expertise.

The US Courts are littered with reports of *Daubert* challenges made whereby experts have been found, in fact, not to be qualified for the subject matter at issue. For example:

- *Weitz Co, LLC & MacKenzie House LLC*
An engineer's expert evidence on the interpretation of contract terms was excluded by the Court on the basis that the engineer was considered not qualified to give such evidence.
- *Freeseen Inc & Boart LongYear Co*
Damages expert evidence was called into question on the basis that the quantum expert had no actual experience of calculating lost opportunity damages.
- *United States ex rel. ML Young Construction Corp v Austin Co*
The Plaintiff's consultant expert was questioned on the legitimacy of him providing planning and programming opinions given that he had not actually authored any articles on planning and programming topics.

In essence, whilst the expert opinion must be capable of being considered reliable according to the standards of the experts' particular field of expertise, it must at the same time be

helpful to the tribunal in providing specialist knowledge that is beyond that common to the tribunal itself. In order to be able to provide competent opinion evidence regarding the subject matter that he or she intends to present and in order to avoid potential challenges that the expert is not in fact qualified to give such opinions, the expert should restrict himself to providing expert opinions that are indeed strictly within the scope of his knowledge, skill and/or experience.

Ensuring the Opinion Evidence is Reliable

The extent to which opinion evidence can be said to be "reliable" was, in large part, the reason why *Daubert* style challenges began to become popular from the mid 1990s onwards in the US. Within established fields such as medicine, anatomy and biology, the concept of "junk science" was becoming more prevalent with so called "experts" venturing opinions on specialist areas that were not in fact based on knowledge at all and, given the lack of research and data that was available on such subjects, the evidence was not capable of being sufficiently tested during the trial. This is not necessarily an issue for the construction expert. However, reliability of the opinion evidence provided by the construction expert is nevertheless of the utmost importance.

The term "reliability" must be considered in the wider sense, in terms not just of the opinion itself that is being given, but reliable in terms of the correct application of methods, principles, techniques, and assumptions that are adopted in analysing facts in the light of the expert's experience. The principles, techniques and solutions adopted by the expert must be properly applied to the facts of the case. This sounds obvious – however, the principles, techniques and solutions adopted should be case specific and this is one of the principal gatekeeping functions that the *Daubert* concept sought to ensure, in that the principles and methods proposed to be used by an expert were reviewed by the Court in light of their suitability to the actual case in hand. Since reliability is not a pre-requisite to the admissibility of expert evidence in Hong Kong, unreliable expert evidence will therefore only surface once a Court or tribunal comes to consider what weight is to be attributed to that evidence once it is presented in the trial or hearing and this can only be done once that evidence has been cross-examined. The Court or tribunal, with the assistance of Counsel, will sift out any evidence that is deemed to be unreliable and so it is important that reliability of the opinion, together with the methods by which it has been derived, is maintained as a central theme to the preparation and presentation of the evidence from the very commencement of an expert appointment; and that that expert opinion is the result of reliable and correctly applied methods.

Ensuring the Opinion Evidence is Relevant

As a generalisation, evidence that is relevant is admissible; whereas evidence that is not relevant is inadmissible. What is meant by evidence being "relevant" is that the evidence is helpful to the Court or tribunal in the sense of helping to establish a fact in issue. If the aim of the expert is to present to the Court objective, tested, reliable and admissible expert evidence, then that evidence clearly has to be relevant to the facts in issue.

To assist in ensuring the relevance of the opinion evidence to a given case situation, experts should insist that their instructing solicitors provide clear instructions concerning the issues that the expert is required to give an opinion on. It is important that the expert then restricts his expert opinion to deal with these instructed issues and that he does not wander beyond his or her area of expertise in doing so, or extends beyond the

boundaries of the instructions that have been given. One useful way of cross-checking that the opinions are indeed relevant to the matters in issue and that the expert has confined the opinion to the matters that the expert has been instructed to address, is to structure the written opinion around a formal framework such as that summarised in **Figure 1** below. The framework, if applied and adhered to rigidly, can help to ensure that the opinion follows a logical structure from, firstly, identifying the issues that are required to be addressed, to, lastly, arriving at conclusions and then verifying that those conclusions address, head-on, the issues that were required to be addressed at the outset.

