1. The differing tests of causation in claims for:
   a. Extension of time.
   b. Loss and expense.
   c. Damages (contract).
   d. Damages (negligence).

2. Categories of claim:
   a. Entitlement to (i) money and/or (ii) time under the contract.
   b. Claim for an indemnity under a contract.
   c. Damages for breach of contract.
   d. No reason in principle why the appropriate tests for causation should be the same (or necessarily differ) as between any of these claims.

   a. Causation in fact.
   b. Causation in law:
      i. Remoteness;
      ii. Scope of duty/Purpose of the rule of law creating liability.
   c. ‘But for’ test.
   d. All or nothing approach.
   e. Common sense?
   f. Scope/purpose of the contractual duty.

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1 An update of a paper delivered at the HKIAC in May 2013.
g. In order to establish “causation in fact” it is still normally a (necessary but not sufficient) requirement in the law of contract that the “but for” test can be satisfied;

h. The principles of causation in contract usually operate in an “all or nothing way”, save where a statutory basis for apportionment on the basis of respective fault applies;

i. Although reference is often made to causation in law being based upon the application of “common sense”, such an approach is too imprecise and may be misleading.

4. Causation – claims for damages for breach of contract – “scope of duty” and “purpose of the rule of law” creating liability


“Before answering questions about causation, it is therefore first necessary to identify the scope of the relevant rule [which imposes liability/responsibility]. This is not a question of common sense fact; it is a question of law”.

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

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

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

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

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


d. The purported application of common sense may disguise the importance of first assessing the “scope and purpose of the rule of law” on which liability is based before considering whether a postulated loss has been caused in a legal sense by the matter relied upon.

e. For more of Lord Hoffmann on the rising importance of the ‘scope or purpose of the duty’ in contract cases, see ‘The Achilleas: Custom and Practice or Foreseeability?’ (2010) 14 Edinburgh LR 47.


g. Relevance of this principle to claims under a building contract?

5. Causation – claims for damages for breach of contract – exceptions to the ‘but for test’


“...As a general rule the ‘but for test’ is a necessary condition for establishing causation in fact. However, there may be cases in which fairness and reasonableness require that it should not be a necessary condition. This is most likely to be in the context of negligence or conversion claims, but I would accept that in principle it is not limited to tort or to particular torts. I would also accept that a case in which there are two concurrent independent causes of a loss, with the consequence that the application of the ‘but for’ test would mean that there is no cause of the loss, is potentially an example of a case in which fairness and reasonableness would require that the ‘but for’ test should not be a necessary condition of causation, particularly where two wrongdoers are involved. However, whether or not that is so will depend on all the circumstances of the particular case....” (my emphasis).

b. A further example would be where 2 causes cooperate to create an effective cause of loss.

c. There may be, at least in principle, exceptional circumstances where fairness and reasonableness also permit recovery where the test has not been satisfied.


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a. Concurrent causes – separate defendants.

b. Concurrent causes – claimant and defendant.

c. Possible answers to (b):

   i. But for – no one wins?
   ii. Dominant cause wins?
   iii. Apportionment – split the winnings?

d. Two or more concurrent independent causes of loss which are the responsibility of separate defendants: a claimant need only show that an individual defendant/cause was “an” effective contributory cause of the loss in order to recover damages in full from either defendant in respect of the same.

e. Each concurrent cause need only be of approximately equal efficacy for this principle to apply.

f. Two or more concurrent independent causes of loss which are the responsibility of claimant and defendant? Position not clear.

g. The proposition that no party should succeed because neither can satisfy the “but for” test, although a logical outcome on one view, in claims for damages is often considered unattractive or sometimes even described as “patently absurd”. But query whether this would be absurd to claims under the contract (see below).

h. Further, the application of the “dominant cause” test to a claim for damages in these circumstances is not supported by authority, save in insurance cases, and there is no reason to assume it is of general application.

i. Finally, the apportionment approach, although adopted in certain contract cases, is not considered to be of general application.

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6 See Chitty on Contracts (30th edn.) Volume 1 at paragraph 26-041, first sentence, which refers to Heskell v Continental Express Ltd [1950] 1 All E.R. 1033 and Banque Keyser Ullmann v Skandia [1990] QB 665 in support of this proposition.

