

Concurrency, Causation, Commonsense & Compensation

ANDREW STEPHENSON
PARTNER

If you have any questions about the details of this document
please contact Andrew Stephenson on +61 3 9672 3358

**CORRS
CHAMBERS
WESTGARTH**

lawyers

WWW.CORRS.COM.AU

Contents

| | | |
|----------|---|-----------|
| 1 | Introduction | 1 |
| 2 | Methods of assessing delay to completion | 2 |
| 3 | Conflict between the decisions in Brompton Hospital and City Inn cases | 6 |
| 4 | Contemporaneously concurrent causes of delay | 12 |
| 5 | Common law approach to causation | 16 |
| 6 | Construction cases dealing with concurrent causes of delay | 23 |
| 7 | Apportioning between concurrent causes | 29 |
| 8 | Conclusion | 29 |

1 Introduction

The purpose of this paper is to discuss the proper analysis of the causal connection between concurrent delaying events and a Contractor's entitlement to extensions of time.

This paper will address the role of causation where there are concurrent delaying events by reference to the following issues:

- (a) methods of assessing delay to completion;
- (b) how the existence of concurrent causes of delay, only one of which arises from an excusable cause, affects the Contractor's entitlement to an extension of time;
- (c) types of concurrency;
- (d) the common law approach to causation;¹
- (e) construction cases dealing with concurrent causes of delay; and
- (f) whether apportioning the gross delay between concurrent causes of delay is appropriate.

In the vast majority of cases, the 'but for' test of causation will be appropriate in resolving disputes about causation. However, where there are concurrent causes the 'but for' test is unreliable. This paper considers a number of cases, unrelated to delay in construction, to establish the basic common law approach to causation and then considers the application of that approach to delay in construction cases. This paper contends that the limit authority, arising from construction cases dealing with concurrent delays, fails to follow the common law principles established in non-construction cases and, as a consequence, falls into error.

Further, the paper contends that the approach taken in *Keating on Construction Contracts* (8th Edition),² is simplistic and inconsistent with principle developed in the leading non-construction cases relating to concurrency.

The proper approach to causation is to apply common sense to the relevant facts having close regard to the purpose of the inquiry. The purpose of such an inquiry into causation is critical to determine which of the many antecedent events will be considered to be the legal cause of the delay. Common sense is obviously a broad concept. This paper explores what it should mean in the context of concurrent delays to completion of a construction project.

¹ One matter not fully canvassed by this paper is the related issue of whether and in what circumstances a Contractor is entitled to extra costs as a consequence of delay to the project. This issue is dealt with in the paper by Ian Bailey SC (see page 000 below), along with legal issues concerning the recovery of liquidated damages for late completion.

² D Keating, S Furst and V Ramsay, *Keating on Construction Contracts* (2006).

2 Methods of assessing delay to completion

The generally accepted method of proving whether there has been a delay to completion as a result of a delay to an activity is the critical path method (CPM). Typically on all projects of significance a critical path program will be prepared by the Contractor. Often, but not always, the certifier will be required to approve the program. It is important that, at the outset, the program accurately sets out the plan which will be used by management to complete the project. Where such a program does not exist, it is often difficult to use CPM to analyse delay. In a recent Scottish case, *City Inn v Shepherd Construction*,³ both experts concluded that it was not possible to do a CPM analysis of the delay, because there was not an appropriate initial program showing accurately how the Contractor intended to construct the works.⁴ The Owner's expert attempted to analyse the delay by reference to an 'as-built analysis' rather than the conventional as-planned analysis. The Contractor's expert was critical of the 'as-built' analysis and adopted a further alternative method of analysis.⁵ Accordingly, both experts were forced to take unconventional approaches to their analysis of the delay as a consequence of there being no program at an early stage of the project showing how the Contractor intended to do the work. The judge rejected the as-built critical path analysis.⁶ Instead the judge accepted an as-planned v. as-built method used by the Contractor's expert, although it was recognised that a major weakness in such an analysis was that it did not identify the critical path.⁷ As a consequence it was not possible to determine whether specific delays were critical or not. The judge was thus forced to determine to what extent the gross delay to the whole project had been caused by the delays of the Owner and the Contractor without the benefit of the conventional tools for analysis. Without the benefit of any CPM analysis, the judge concluded that all delays which were identified by the parties were concurrent causes of the gross delay. The judge then apportioned the gross delay between the Owner and the Contractor by reference to common sense and a consideration of what was fair and reasonable.⁸

City Inn is an unusual case as in most cases an agreed critical path program will have been established or will be capable of being established at the outset or very early in the project which can be used to analyse whether particular events caused delay and the extent of delay caused by each event. That is, in the usual circumstance, there is no need to consider the gross delay and apportion it, without a CPM analysis. Contrary to the judge's observations in *City Inn*⁹ a CPM analysis can be done, even if there is no computer program.

³ [2008] BLR 271 ('*City Inn*').

⁴ *Ibid.* at [27], [31], [32] and [33], where the approach of the Owner's expert is considered. It is apparent that the method of analysis is used by this expert was an 'as-built analysis' rather than an analysis of the as-planned program (by employing the conventional CPM).

⁵ *Ibid.* [26]–[27].

⁶ *Ibid.* [38].

⁷ *Ibid.* [28].

⁸ *Ibid.* [157].

⁹ *Ibid.* [29].

Where it is possible to do a CPM analysis, it is necessary to update the original plan to take account of delays that occur (i.e. excusable and non-excusable), progressively.