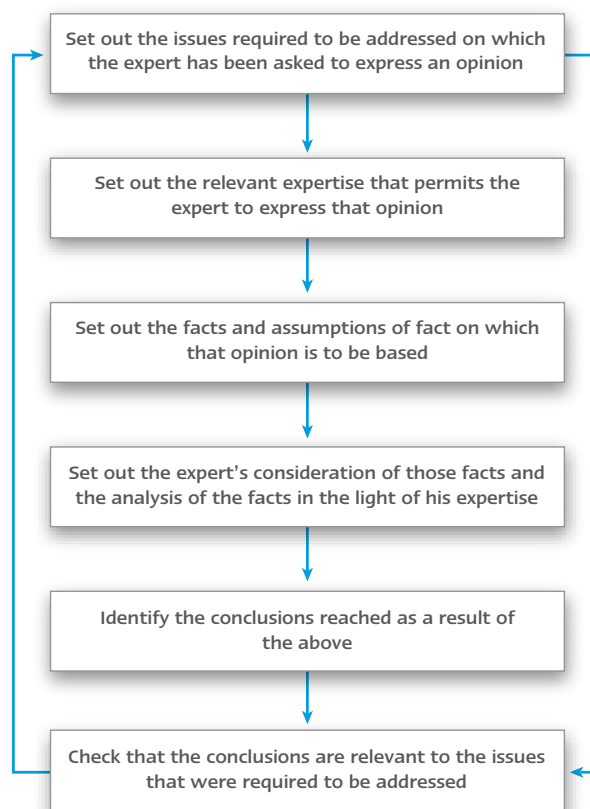


Figure 1: Framework for Written Opinions

Generally, a Court or tribunal is likely to admit all material that is relevant (i.e. material that has probative value) provided that it is material to the issues in dispute, to the facts of the dispute, and provided always that it appears reliable (i.e. credible), particularly, say, when it has the ability to resolve what actually happened in a construction project when there may be a dispute of fact. In the US courts there are numerous reports of successful *Daubert* challenges resulting from expert evidence that has been found not to be relevant to the case at issue, either because the expert opinion was not sufficiently focused on the case at hand, or because the investigations were focused too narrowly.

Maintaining Objectivity

Although the construction expert is retained by one of the parties to a dispute, the expert should nevertheless strive for objectivity and avoid becoming an advocate on behalf of that instructing party. Independence and objectivity are essential qualities on which the expert witnesses' credibility depends and these can very easily be eroded by a failure to maintain objectivity.


In construction case disputes, there is very often little dispute about the primary facts of a case. The real issues are typically concerned with the application of principles and professional practice when applied to those facts; for example, the extent of extension of time entitlement or the quantum of damages suffered and this is where expert opinions can differ substantially. Experts can often face difficulties in the framing of their evidence, particularly when, in good conscience, the results of an analysis does not quite match the hopes or aspirations of the party retaining the expert. The expert should nevertheless maintain his objectivity above all other considerations and biased assumptions, which are a clear indicator of a lack of ability to maintain an objective stance, should be avoided.

Summary

There is no doubt that *Daubert*, together with the subsequent case law that has materialised on the topic of the admissibility of expert evidence has had a profound effect on the treatment

of expert witness evidence in the US courts. The US is a very different disputes arena to that of Hong Kong of course and whereas in the US, factors such as contingency fee arrangements and the like may provide positive incentives to litigate or even to challenge litigation, those same reasoning are not necessarily at play in Hong Kong. Nevertheless, lessons can be learnt from the study of practice and procedure within different judicial systems, and, if nothing else, the *Daubert* challenge concept supports the principle that experts who continue to keep abreast of developments in their expert field, who undergo continued training and who strive to provide reliable, relevant and objective expert opinions, are unlikely to be caught out by the types of issues that are continuing to lead to successful *Daubert* challenges in the US.

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Concurrent Delay in Modern Contracts



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Introduction

Concurrent delay may be common or very rare, but it is without exception argued: it is not therefore possible for either the industry or legal practitioners to ignore it. This article analyses the contractual assistance to be gained from the authorities, reviews the potential effect of the wording of some modern contracts in common use which differ materially from the JCT Form and considers the effect of the prevention principle on the proper construction of the contract.