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

8 See Clerk and Lindsell on Torts, 20th edn, at paragraph 2-72.

9 Although reference could be made to the dicta of Croom Johnson LJ in Tennant Radiant Heat Limited v Warrington Development Corporation (1988) Con. L.J. 321 at 324 – but it should be noted that in that case the Court of Appeal decided the case on the basis of an unusual “contractual apportionment” between the claimant/defendant.
7. Causation – claims for damages for breach of contract – concurrent independent causes of loss - claimant and defendant – apportionment

a. An apparent answer:
   i. *Tennant Radiant Heat Ltd v Warrington Development Corp* [1988]
   ii. *W Lamb Ltd v J. Jarvis & Sons Plc* [1998]

b. But now considered to be of doubtful general application:
   i. *Hi-Lite Electrical Ltd v Wolseley UK Ltd* [2011]

c. *Tennant Radiant Heat Ltd v Warrington Development Corp* [1988] 1 EGLR 41; (1988) 11 EG 71 (CA): apportionment on causation grounds in the context of a landlord and tenant dispute over damage caused by the collapse of a warehouse roof; per Croom Johnson LJ “where one is dealing with two contemporaneous causes, each springing from the breach of a legal duty but operating in unequal proportions, the solution should be to assess the recoverable damages for both on the basis of causation”; note the limitation that this approach is to be limited to situations where the contemporaneous causes each flow from breach of a legal duty.

d. *W Lamb Ltd v J. Jarvis & Sons Plc* (1998) 60 Con. L.R. 1: adopted a similar approach in the context of leaking pipes said to be the joint responsibility of the claimant sub-contractor and defendant main contractor and in which it was held that there was no rule of law preventing apportionment in such circumstances.

e. *Hi-Lite Electrical Ltd v Wolseley UK Ltd* [2011] EWHC 2153 (TCC), [2010] B.L.R. 225: the *Tennant* decision was held to be a decision on its own facts and distinguishable, that the apparent application and extension of the *Tennant* decision in *Lamb* was not justified and that, absent a right of contribution under the Law Reform (Contributory Negligence) Act 1945\(^\text{10}\), there is no general ability to apportion damages between parties and that to the extent that City Inn\(^\text{11}\) decided otherwise that it did not represent the current position in English law.

f. Thus, there is some English Court of Appeal authority adopting a similar approach to apportionment in certain circumstances in claims for damages. But, the correctness of the decision in *Tennant Radiant Heat* has been doubted: probably now best seen now as an authority limited to its own facts.

8. Causation – summary - claims for damages for breach of contract:

\(^\text{10}\) See the statement of principle per Beldam LJ in *Barclays Bank Plc v Fairclough Building Ltd* [1995] Q.B. 214 at p.230.

a. ‘But for’ test normally has to be satisfied.

b. Only ‘Effective’ causes are relevant.

c. Effective can mean something less than ‘of equal causative potency’ with other cause(s).

d. Where C and D are responsible for the competing causes, the dominant cause test is not established to be of general application.

e. Apportionment on basis of causation is not generally available (absent availability of contributory negligence as a defence).

9. Causation – summary - claims for damages in negligence

a. In the tort of negligence, the position is more settled and straightforward.

b. To be effective a cause must only materially contribute to the loss

c. ‘But for’ test applied less strictly

d. Causation issue as between C and D does not arise (due to availability of contributory negligence as a defence)

e. If there are two or more causes of a loss, one of which is a defendant’s responsibility and the other not the claimant’s, the claimant is entitled to recover damages in full against the defendant as long as that cause materially contributed to the loss.  

f. The applicability of the ‘but for’ test is less strict and subject to more exceptions than in the context of liability in contract.

g. In certain circumstances a ‘contributory cause’ does not have to be capable in itself of causing the whole injury complained of, so long as it ‘materially contributed’ to the same.

h. The “but for” test can be too restrictive and is departed from in unusual tort cases.

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

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

14 See McGhee v National Coal Board [1973] SC 37 at 53, HL and IBA v EMI and others [1980] 14 B.L.R. 1, HL. Although it is not clear that the IBA v EMI case is even really authority for this proposition in a non-personal injury situation.
i. But this is not a general rule: it represents one of the exceptions to the normal requirement to satisfy the ‘but for’ test\(^\text{16}\) and is limited to cases where there is only one possible cause or agent of loss\(^\text{17}\).

j. If one of the causes of the loss is the claimant’s responsibility, then the claim will fall to be reduced to reflect any contributory negligence.

10. Causation – claims under the contract

a. See, for example, clause 26.1 of the JCT Standard Form of Building Contract (1998 edn) which states [in respect of money claims]:

“If the Contractor makes written application...stating that he has incurred or is likely to incur direct loss and expense...because the regular progress of the Works or any part thereof has been or is likely to be materially affected by any one or more of the matters referred to in clause 26.2...” (Emphasis provided.)\(^\text{18}\)

b. Or clause 24 of the HK Standard Form of Building Contract (RICS) (1986 edn):

“If upon written application being made to him by the Main Contractor the Architect is of the opinion that the Main Contractor has been involved in direct loss and/or expense.....by reason of the regular progress of the Works or of any part thereof having been materially affected by......”

c. Express terms usually make the precise causation requirements unclear [both in UK and HK standard form contracts].

d. See also HK Government’s General Conditions of Contract for Civil Engineering Works (1999) at clauses 50 (time) and 63 (money).

11. And in relation to time:

a. See, for an example of an extension of time clause, 25.3.1 of the JCT Standard Form of Building Contract (1998 edn) which states:

\(^{15}\) See *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 A.C. 883 per Lord Nicholls at [73-74].