Sometimes an analysis of the delay will be presented which compares the original plan for execution of the works with an as-built program (which appears to have been the type of analysis relied upon by the judge in *City Inn*).¹⁰ However, such an approach is inappropriate. Judge Seymour in *Royal Brompton Hospital NHS Trust v Hammond*¹¹ considered an argument where, by reference to the original program, two delays were identified happening at different times. The earlier was not excusable; the latter was excusable. It was argued that they were the concurrent causes of the delay. The judge concluded:

'However, it is, I think, necessary to be clear what one means by events operating concurrently. It does not mean, in my judgment, a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a relevant event [i.e. an event which if on the critical path would give rise to an extension of time] **and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a relevant event,**

'the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date'.

The relevant event simply has no effect upon the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, the works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a relevant event, while the other is not. In such circumstances there is a real concurrency of causes of the delay ...¹² (Emphasis added.)

As discussed below, concurrent causes of delay are not limited to circumstances where two delay events happen at the same time, however, the point made by the Judge is a good one and is best demonstrated by considering some simple Gantt charts.¹³ Assume that the original planned program was as follows:

¹⁰ *Ibid.*

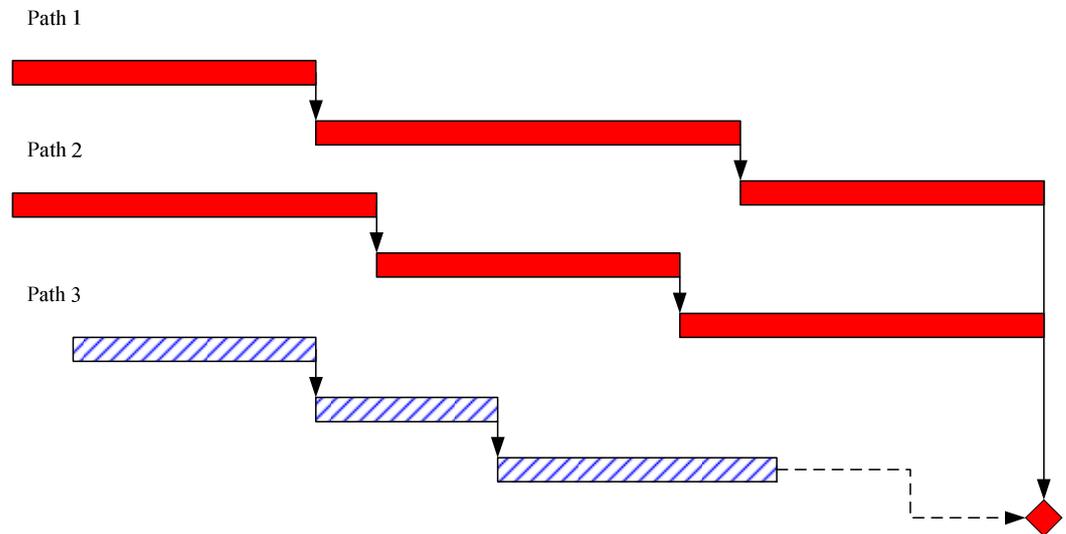
¹¹ (2001) 76 Con LR 148 (*'Brompton Hospital'*).

¹² *Ibid.* 173–4.

¹³ The author thanks Mr P Blunden and Mr D Watson, both of Hinds Blunden Pty Ltd (Melbourne), for their kind permission to use this and subsequent gantt charts.

Diagram 1

Base Program

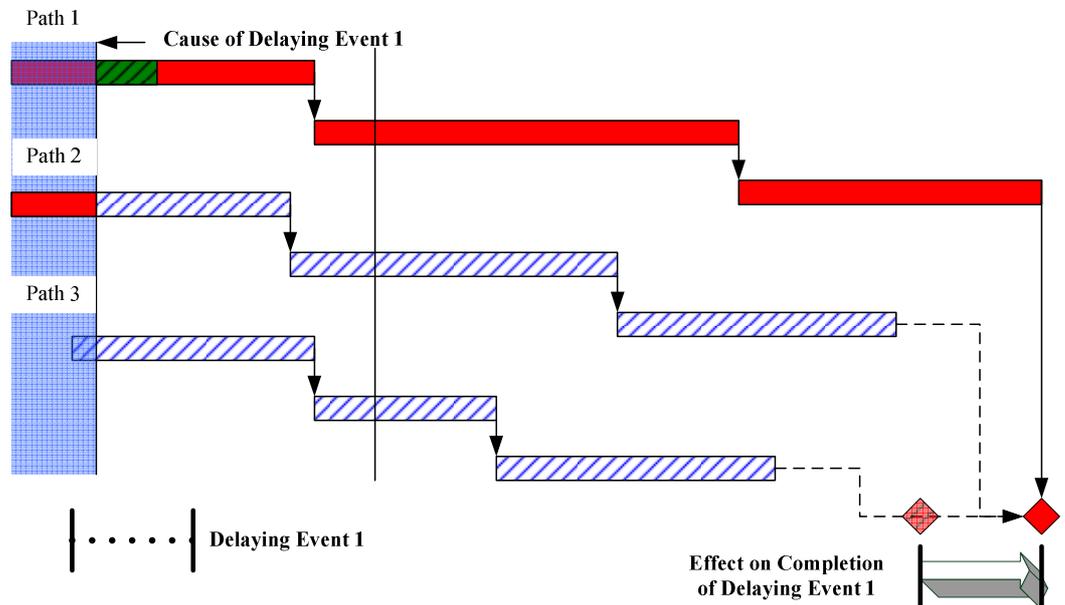


This diagram depicts a simple construction project. There are three activities. The first two activities, marked Path 1 and Path 2, are both critical to completion of the works. The third path is not critical. The extent of the available float on Path 3 is depicted by the dotted lines leading to the red diamond (being the planned date for completion).¹⁴

Now assume that the first activity is delayed by an event which is the responsibility of the Contractor. The program can now be adjusted to take account of this delaying event, which has been done in diagram 2 below.