The Problem

This article will use Mr Marrin QC's definition of concurrent delay from his seminal 2002 article.¹ Concurrent delay is "A period of project overrun which is caused by two or more effective causes of delay of approximately equal causative

potency." On that definition, it follows that we are looking for simultaneously occurring effects not simultaneously occurring causes.²

This raises a causation problem. On common law principles, it is not possible to pass the "but for" test for either cause of delay, because by definition the delay would have occurred in any event absent either cause. In the case of a construction contract, this problem has two aspects: any solution must deal with both the contractor's claim for time and his claim for money.

If it is assumed that the contract has abandoned the "but for" test for both the contractor-risk and the employer-risk delays, a new problem arises. On that scenario, the contractor gets his time and time-related costs, but the employer is also entitled to recover his liquidated damages for the same period of delay. This cannot logically be right and therefore is unlikely to be what the parties intended. This is known as the "obverse problem"³ and the contractual solution must not fall foul of it.

At this point it is useful to look at the particular wording of the JCT Standard Form. Almost all the authorities relate to cases in which that form was used. The relevant wording is as follows (identical in all versions between 1980 and 2011):

*If... any of the events which are stated by the Contractor to be the **cause** of delay is a Relevant Event and the completion of the Works **is likely to be delayed thereby** beyond the Completion Date the Architect shall... give an extension of time by fixing such later date as the Completion Date as he then estimates to be **fair and reasonable**...*
[emphasis added]

Older Authorities

The first case to consider the concurrent delay problem was *Balfour Beatty v Chestermount Properties*.⁴ The dispute in the case was as to whether a "gross" or "net" approach to calculating extensions of time was required by the contract. The gross approach assumed that if an employer risk event occurred one month after the completion date and caused one further month of delay, the contractor would be entitled to a two month extension of time, because he couldn't have completed any earlier. The net approach gave the contractor a one month extension of time on the same facts, because that was the delay in fact caused by the event. Needless to say,

The Hong Kong standard form ... contains no reference to fair or reasonable. It follows that ... it is not possible to justify the *Malmaison* approach by reference to those words.

Colman J held that the net approach was the right one.

This was not therefore a concurrent delay case on the facts but Colman J had this to say about the concurrent delay problem [page 34]:

"Before leaving this issue it is right to add that the application of the 'net' method to relevant events occurring within the period of a culpable delay may give rise to particular problems of causation. These were discussed at some length in the course of the argument. In each case it is for the architect exercising his powers under clause 25.3.3 to decide whether an adjustment of the completion date is fair and reasonable having regard to the incidence of relevant events." [emphasis added]

It will be seen from the highlighted phrase that as a matter of contractual justification for the conclusion, Colman J placed reliance on a wide discretion given to the architect under a JCT Form by the words "fair and reasonable" in the clause. This has been hugely influential on both the industry's approach on site and commentaries on the problem.

The next case to consider the point was *Henry Boot v Malmaison*.⁵ *Malmaison* is usually regarded as authority for the principle that in a concurrent delay situation the contractor can obtain an extension of time but cannot recover any time-related costs.

Malmaison was decided by Dyson J (as he then was). It is therefore unsurprising that it is treated as an authoritative decision. The issue in the case was whether an architect assessing extensions of time under the 1980 JCT Form was permitted to have regard to both the occurrence of Relevant Events and the overall context of the progress of the works as a whole or only at the effect of the Relevant Events. It was argued by the contractor that the latter was the case and that therefore the employer could only advance a purely defensive case in the arbitration (for example that the events relied on were not Relevant Events) and could not advance a positive case (for example that contractor-risk events had occurred and caused the delay to completion). Dyson J did not have any difficulty in finding for the employer (based on the "fair and reasonable" phrase in the clause).

It will be appreciated that, once again, this was not a concurrent delay case. However, at paragraph 13 of the judgement, Dyson J said:

"...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." [emphasis added]

The *Malmaison* judgment, so far as it relates to concurrent delay, is therefore merely the record of a concession (the learned judge makes no comment on it) which was not relevant at all to the decision in the case itself.

City Inn

The next interesting case is *City Inn Ltd v Shepherd Construction*.⁶ The contract in question was the JCT 1980 again. The judge at first instance and the Inner House of the Court of Session placed heavy weight on the "fair and reasonable" wording. On appeal, the majority found that apportionment was the correct solution to the concurrent delay problem.⁷ Lord Carloway dissented on the issue of

apportionment, and it is this judgment which is most interesting from the perspective of this article.