\(^{16}\) Although *Chester v Afshar* [2005] 1 A.C. 134 probably extended this further in the context of medical negligence cases – but this authority is not thought to be of general application (see McGregor on Damages (18th edn) at para. 6-027).

\(^{17}\) See McGregor on Damages (18th edn) at para. 6-020.

\(^{18}\) See also the similar wording in clause 4.23 of the JCT SFC 2005.
“If, in the opinion of the Architect/the Contract Administrator...any of the events which are stated by the Contractor to be the cause of delay is a Relevant Event and...the completion of the Works is likely to be delayed thereby beyond the Completion Date, the Architect/Contract Administrator shall in writing to the Contractor give an extension of time by fixing such later date as the Completion Date as he then estimates to be fair and reasonable...” (Emphasis provided.)

b. Or clause 24 of the HK Standard Form of Building Contract (RICS) (1986 edn):

“...if in the opinion of the Architect the completion of the Works is likely to be or has been delayed beyond the Date for Completion...by reason of...the Architect shall...make in writing a fair and reasonable extension of time...”

c. The starting point for the consideration of any extension of time or loss and expense claim should be the express terms of the building contract.

d. This is part of the agreed scheme of risk allocation under the contract.

e. Operation of the relevant provisions depends upon the proper interpretation of the express words used: no necessary or automatic relevance of common law concepts of causation

f. Typically, however, the express terms of the contract do not contain a clear explanation of how the assessment of any such entitlement should be conducted and in particular the applicable test of causation.

g. As a result the person making the assessment of entitlement under the contract is often left in some doubt as to how to act and what conclusions to draw.

12. HK General Conditions of Contract for Civil Engineering Works:
   a. Time: clause 50:

“(1)a) As soon as practicable but in any event within 28 days after the cause of any delay to the progress of the Works or any Section thereof has arisen…”

I(b)…then the Engineer shall within a reasonable time consider whether the Contractor is fairly entitled to an extension of time for the completion of the Works or any Section thereof…”

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19 See also the similar wording in clause 2.28 of the JCT SFC 2005.
b. Money: clause 63:

“….the Contractor has been or is likely to be involved in expenditure….by reason of the progress of the Works or any part thereof having been materially affected by….”

13. Causation - extension of time clauses - introduction

a. Represents an agreed mechanism to adjust the completion date in defined circumstances.

b. Benefit for both contracting parties.

c. Requires critical delay to be established.


e. ‘Concurrent causes’ do.

f. The key point is that EOT clauses are intended to be for the benefit of both employer and contractor (potentially a matter of some importance for a purposive construction of the causation test required to be satisfied).

g. Usually requires the contractor to show critical delay to completion date for the works due to a relevant event

h. Ultimately, an understanding of the operation of the clause (including any requirement to show causation) depends upon its proper interpretation

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

j. Difficulties arise, however, where (as is often the case in major projects) the claims for delay are based on a number of events or where the alleged claim is presented either entirely or in part on a global basis.

k. Where there are two concurrent independent causes of delay/loss, one the responsibility of the employer but the other that of the contractor, the position is most difficult.

14. Causation – extension of time claims - meaning of ‘concurrent delay’

a. Concurrent delay = delay caused by two or more events
b. JCT contracts do not expressly state how concurrent causes of delay are to be treated.

c. Concurrent delay has been defined more precisely as a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency.\(^{20}\)

d. But is this too restrictive?

e. It is only necessary to retain such a definition if it is assumed that the dominant cause test is the starting point and to be applied as the first level of the causation assessment.

f. But can the ‘dominant cause’ approach survive the rise of the Malmaison approach?

g. There is only true concurrency in the sense at (c) above where both events cause delay to the progress of the works and the delaying effect of the two events is felt at the same time.

h. Traditionally, it is normally considered that only in exceptional factual situations is true concurrency of this kind likely to occur.\(^{21}\)

i. But why should that be so – especially in complex building projects?

j. And what does “approximately equal causative potency” actually mean?

k. This definition of concurrency was born in an era when the ‘dominant cause’ test was widely accepted to prevail where there were competing causes of delay/loss and was provided in an attempt to steer the industry away from the dominant cause approach.

l. But if there are two competing causes each of which would have caused a given delay had they occurred by themselves, shouldn’t they always be considered ‘concurrent causes’ with sufficient causative potency to trigger entitlement to relief (by analogy with the position in law for damages claims – see Heskell above)?

m. However, the even narrower definition of concurrency, requiring both the timing of the events relied upon and their delaying effect to coincide,\(^{22}\) is on any view too limited.

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\(^{21}\) See the article Concurrent Delay by John Marrin QC (2002) 18 Const LJ No 6, 436; Bailey on Construction Law at Volume 2, paragraph 11.70.