¹⁴ In this paper, the expression 'float' refers to the amount of time available in non-critical activities which can be consumed without causing a delay to the planned date for completion (rather than the contractual date for completion).

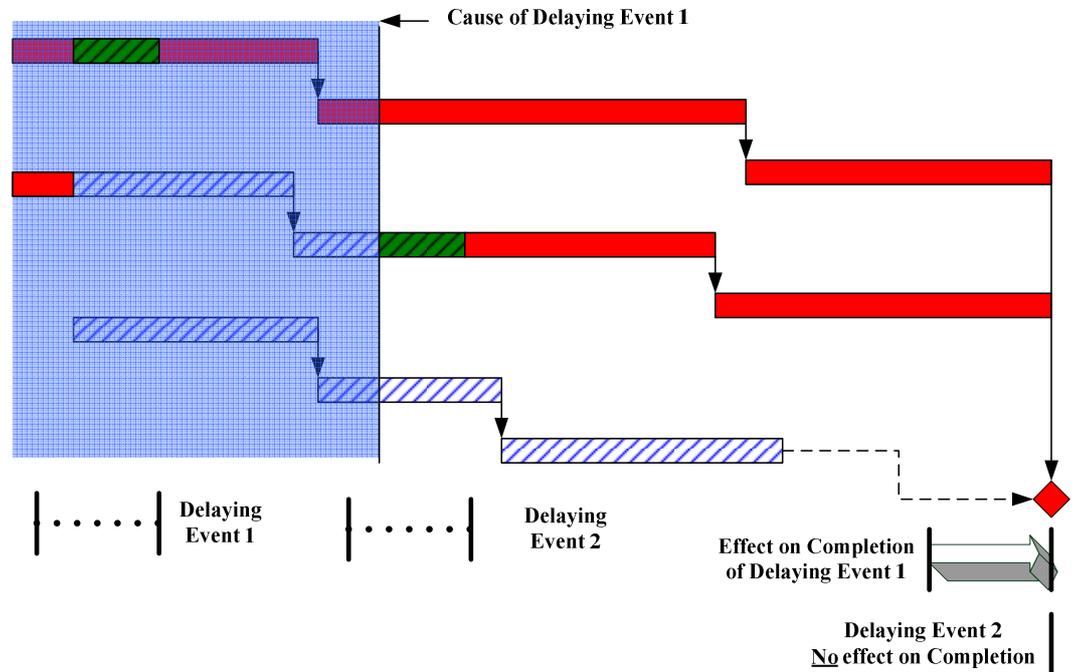
Diagram 2
Effect of Delaying Event 1



As can be seen from the above adjusted program, Path 1 remains critical while Path 2 has become non-critical, because the delay to Path 1 has created float in Path 2. There has been a delay in completion, but the Contractor is not entitled to an extension of time because the cause of delay is a matter in respect of which the Contractor has assumed responsibility.

Now consider a further delay on Path 2 occurring sometime after the first delay. Assume further that the second delay's duration equals the amount of float on Path 2. The effect of that delay is depicted in Diagram 3 below.

Diagram 3
Effect of Delaying Event 2



The effect of this delay is that the float that existed on Path 2 has been consumed and Path 2 is now, once again, a parallel critical path with Path 1. However, Event 2 has caused no further delay to the completion of the whole of the works. All that has occurred as a consequence of the second delay is that the float created on Path 2, as a consequence of delaying event 1, has been consumed. If the program had not been updated to take account of the first delay before analysing the effect of the second delay, that analysis would have shown, incorrectly, that the second delay delayed completion.

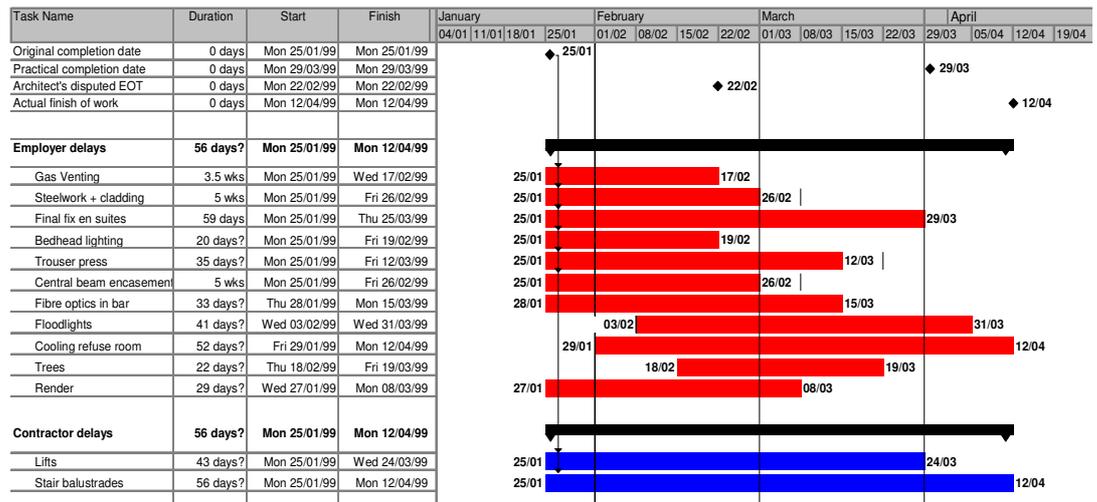
This demonstrates that when considering sequential delay using CPM analysis, it is necessary to update the planned program to take account of delays that have occurred. In the simplest of delays (as depicted above) this may change the status of particular activities. In more complicated examples it may result in changes to the logic which was used in the base program.