Lord Carloway argues that the "fair and reasonable" discretion in clause 25 is limited to the period of the extension of time. There is no such discretion in relation to establishing the causation of delay by a relevant event (which is required by the first part of the clause). Commenting on Colman J's opinion in *Balfour Beatty* quoted above, he said:

"... that is not what the clause says. The exercise for the architect... is, first, to determine whether there is likely to be, or was, delay in the completion date caused by a relevant event and, secondly, to fix such later date as he considers to be "fair and reasonable."

"... The words "fair and reasonable" in the clause are not related to the determination of whether a Relevant Event has caused the delay in the Completion Date, but to the exercise of fixing a new date once causation is already determined." [emphasis added]

It is difficult to see why this construction is wrong. It appears that it has been accepted by authoritative commentators: John Marrin QC does not rely on the "fair and reasonable" wording to support the *Malmaison* approach in *Concurrent Delay Revisited*⁸ and Mr Justice Ramsey (discussing *City Inn* in 2011⁹) said:

"The basis for assessing extension of time starts with a breach or event which causes delay. It is that delay which has to be assessed to give a "fair and reasonable" extension of time."

This has some controversial implications for the conventional approach to concurrent delay, which has since *Balfour Beatty* placed great weight on the wide discretion conferred on the architect. If the "fair and reasonable" discretion is limited to the period of the extension of time, is the concession in *Malmaison* correct? Further, if that discretion does not apply to the causation requirement, on what contractual basis does the contractor succeed where there is concurrent delay?

Other Standard Forms

At this point it is interesting to look at some other standard forms of contract in common use internationally. The wording in these contracts is different to the JCT Form. In the SIA clause 23(1) provides for an extension "until such further dates as may reasonably reflect any delay in completion." The Hong Kong standard form is based on the 1963 JCT Standard Form but clause 25.3 contains no reference to fair or reasonable. Similarly, the FIDIC Red Book (clause 8.4) and NEC3 (clause 63.3) omit any reference to fairness or reasonableness and simply require an extension for the delay caused by the event. It follows that whether or not Lord Carloway is right, in these contracts it is not possible to justify the *Malmaison* approach by reference to those words.

Recent Authorities

There have been several recent cases in the UK dealing with concurrent delay. These are *Adyard Abu Dhabi v SD Marine Services*¹⁰, *De Beers UK Ltd v Atos Origin IT Services*¹¹ and *Walter Lilly & Co Ltd v Mackay*.¹²

Adyard was a shipbuilding case relating to two contracts on the Shipbuilder's Association of Japan standard form with

bespoke amendments. The contracts provided an extension where delays were "caused by" default or "Permissible Delay". There is no reference to "fair and reasonable" in the clause. Hamblen J accepted the *Malmaison* approach¹³ and stated:

"As set out above, the English law authorities in relation to extensions of time under the JCT form **and similar contracts** are clear that it must be established that the relevant event is at least a concurrent cause of actual delay to the progress of the works." [emphasis added]

The relevance of this is that Hamblen J was treating contracts such as the SAJ as similar to traditional construction contracts such as the JCT. It is suggested that this is obviously correct as to the overall scheme of such contracts, but that the difference in wording of the specific clause is potentially material.

The decision in *Walter Lilly* has attracted a lot of attention. The contract was the JCT Form (again). In that case, the debate was between the English approach (*Malmaison*) and the Scottish apportionment approach (*City Inn*). Neither party argued that there was any other contractual alternative result. The discussion in judgment has to be understood in that context and (once again) in the light of the judge's finding that there was no concurrent delay on the facts in any event.

In *Walter Lilly*, Akenhead J considers *Malmaison* and acknowledges that Dyson J records a concession.¹⁴ The learned judge suggests that it is possible to discern some implied approval of that concession in the judgment. This is respectfully disputed. The judgment goes on to cite *De Beers* which recites the orthodox position (but contains no discussion of the point at all) and cites *Adyard* as approving the *Malmaison* concession as good law (which is correct, but obiter).

However, all this goes to the conclusion that *Malmaison* is to be preferred to an apportionment solution. No contractual reason is given as to why the *Malmaison* approach is correct. For this reason, *Walter Lilly* is primarily helpful on the Court's approach to global claims. It does not add anything new to the debate on concurrent delay.