\(^{22}\) See the definition of concurrency in Appendix A of the SCL Delay and Disruption Protocol and The Royal Brompton Hospital NHS Trust v Hammond (2001) 76 Con. L.R. 148 per HHJ Seymour QC at [31].
n. Further, it is always necessary to distinguish between cases involving truly concurrent causes of loss and cases which, upon proper factual analysis, involve sequential or separate aspects of loss attributable to the various competing “causes”.

o. In such a situation, it is still necessary for the claimant to satisfy the orthodox “but for” test of causation and to determine which part of the claimed loss is attributable to each cause.23


15. Causation – extension of time clauses - concurrent causes – the appropriate test of causation

a. No rule of law as to which should apply.

b. Ultimately a matter of construction of the contract.

c. Therefore could be anything; but to date the main competing causation tests:

   i. Dominant cause;
   ii. Malmaison approach;
   iii. Apportionment.

16. Causation – extension of time clauses - concurrent causes - the dominant cause approach - summary

a. This approach held sway during the 1980s and 1990s.

b. The dominant cause test:

   “If there are two causes, one the contractual responsibility of the Defendant and the other the contractual responsibility of the Plaintiff, the Plaintiff succeeds if he establishes that the cause for which the Defendant is responsible is the effective, dominant cause. Which cause is dominant is a question of fact, which is not solved by the mere point of order in time, but is to be decided by applying common sense standards” (see Keating on Building Contracts (5th ed, 1991), p195).

   c. The rationale for this approach was therefore based upon (i) the intention of the parties and a proper interpretation of the relevant terms of the contract (to the effect that the parties must

23 See for example the approach taken by HHJ Seymour QC in Freemans Plc v Park Street Properties Ltd [2002] 2 P&CR 30 at [71-73].
have intended that any delay should be attributed by the contract administrator to only one cause), and (ii) an analogy drawn with the common law insurance cases referred to above.

d. The need for this analysis was also justified by the supposed conundrum of the "obverse problem": that both the contractor and employer cannot be allowed (by whatever causation test is applied) to both win their money claims (one for loss/expense and the other for LADs).

e. It is clear that in the case of a single cause of alleged delay the contractor must show causation in the sense that on the balance of probabilities the relevant matter relied upon was the “dominant or effective” cause of the postulated delay/loss.

f. Where there are competing causes, however, under the “dominant cause” approach the assessment of which of the competing causes should be taken as “dominant” falls to be considered by reference to the comparative “potency of the causative events” by applying “common sense”.

g. It is a shame Lord Hoffmann never had a chance to consider this approach!

17. Causation – extension of time clauses - concurrent causes - the dominant cause approach – problems in application

a. What if there are 2 concurrent causes of delay of equal potency?

b. Inconsistent with but for test.

c. Why should parties be taken to have agreed to apply it (especially given that no such general; rule at law in damages claims and in light of the Malmaison approach)?

d. No clear legal authority applying this approach; but there is authority not following it.

e. Clearly this approach does not resolve the problem where there is no one dominant cause (i.e. where there are ‘concurrent causes’ as defined above – of equal causative potency).

f. Furthermore, the dominant cause test appears to be inconsistent with the “but for” test since there is no need to identify a “dominant” cause unless there was some other cause of the delay/loss which, but for the dominant cause, would have resulted in the same delay/loss.

g. Thus, notwithstanding the fact that the claimed delay would have been incurred anyway, under the dominant cause test the contractor would become entitled to recover further

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24 Thereby reflecting an application of the normal test of causation in the law of contract where there is a single alleged cause of the loss. See Chitty (30th edn) Volume 1 at para. 26-042.
extension of time/payment as long as the employer risk event is construed as the dominant of the competing causes.

h. Further, although the dominant (or proximate) cause approach to causation is well established in the law of insurance contracts and, in principle, could be of wider application in other contractual situations, there would not appear to be any compelling reason why this should be taken to be of general application under construction contracts (certainly absent authority to this effect).

i. For an authority refusing to follow the dominant cause approach in an EOT claim, see H. Fairweather & Co Ltd v London Borough of Wandsworth (1987) 39 BLR 106).

j. There is Scottish authority, albeit only obiter dicta, to the effect that the dominant cause approach should apply to loss and expense claims under the JCT form (see Laing Management v John Doyle [2004] BLR 295 at paragraphs 14-15) and extension of time claims (see City Inn [2010] BLR 473 at paragraph 42).

18. Causation – extension of time clauses - concurrent causes - the Malmaison approach

a. So named after the decision in Henry Boot Construction (UK) Ltd v Malmaison Hotel\(^25\).

b. Per Dyson J:

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

c. This represents the now generally accepted approach to resolving issues of true concurrency in the context of extension of time claims (at least in the JCT form/wording)\(^26\).

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\(^{25}\) (1999) 70 Con. L.R. 32.