3 Conflict between the decisions in Brompton Hospital and City Inn cases

The approach suggested above is inconsistent with the approach in *City Inn*.¹⁵ As will be recalled, in *City Inn* it was not possible to do a CPM analysis. As a consequence the judge had to consider the various alleged delaying events

¹⁵ [2008] BLR 271.

(some being excusable and others not) and to apportion the gross delay between the two classes of delay. The difficulty facing the judge in that case, is very well summarised in an article by Jeremy Winter 'How Should Delay Be Analysed — Dominant Cause and Its Relevance to Concurrent Delay'.¹⁶ At paragraph 10 of that article Mr Winter summarises the effects of the delay in the following Gantt chart:¹⁷



The dark black line on the line marked 'Employer Delays' depicts the total duration of delays which were the responsibility of the Owner. The dark black line on the line 'Contractor Delays' depicts the duration of the delays which were attributable to the Contractor. Under each of these headings are the various causes of delay.

For the reasons previously discussed, there is no attempt in the judgment to try to establish the extent of delay attributable to each of the events of delay by reference to a precise methodology such as the CPM method. It is assumed that all delays to activities had an effect on completion. This is highly unlikely. However, absent any other method of analysis, given the limitations of the expert evidence, the judge had little choice but to apportion the total delay between various identified events of delay, whether or not those events were on the critical path.

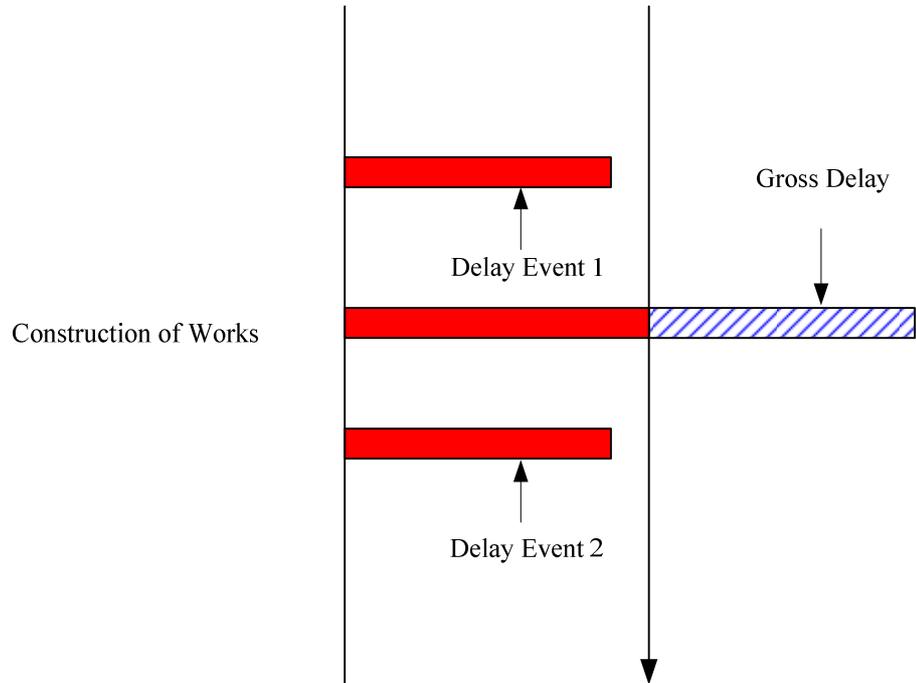
As can be seen from Mr Winter's diagram the delays that were occurring, which were the responsibility of the Contractor and those that were the responsibility of the Owner, occurred at approximately the same time and were approximately of the same duration. The question for the judge was to apportion the gross delay between these events so that an appropriate grant of an extension of time could be given. Absent any CPM approach to assist, the judge was forced to consider the two causes of delay as concurrent causes of

¹⁶ Paper presented by J Winter to the SCL International Construction Law Conference held in London on 6–7 October 2008, Paper Number 153.

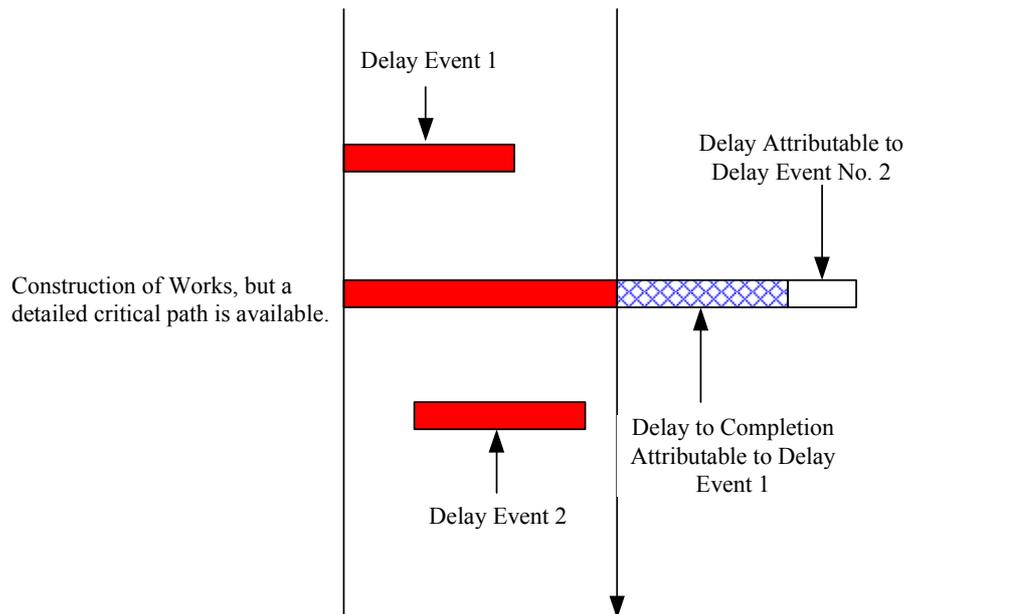
¹⁷ *Ibid.* 10.

the total delay. Whether this was in fact the case could not be established without the benefit of CPM analysis.