Effect of the Prevention Principle

Following these recent cases, John Marrin QC has published *Concurrent Delay Revisited* (on the ten year anniversary of his influential 2002 article). Mr Marrin suggests that the prevention principle assists in providing the contractual explanation for the *Malmaison* approach (which is missing from all the authorities). Given that construction lawyers can usefully solve most of their problems by asking themselves: "what would John Marrin do?", it is with some trepidation that this article queries whether that explanation does in fact deal satisfactorily with all the problems generated by the concurrent delay issue.

The prevention principle states that if the employer prevents completion of the works by the completion date, he cannot rely on his liquidated damages clause (time is usually considered to be at large¹⁵). Contractually legitimate actions such as instructing a variation can be an act of prevention. However, if the contract includes an extension of time clause dealing with the relevant act, then prevention principle does not apply and the contractual scheme takes over.

Mr Marrin's argument has three main planks.¹⁶ First, that the prevention principle does not require "but for" causation so that if the employer commits an act of prevention, time is put at large even if the contractor would always have finished late (because the delays are concurrent).¹⁷ Second, that unless the

... the law as to concurrent delay remains difficult and unclear despite the series of recent decisions.

Malmaison approach is taken to delay claims, the extension of time clause cannot be said to deal with the relevant act of prevention, so the prevention principle would operate to put time at large every time there was concurrent delay. Since the courts will construe a contract so that it works where possible, a construction which leads to this result is unlikely to be the right one.¹⁸ Third, Mr Marrin points out that a combination of the *Malmaison* approach to delay and a "but for" test for time-related money solves the obverse problem.¹⁹

It is respectfully suggested that a number of points arise on this analysis.

First, not all delay claims are based on an act of prevention. Many contracts include grounds for a contractual extension of time such as weather or ground conditions which could never be acts of prevention. The prevention principle cannot justify the *Malmaison* approach in relation to these grounds, and there is no contractual reason to suppose that the approach to concurrent delay should be different where the employer-risk event relied on is weather as opposed to (for example) a variation instruction.

Second, *Concurrent Delay Revisited* concludes that the prevention principle does not require "but for" causation. The relevance of this is that if it did, it would simply have no application in a concurrent delay scenario because the delay caused to the completion date would of course have occurred in any event. Mr Marrin discusses *Adyard* and *Jerram Faulkus v Fenice*²⁰, in which it was held that the prevention principle did require "but for" causation, and refers to *SMK Cabinets v Hilli*²¹ in which the Australian court held in terms that it did not.

SMK Cabinets is an interesting decision because, on analysis, it may not in fact be a concurrent delay case itself and the previous decisions cited by the court are almost certainly not concurrent delay cases. This is the reason that Mr Justice Coulson came to the conclusion he did in *Jerram Faulkus*. It follows therefore that (as so often in relation to concurrent delay) the law is unclear.

Assuming that *SMK Cabinets* is correct, the third point is whether the inclusion of an extension of time clause in the contract can by itself represent a decision to contract out of the prevention principle. *Concurrent Delay Revisited* assumes that it cannot; that some further express wording is required. However, this surely depends on the meaning of the extension of time clause on its proper construction: if the clause says that the contractor gets an extension of time for (say) variations unless there is concurrent delay, then the parties have already agreed what will happen in those circumstances and the prevention principle has no application.

Contractual Tension

This is of course the very question (what does the extension of time clause actually require in causation terms in a concurrent delay scenario?) which remains unanswered in the authorities

and which is not at all obvious on the face of the clauses in most of the standard forms.

This point gains in force when considered in the context of the standard clauses which deal with the recovery of time-related money. In the standard forms in common use, the contract simply provides that the contractor may recover the time-related costs caused by the event relied on.

It therefore appears on the face of the clause that a simple causation test is required for the recovery of money (and that it therefore attracts a "but for" test). It is not at all clear why the test for recovery for time should be different: it appears to be exactly the same. In other words, there is no obvious contractual basis for differentiating between the recovery of time and money, whether as a matter of the prevention principle or at all.

The conclusion of this discussion is, perhaps, simply that the law as to concurrent delay remains difficult and unclear despite the series of recent decisions. If the right approach to the issue of concurrent delay under a construction contract is one primarily of contractual interpretation, there are a number of arguments available:

- a) on differently worded contracts;
- b) on the JCT Form on the basis of Lord Carloway's dissenting judgment; and
- c) on the basis of the prevention principle.

The key issue will remain the precise nature of the causation requirement in the time and money clauses: there is no obvious solution.