\(^{26}\) As confirmed in Walter Lilly & Co Ltd v Mackay & DMW Ltd [2012] EWHC 1773 per Akenhead J at paragraphs 362-370 and also in Greenwich Millennium Village Ltd v Essex Services Group Plc [2013] EWHC 3059 (TCC) per Coulson J at paragraph 176.
d. The rationale supporting this approach is that on a proper construction of the relevant clause the parties may be taken to have agreed that despite of any period of delay being attributable to more than one cause, as long as one of those causes qualifies for relief an extension of time should be awarded.

e. On the face of things, however, it is not clear why such reasoning should only permit truly concurrent causes to trigger entitlement – why shouldn’t a cause which has less than equal causative potency quality, as long it is at least an effective cause of the delay?

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

19. Causation – extension of time clauses - concurrent causes – problems with the current consensus

a. Current ‘consensus’ under JCT contract wording: dominant cause test + Malmaison approach applies where ‘John Marrin concurrency’ occurs (see, for example, Hudson (12th edn) at paragraph 6-061).

b. But, (i) no clear authority on this point, (ii) the correct approach is ultimately a matter of construction of particular provision, and (iii) no reason why a universal approach/test should apply.

c. Further:

   i. What qualifies as a ‘concurrent delay’ event triggering the looser Malmaison test?
   
   ii. Why does it have to be a ‘John Marrin concurrency’ event as defined above (i.e. of equal causative potency)?
   
   iii. What does ‘equal causative potency’ actually mean in this context?

   d. Is it logical to combine the dominant cause and Malmaison tests in some kind of ‘universal rule’?

   e. Does the Malmaison approach sit with the dominant cause approach (only applying when there is true concurrency between events of equal causative potency) or will it apply whenever there can be said to be 2 ‘effective’ causes of delay in a looser sense?

   f. Probably not: the Malmaison approach proceeds on the premise that the parties’ intended that there would be no need to choose between competing causes of delay; whereas the ‘dominant
cause’ approach rests on the presumed intention of the parties to agree that there cannot be more than one cause of delay for the operation of the clause.

g. In practice, in any event, the latter is increasingly understood to be the position and the Malmaison approach has, in effect, replaced the ‘dominant cause’ approach in such cases.

20. Causation – extension of time clauses - concurrent causes – what about apportionment?

a. In City Inn Ltd v Shepherd Construction Ltd both the Outer\textsuperscript{27} and Inner\textsuperscript{28} House of the Court of Session in Scotland took a quite different approach to causation under the JCT form of contract.

b. The Outer House held that where there are concurrent causes of delay, none of which can be described as dominant, the delay should be apportioned as between the Relevant Events and the contractor’s risk events.\textsuperscript{29}

c. In HC of HK, see Witting Construction Co Ltd v Boost Investments Ltd [2009] BLR 339 9 (per DHCJ Westbrook SC at paragraph 61 adopting City Inn analysis).

d. Criticism of this approach:

i. Too much emphasis on the words “fair and reasonable”.

ii. Unworkable in practice?

iii. Why is relative culpability relevant to assessment of delay?

iv. Approach would trigger prevention principle placing time at large.

v. Apportionment in common law claims for damages is not generally available anyway (absent a statutory right to the same).

e. There is therefore Scottish authority to the effect that in the event of concurrent causes of delay or loss and expense a Court may apportion the relevant period of delay or loss between the contractor and employer\textsuperscript{30}.


\textsuperscript{29} It may be doubted whether, on a careful reading of the case, there was in fact true concurrent delay.

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

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

h. However, it has been suggested that in approaching the matter in this way the Scottish Court of Session placed too great a weight on the words “fair and reasonable”.

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

j. It has also been argued that the adoption of a general apportionment approach based upon the respective culpability and/or causative potency of the concurrent causes would introduce a new element of uncertainty into this field, could prove unworkable in practice and is probably unnecessary.

k. Even in claims for damages this approach has been doubted and there is no authority extending this approach to the assessment of concurrent causes of loss and expense and extension of time entitlements under the express provisions of building contracts.

l. Further, the apportionment approach necessarily gives no weight to the Malmaison argument set out above which derives from a proper construction of the contract.

m. It might also be thought that an apportionment which gave weight to relative culpability imports questions of culpability/fault which are unhelpful in analysing delay.

n. In the construction context, Peak Construction Ltd v McKinney Foundations Ltd (1970) 1 B.L.R. 111 (CA) per Salmon LJ at 119 is sometimes referred to as an example of a similar

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

32 In Bank of Nova Scotia v Hellenic Mutual Risks Association (Bermuda) Ltd [1990] 1 QB 818 the principle of apportionment in these situations was doubted. It should also be noted that the Law Commission Report (Working Paper No. 114) on Contributory Negligence (1990) referred to the decision in Tennant Radiant Heat Ltd as “an unusual application of causation principles...”, although the report concluded by recommending that apportionment be available under all forms of contract, save “where the contract excludes it, whether expressly or by implication from the nature and extent of the contractual duty undertaken by D” (see paragraphs 3.20, 4.24 to 4.26 and 5.1).
approach being approved, although it is probable that the apportionment contemplated in this case related to splitting a period of delay between different causes, rather than of a situation where there were concurrent causes of a single period of delay as contemplated in the passages above.

o. If responsibility for a period of concurrent delay were to be apportioned between the parties, the contractor would not receive its full EOT and the prevention principle may then come into play. For this reason many commentators have rejected the application of apportionment approach as a matter of principle33.

p. London TCC is likely to be uninterested in apportionment under contractual claims (and see now decision in Walter Lilly below).