Another way to consider the problem facing the judge is by reference to the diagram below.



This diagram shows a single construction activity. There are delays to activities, which are identified as Delay Event 1 and Delay Event 2. Absent an ability to use CPM, there is no way of establishing what, if any, delay is attributable to each delay event. Accordingly, there is a single delay to completion (the gross delay), which is potentially attributable to both events of delay, albeit the extent of delay attributable to each delay event cannot be determined.



This diagram simply shows that where a CPM analysis is possible, the delay to completion caused by each delay event can be determined. Accordingly, the diagram depicts the delay being attributed to each delay event. Note that, despite the delaying events being of similar duration, the extent of delay to completion attributable to each cause is very different. Accordingly, this diagram depicts the effect of a CPM analysis which establishes that there is not a direct relationship between delay to completion of an activity and delay to completion to the works.

In *City Inn*, the judge summarised his approach as follows:

'I accordingly conclude that the delay in completion was the result of concurrent causes. The majority of those were the result of the late instructions or variations issued by the architect, and are Relevant Events for the purposes of clause 25; two of those causes, however, the work on the lifts and the work on the stair ballustrading, were the fault of the defenders [the contractors] or their subcontractors. In my opinion none of the causes of delay can be regarded as a 'dominant' cause; each of them had a significant effect on the failure to complete timeously. The pursuers advanced an argument based on the proposition that the items involving contractor default, the lift and stair balustrades were the 'dominant' cause of delay, but I am of the opinion that this contention must be rejected. Indeed, the lateness of the instruction relating to the gas venting scheme and the roof steelwork had a major effect on the progress of the works, to a substantially greater degree than the items involving contractor default. Consequently the case is one of true concurrent causes. In those circumstances the correct approach is in my opinion that set out in paragraph [18] above. Clause 25 requires that the

architect should exercise his judgment to determine the extent to which completion has been delayed beyond the Completion Date by the Relevant Events, or non-contractor's risk events. Put another way, that involves a determination of the aggregate period within which the Work as ultimately defined should have been completed having regard to the incidents of Relevant Events. **That determination must be made on a fair and reasonable basis, as required by clause 25. In a case such as the present where there is true concurrency between Relevant Events and events that involve contractor default, apportionment will frequently be appropriate. In my opinion this is such a case.**¹⁸ (Emphasis added.)

The judge in *City Inn* went on to conclude having regard to all the evidence that a substantially greater proportion of the delay was attributable to the Owner, and granted an extension of time of 9 weeks. It is clear from the reasoning that this conclusion is a matter of judgment having regard to all of the evidence, not a calculation by reference to a detailed analysis, as could have been done if CPM analysis was possible. This paper is not dealing with the situation which arose in *City Inn*. In most sophisticated projects there will be an original plan, regularly updated, so that CPM analysis is possible.

Accordingly, *City Inn* was an unusual case which required an unusual approach. It should not be regarded as inconsistent with the *Brompton Hospital* case; the two cases reflect the two approaches which may be taken, depending on the expert evidence available. However, in the vast majority of cases in large projects the expert evidence is likely to allow a *Brompton Hospital* analysis, which is more sophisticated and accurate and therefore should be adopted. The balance of this paper deals with the situation where it is possible to do a CPM analysis.

Types of concurrency

This paper will consider two types of concurrent causes of delay relevant where a CPM analysis is possible:

- (a) contemporaneously concurrent causes of delay; and
- (b) non-contemporaneously concurrent causes of delay.

Much of what has been written about concurrent causes of delays assumes that such delays only occur when there are two events occurring at the same time, which delay completion of the whole of the works. However, this is too narrow. There are many cases, not limited to construction cases, where courts have considered loss which has been caused by two events which occurred at different time. Those causes are classed as concurrent.

Indeed, the word 'concurrent' is defined by the *Shorter Oxford Dictionary* to mean:

¹⁸ [2008] BLR 271 at [157].

- '1. Occurring or operating simultaneously or side by side.
2. **Acting in conjunction; co-operating.**' (Emphasis added.)

Outside the area of concurrent delay in construction cases, the expression 'concurrent cause' of something has always been concerned with events which co-operate in causing a particular event to occur, rather than events which occur contemporaneously.¹⁹ In the context of delay in construction project events, delays can:

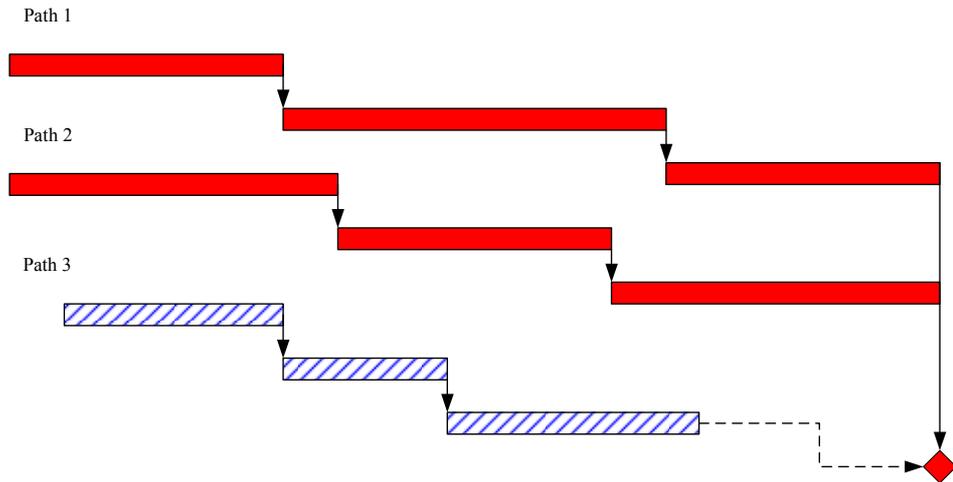
- (a) occur at exactly the same time and therefore be 'contemporaneously concurrent'; or
- (b) occur at different times but co-operate together to cause a single delay, and be 'non-contemporaneously concurrent'.

¹⁹ See for example *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310; *March v Stramare* (1991) 171 CLR 506; *Bennett v Minister for Community Welfare* (1992) 176 CLR 408; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413; and *Henville v Walker* (2001) 206 CLR 459.

4 Contemporaneously concurrent causes of delay

Contemporaneously concurrent causes of delay are demonstrated by the simple Gantt charts below.

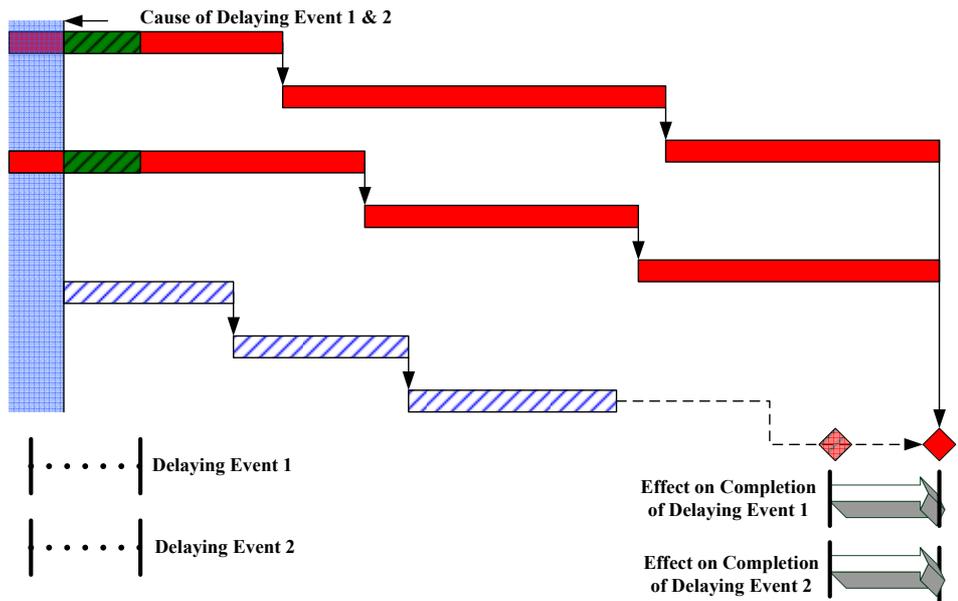
(a) Base Program



(b) Delaying Events



(c) Effect of Delaying Events 1 & 2



As can be seen from these diagrams, the original plan required completion of three activities. Path 1 and Path 2 were critical and Path 3 was non-critical activity.

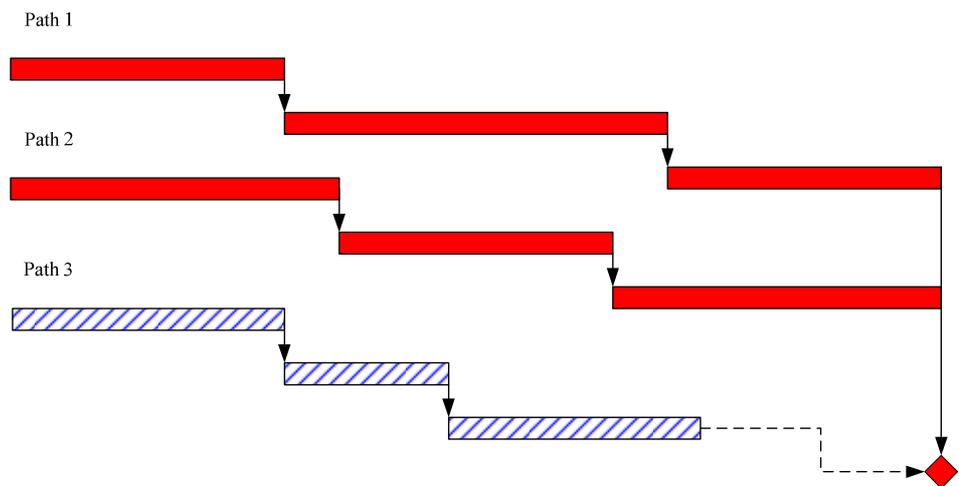
Two **separate** events occur simultaneously and adversely affect the activities depicted by Paths 1 and 2. As a consequence, the whole project is delayed by an amount equal to the delay caused by both Delaying Event 1 and Delaying Event 2. This is a simple example of contemporaneously concurrent events which cause delay to completion of the whole project. If one of those events entitles the Contractor to an extension but the other does not, very interesting questions arise as to the Contractor's entitlement to extensions of time, discussed below.

Non-contemporaneously concurrent delay

Non-contemporaneously concurrent delay is depicted by the following simple Gantt charts.