For further information contact:

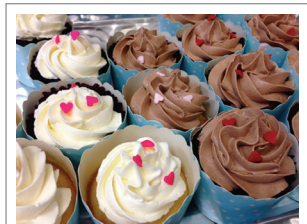
 lgarrett@keatingchambers.com

Footnotes:

1. Concurrent delay (2002) 18 Const LJ 436. Approved in *City Inn Ltd v Shepherd Construction Ltd* [2010] BLR.
2. Although there is an interesting debate to be had (outside the scope of this article) as the force of the argument which says that the event that occurs first in time is the one which is causative of the delay.
3. Coined by Sir Anthony May in the 5th Edition of *Keating on Building Contracts* in 1991.
4. [1993] 62 BLR 1 (Comm Ct).
5. (1993) 70 Con LR 32 (TCC).
6. [2010] BLR 473.
7. In Scotland, apportionment is now the law. In the UAE, Article 290 of the UAE Civil Code expressly requires it. In England, it has been repeatedly rejected. In Hong Kong, there was very tentative acceptance in *Hing Construction v Boost Investments* [2009] 1 H Ct HK, but it is thought the question remains open in this jurisdiction.
8. SCL Paper 179, February 2013.
9. "Claims for Delay & Disruption: the impact of City Inn" (an address to the Technology and Construction Court Bar Association Conference 2011).
10. [2011] BLR 384 (Comm Ct).
11. [2011] BLR 274 (TCC).
12. [2012] BLR 503 (TCC).
13. The shipyard argued that there was no relevant extension of time clause at all (on the basis that Permissible Delay did not include employer variations) so that the prevention principle disabled employer from relying on the termination clause, and only relied on clause 3.3 for a contractual extension of time in the alternative. *Adyard* is therefore primarily a prevention principle case, not a delay case, so Hamblen J's comments are obiter.
14. This is in itself unusual: most commentators omit this.
15. Although see Mr Justice Ramsey's paper *Prevention, Liquidation and Time at Large* given to the SCL on 3 April 2012.
16. Necessarily greatly shortened and summarised here: readers are referred to the full text of the article.
17. See pages 4 to 7.
18. See pages 15 to 17.
19. See pages 17 to 19.
20. [2011] BLR 644.
21. [1984] VR 391.

ADR | News

Birthdays With Love, Ma On Shan - 25th May 2013



On 25th May 2013, ADR was pleased to sponsor a birthday party held by Birthdays With Love for around nine youngsters and their friends and family in Ma On Shan. Birthdays With Love is a non-profit making organization (currently seeking charitable status) which provides birthday parties for underprivileged children in Hong Kong.

More information about their work can be found on Facebook: <https://www.facebook.com/pages/Birthdays-With-Love/276571995812819>.

Personal Data Privacy Ordinance

We are sure that you have already received numerous alerts informing you that amendments to the Personal Data Privacy Ordinance took effect in Hong Kong on 1st April 2013.

We use your personal data (such as your name, company address and email) to send you, inter alia, the *ADR Digest* and invitations to events that may be of interest to you. We hope that you find this material useful and informative. If you do not wish to continue receiving this material from us, simply advise us accordingly on info@adrpartnership.com.

ADR Annual Cocktails, China Club – 6th June 2013



ADR | Diary

Forthcoming Events 2013

4 Sep Britcham Breakfast Briefing: Very Tall & Very Cool Projects – Wilkinson Eyre Architects, The Hong Kong Club

13 Sep Lighthouse Club Annual Contractor's Dinner, City Hall Maxims Palace

13 Sep Britcham Annual Ball, The Grand Hyatt Hotel

18 Sep Lighthouse Club Seminar: Legal Matters of Interest to the Construction Industry, Hong Kong Convention & Exhibition Centre

19 Oct Britcham Breakthrough Boxing, The Hong Kong Football Club

8 Nov Lighthouse Club Annual Dinner, Hong Kong Convention & Exhibition Centre

27 Nov Lighthouse Club Annual Golf Dinner, Kau Sau Chau Golf Course

Based in Hong Kong, ADR Partnership Limited is a dynamic practice of construction professionals providing specialist commercial and contractual services to the construction industry.

If you would like to discuss any of the articles published in this Digest or your project requirements, please contact James Longbottom, Patrick O'Neill or David Longbottom at ADR Partnership Limited on **(852) 2234 5228** or e-mail us at info@adrpartnership.com

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