21. Walter Lilly v DMW [2012] Per Akenhead J at paragraph 370 (my emphasis):

“In any event, I am clearly of the view that, where there is an extension of time clause such as that agreed upon in this case and where delay is caused by[1] 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. [2] 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[3] 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 [4] the causation criterion is established. The fact that the Architect has to award [5] a “fair and reasonable” extension does not imply that there should be some apportionment in the case of concurrent delays. [6] The test is primarily a causation one. It therefore follows that, although of persuasive weight, the City Inn case is inapplicable within this jurisdiction.”

22. Greenwich Millenium Village Ltd v Essex Services Group Plc [2013] per Coulson J at paragraph 176:

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

33 Ramsey J in the paper entitled “Claims for Delay & Disruption: the impact of City Inn” at page 15; Hudson at paragraphs 6-060 and 6-062.
23. ENE Kos 1 Ltd v Petroleo Brasileiro SA (N02) [2012]: Per Lord Sumption (para 12):

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

24. ENE Kos 1 Ltd v Petroleo Brasileiro SA (N02) [2012]: Per Lord Clarke (paras 61-62):

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

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

25. Per Lord Clarke (paras 70-71):

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

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

a. No universal rule – a matter of construction in each case

b. EOT provisions tend to be opaque in terms of causation requirement – but leave much to the discretion of the CA.

c. Current consensus in JCT type contracts = dominant cause + Malmaison approach.

d. In practice, however, this has invited a loose approach to causation where there are concurrent causes.

e. It is now generally accepted that under the JCT form of contract and similar contracts a contractor is entitled to an extension of time where delay is caused by matters falling within the clause notwithstanding the matter relied upon by the contractor is not the dominant cause of delay, provided only that it has at least equal “causative potency” with all other matters causing delay.\(^{34}\)

f. But due to the difficulty in distinguishing between relative causative potency of delay events, in practice this approach has a much wider application to extension of time claims.

g. The rationale for such an approach is that where the parties have expressly provided in their contract for an extension of time caused by certain events, the parties must be taken to have contemplated that there could be more than one effective cause of delay (one of which would not qualify for an extension of time) but nevertheless by their express words agreed that in such circumstances the contractor is entitled to an extension of time for an effective cause of delay falling within the relevant contractual provision.\(^{35}\)

h. It is suggested that this reasoning is in fact not easily reconcilable with the reasoning previously used to justify the dominant cause test.

i. Therefore should a new test, in light of Malmaison, simply ask whether the relevant event under consideration was at least an effective cause of delay?

27. Causation – extension of time – a new test?

\(^{34}\) Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd [1999] 70 Con. L.R. 32; Royal Brompton Hospital National Health Trust v Hammond (No. 7) 76 Con. L.R. 148; The SCL Delay and Disruption Protocol at www.eotprotocol.com.

a. A new test - is the relevant event at least an effective cause of actual delay to the completion date?

b. Per Edwards-Stuart in De Beers [177]:

“The general rule in construction and engineering cases is that where there is concurrent delay to completion by matters for which both employer and contractor are responsible, the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by the delay. In the case of the former, this is because the rule where delay is caused by the employer is that not only must the contractor complete within a reasonable time but also the contractor must have a reasonable time within which to complete. It therefore does not matter if the contractor would have been unable to complete by the contractual completion date if there had been no breaches of contract by the employer (or other events which entitled the contractor to an extension of time) because he is entitled to have the time within which to complete which the contract allows or which the employer’s conduct has made reasonably necessary” (emphasis added).36

36 Referred to without criticism in the context of an extension of time claim in Walter Lilly & Co Ltd v Mackay & DMW Ltd [2012] EWHC 1773 per Akenhead J at paragraphs 362-370.

There would not appear to be much room or need in such a “general rule” or approach for the concept of ‘dominant cause’.

d. Lord Carloway’s dissenting judgment in City Inn also provides some support for such a wider approach to the test for causation in these cases

e. Some support exists for such a new test in De Beers UK Ltd v Atos Origin IT Services UK Ltd [2011] B.L.R. 274 at [177]. TCC it was said that the contractor “is entitled to have the time within which to complete which the contract allows or which the employer’s conduct has made reasonable necessary” notwithstanding that the contractor would have been unable to complete absent any breaches of contract on the part of the employer.

f. Such an approach can be said to be reinforced by contractual provisions for extension of time which by their wording appear to leave a discretionary element to the architect or engineer in assessing the entitlement by use of words such as a “fair and reasonable”37.

g. Lord Carloway’s dissenting judgment in City Inn goes some way toward articulating this kind of approach – save that it probably went too far in saying that alternative causes can be ignored as part of the assessment of the factual impact of the relevant event under consideration.