Delay

(a) Base Program



(b) Delaying Events

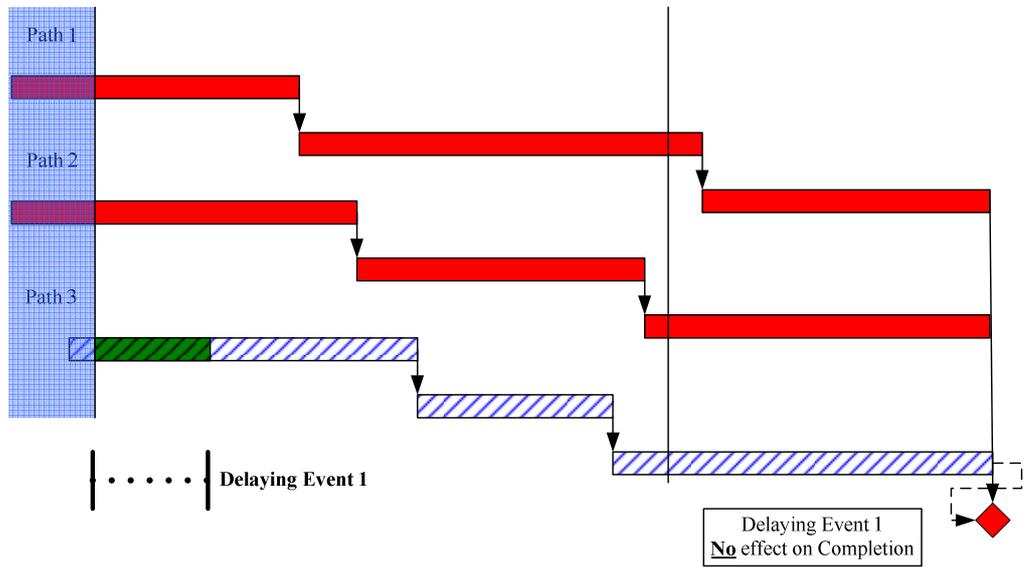


Delaying Event 1,
Affecting Path 3

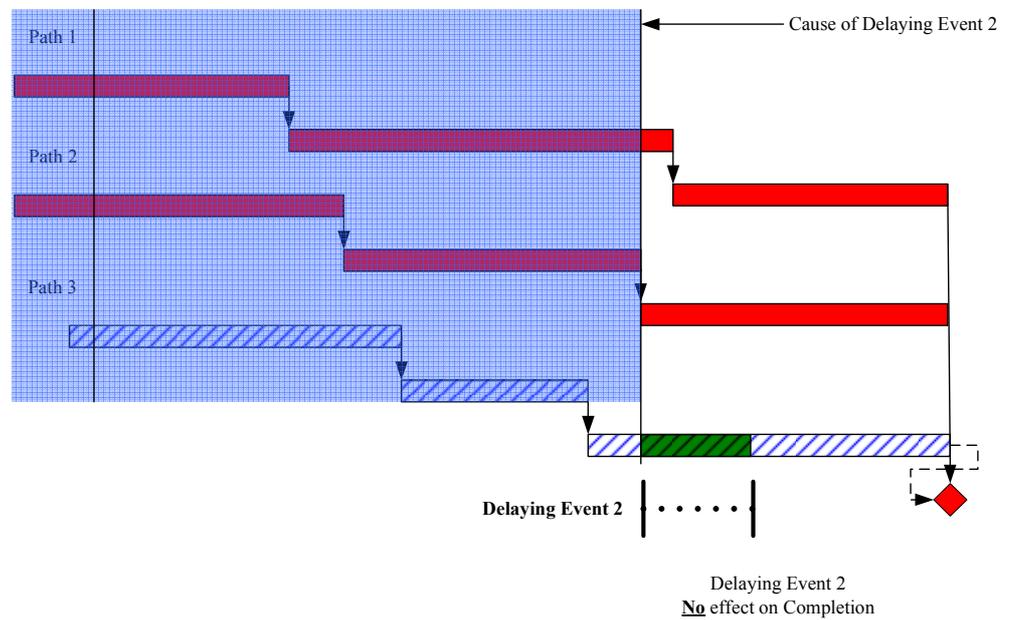
Delaying Event 2,
Affecting Path 3



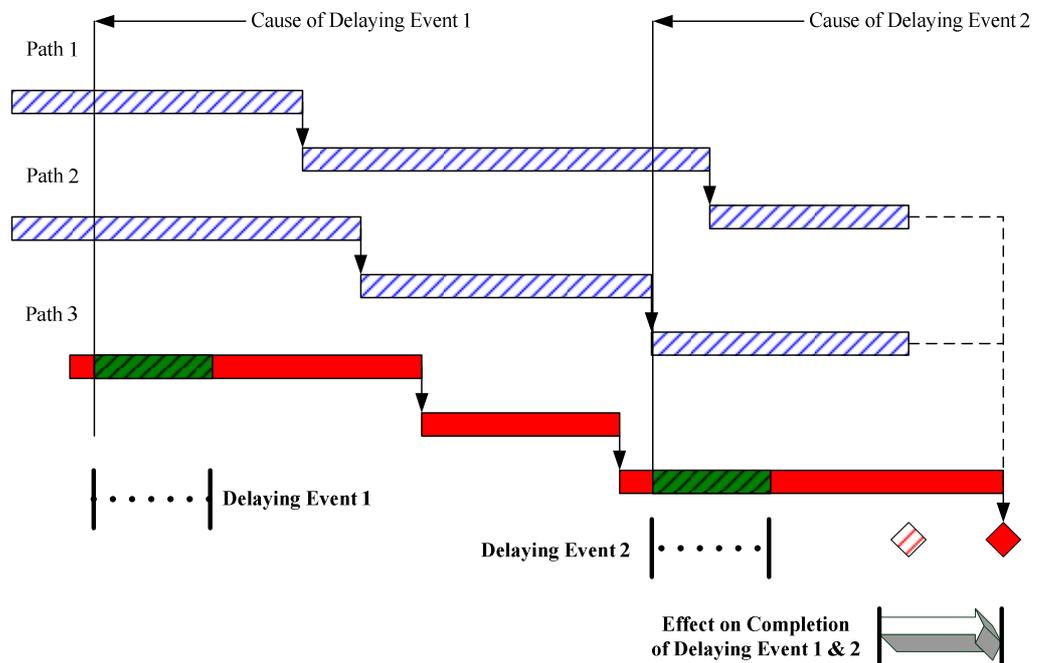
(c) Effect of Delaying Event 1 in isolation