28. Causation - loss and expense claims - introduction

a. Meaning of “direct loss and/or expense”.

b. Relationship to damages claim at common law.

c. Relationship to EOT claim.

d. Money claims under the express terms of a building contract may be value/price based (unusual) or cost based (more usual).

e. In most standard forms of contract the JCT phrase “direct loss and/or expense” is used to describe the further payment that a contractor may be entitled to for relevant matters causing prolongation and disruption of the works.

f. Such claims must consist of actual losses or expenditure incurred as a direct result of the relevant matter giving rise to the entitlement to further payment.

g. They are treated as analogous to damages recoverable at common law under the first limb of the rule in Hadley v Baxendale.

h. Once again, however, there is no reason in principle why common law test of causation should be imported into the relevant clause.

i. It should also be emphasised that although prolongation claims are often seen as the financial side of a “delay claim”, there is no automatic entitlement to loss and expense or damages even if a right to an extension of time is established.

29. Causation - loss and expense claims – applicable causation test

a. Once again no rule of law as to which should apply; ultimately a matter of construction of the contract.

b. Therefore could be anything; but usual competing causation tests:

   i. Simple ‘but for’/burden of proof;

   ii. Dominant cause;

   iii. Apportionment.

c. Current consensus under JCT contract wording:
30. Causation - loss and expense claims – prevalence of the ‘but for’ test?

a. Although not often articulated, a stricter test of causation is often applied to loss and expense claims than in (post Malmaison) EOT claims.

b. The consensus under the JCT wording is that a contractor will get its time claim, but not its money claim.\(^{38}\)

c. Thus, the ‘dominant cause’ test does not seem to be applied.

d. In *De Beers UK Ltd v Atos Origin IT Services* [2010] EWHC 3276 (TCC), (2010) 134 Con. L.R. 151 it was said (at [178]) that:

> “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.”

e. Sometimes, it is stated/assumed that the dominant cause approach should apply to money claims as well.

f. If so, notwithstanding the fact that the claimed delay would have been incurred anyway, under the dominant cause test the contractor would become entitled to recover further payment as long as the employer risk event is construed as the dominant of the competing causes.

g. However, such an outcome would contradict the view that loss and expense claims must satisfy the “but for” test of causation and the (admittedly few) authorities in this field which have indicated that loss and expense provisions are to be treated as contractual entitlements to payment of, in effect, damages at common law under the first limb of the rule in *Hadley v Baxendale*.\(^{39}\)

h. As set out above the dominant cause test is not necessarily of general application in damages claims at law; but the support for the dominant cause test in the context of contractual claims in *City Inn* and *John Doyle* should be noted; but see *Great Eastern Hotel* (2005) 99 Con LR 45.

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\(^{38}\) See the *De Beers* case at paragraph 177-178 quoted previously.

\(^{39}\) See, for example, the Court of Appeal’s decisions in *F. G. Minter Ltd v WHTSO* (1980) 13 B.L.R. 1 and *Rees & Kirby v Swansea City Council* (1985) 30 B.L.R. 1. Note also the dicta to similar effect in *How Engineering Services Ltd v Lindner Ceilings Floors Partitions Plc* (1999) 64 Con. L.R. 67 per Dyson J at page 74.
i. Commentators now clear that ‘but for’ test usually taken to be intended in l/e clauses in JCT wording: see Keating (9th edn) at paragraph 9-070; John Marrin QC “Concurrent Delay Revisited” SCL HK paper 2012.

31. Causation: loss and expense: the impact of Walter Lilly: ‘But for’ test of causation applies to JCT loss and expense provision?

Per Akenhead J at paragraph 543 (head office overhead and profit):

“Considering these various authorities, the following conclusions can be drawn:
(a) A contractor can recover head office overheads and profit lost [1] as a result of delay on a construction project caused by factors which entitle it to loss and expense.
(b) It is necessary for the contractor to prove [2] on a balance of probabilities that if the delay had not occurred it would have secured work or projects which would have produced a return (over and above costs) representing a profit and/or a contribution to head office overheads.
(c) The use of a [3] formula, such as Emden or Hudson, is a legitimate and indeed helpful way of ascertaining, on a balance of probabilities, what that return can be calculated to be.
(d) The [4] “ascertainment” process under Clause 26 does not mean that the Architect/Quantity Surveyor or indeed the ultimate dispute resolution tribunal must be certain (that is sure beyond reasonable doubt) that the overheads and profit have been lost…….”

32. Causation - loss and expense claims – what about the Malmaison approach?

a. The Malmaison approach to the issue of concurrent causes in the context of extension of time claims is not thought to apply generally to loss and expense claims under the related provisions in JCT standard form contracts40

b. But why not?

c. Does Lord Hoffmann’s “purpose of the rule of law creating liability” principle provide a possible answer?

d. However, why should there be such a dichotomy in the approach to causation under extension of time and loss and expense clauses at all – the reason is not apparent in the typical JCT wording of the respective clauses.

e. There is no reason in principle why, depending upon the particular construction of the provisions in question, there should not be the same approach to concurrency.

f. Any difference in approach needs to be justified by way of the proper interpretation of the respective clauses.

g. An answer may be provided by the purposive approach to construction supported by Lord Hoffmann.

h. This principle may be of particular relevance in the context of construing the (potentially different) tests of causation in extension of time and loss and expense provisions under a building contract.

i. This principle emphasises the need to decide as a matter of law (which in the present context means considering the proper construction of the clause under consideration) what causal connection is required between the relevant event/loss to trigger entitlement to relief.

j. Such an approach emphasises that when construing a provision account needs to be taken not just of the language of “causation” within the clause itself (which as indicated above is usually not clear enough to give final guidance) but also the purpose of the provision in question within the contractual scheme as a whole.

k. Thus it is arguable that an examination of the purpose of the provision in question may justify and explain the distinction between the modified causation test applicable to extension of time clauses and the more traditional test based upon a simple application of the “but for” test which normally applies in the case of loss and expense clauses;

l. This is because extension of time provisions, properly understood, are intended to be for the benefit of both the contractor and employer, whereas loss and expense provisions are primarily for the sole benefit of the contractor to provide a contractual regime for the recovery of actual cost/loss

m. The latter may therefore be taken to have been intended to attract a more rigorous test of causation.

33. Causation - loss and expense claims – what has to be proved?

a. *Costain Ltd v Charles Haswell & Partners Ltd* [2009] EWHC 3140 (TCC) at [183] considered the distinction between the test of causation in claims for extension of time and damages.

b. Held, effectively, that there was a need to satisfy the ‘but for’ test in damages claims and show that site wide delay was caused by a relevant breach if site wide costs are claimed as damages.

c. Same approach would apply in a loss and expense claim for site wide prolongation costs it is suggested.
d. In an EOT claim, by contrast, need only show that (i) a delay to an event on the critical path has occurred and (ii) that delay has in fact pushed out the completion date by the time claimed.

e. Note that this approach is consistent with the new test canvassed above re EOT claims.

f. Reaction of this decision by the industry a good illustration of the confusion that exists in relation to causation.

g. See the discussion of the contrasting approach to causation in the context of an extension of time claim and a damages claim for breach of contract in Costain Ltd v Charles Haswell & Partners Ltd [2009] EWHC 3140 (TCC) at [183] per Deputy High Court Judge Fernyhough QC at [183].

h. Simply showing that the delay event was on the critical path for the works will not, by itself, establish that it impacted on all other site activities (as opposed to merely the activities immediately following and dependent upon the activity in question) or trigger an automatic entitlement to loss and expense or damages on all of these potential bases.

i. A contractor will not therefore recover loss and expense or damages in relation to general site overheads unless it is shown that the delay event impacted on all other site activities.

j. See SCL Paper No. 170 dated September 2011 “Prolongation Costs: Where now after Costain v Haswell?” by Dr Ronan Champion. This paper suggests that unless the costs claimed are volume-related (i.e. are proportionate to work carried out such as plant or site foremen) it is wrong in principle to dismiss a claim for loss and expense for prolongation merely because it cannot be shown that all site activities were affected by the delay event: it is sufficient to demonstrate that the costs being claimed have increased in proportion to the period of delay.

k. Normally a contractor will be unable to recover loss and expense in relation to delay where it would have suffered the exact same loss and expense anyway (absent the relevant matters alleged to be the employer’s responsibility) as a result of causes within the contractor’s control or for which it is contractually responsible41.

l. Thus, where there are concurrent causes of delay (one the responsibility of the contractor and the other of the employer) a contractor will normally not be entitled to receive payment for loss and expense in respect of a relevant matter42.

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42 See Core Principles 9 and 10 of the SCL Delay and Disruption Protocol.
34. Causation – loss and expense claims - summary

a. Depending upon the precise wording of the contract a contractor is normally only entitled to recover loss and expense (at least in the JCT wording) where it satisfies the “but for” test\(^43\).

b. Thus, even if the event relied upon was the dominant cause of the loss, the contractor will fail if there was another cause of that loss for which the contractor was contractually responsible.

c. These tests are not rules of law – and may be displaced by alternative tests depending upon the wording of the relevant clauses.

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5/12/13.

\(^{43}\) See now support for this approach in Walter Lilly & Co Ltd v Mackay & DMW Ltd [2012] EWHC 1773 per Akenhead J at paragraphs 486 and 540-543.