(d) Effect of Delaying Event 2 in isolation



(e) Effect of Delaying Events 1 & 2 acting concurrently



The base program (a) above, again depicts two critical paths, being Paths 1 and 2. Path 3 is not-critical. With the benefit of hindsight it is known that there are two delaying events which are depicted in (b) above.

The program (c) depicts the effect of the first delaying event on the non-critical activity. The delay is such that the activity remains non-critical, but only just. There has been no delay to completion.

Diagram (d) considers the effect of the second delaying event in isolation. The length of this delay is such that if the first delay had not occurred, then the second event would not have caused any delay to completion. Accordingly, neither Delaying Event 1 nor Delaying Event 2, by themselves, is sufficient to cause any delay to completion.

Diagram (e) depicts the effect of both delays. As can be seen, when both delays are considered together, they co-operate to cause a delay to the project. Significantly, neither Delaying Event is sufficient to cause the delay to completion, both are necessary to create a delay to completion. These Delaying Events are therefore both co-operating or acting concurrently to cause a delay to completion.

Where this occurs and one of the delays is excusable and the other not, arguments are likely to arise as to whether the Contractor is entitled to an extension of time. If the first delay is due to an act or omission of the Owner (and therefore excusable), it is likely that the Owner will point to the second delay as being the real (or dominant) cause of the delay (i.e. the non-excusable delay) and therefore argue that the Contractor is not entitled to any extension

of time. Such an argument is predicated on the proposition that the last event is the true and only cause of the delay. This logic requires choosing one of the two pre-conditions for a delay to completion of the project and elevating it to the sole cause of delay.

Before considering this issue in further detail, it is appropriate to consider the general common law approach to causation in cases unrelated to the construction industry.

5 Common law approach to causation

Prior to the late 1980s, the test usually adopted to establish causation was to ask the question: but for the event occurring, would the loss have been suffered? If the answer was 'no', then the event was said to have caused the loss. This is called the 'but for' test.

However, it became apparent that the test had two serious limitations, which are relevant to the question of concurrent delay. First, if two events occurred which were independent and each was sufficient to cause the loss in question, then the application of the 'but for' test would result in the conclusion that neither event caused the loss in question. Such a conclusion obviously defies common sense. Secondly, the application of the 'but for' test means that any cause which is an essential condition to the occurrence of a particular event, causes that event. While undoubtedly this is, in a philosophical sense, true, it is of marginal use to the law. For example, a number of cases have cited the fact that the application of the 'but for test' will result in the conclusion that the decision of the defendant's grandmother to have children is a cause of the defendant having committed a tort. While it is no doubt true that a decision of the grandmother was a pre-condition of the commission of the particular tort by that particular individual, it is not sensible, for legal purposes, to ascribe that decision as being causally connected to the tort. The purpose of a legal analysis is to attribute blame to a particular party. Therefore, a blind application of the 'but for' test can, on occasions, cast the net far too widely for the purposes of the law.

In *March v M H Stramare Pty Ltd*,²⁰ the question of causation was considered by the High Court of Australia at some length in the context of a personal injuries case (i.e. a case in negligence) at some length. In that case, the plaintiff was intoxicated and driving late at night. The defendant had parked his truck along the centre line in the middle of the street, illegally, thereby causing a hazard for inadvertent drivers. The plaintiff, due to his intoxicated condition, was inadvertent and as a consequence, ran into defendant's truck and suffered significant injuries. At first instance, the court apportioned 30% liability for the loss to the defendant and 70% liability to the plaintiff. The effect of this apportionment was that the plaintiff did not recover 70% of his loss, however, the defendant was required to pay 30% of the monetary value of that loss.

²⁰ (1991) 171 CLR 506 ('*March's case*').

Subsequently, the case was appealed to the Full Court of South Australia, where the court applied the doctrine of 'last opportunity' or 'last clear chance' against the plaintiff and dismissed the claim. Prior to the introduction of legislation which provided a mechanism for apportioning liability in these circumstances, the defence of 'contributory negligence' constituted a complete defence to an action in negligence, even if the contributory negligence of the plaintiff was relatively small. Obviously, such a principle gave rise to significant injustice and the courts developed doctrines to limit unjust outcomes.

The touchstone for *novus actus interveniens*, is whether the second event is 'not readily foreseeable as arising from the earlier wrongful act'. If it is not then the doctrine can apply. If the second event is foreseeable then the doctrine of *novus actus interveniens* cannot apply.

Accordingly, in the context of the facts in *March's case*,²¹ the possibility of an intoxicated driver late at night travelling the road where the truck was parked, was a foreseeable event in respect of which the defendant should have taken precautions. It did not constitute a *novus actus interveniens* so as to break the causal chain between the defendant's negligence and the loss suffered by the plaintiff (although it leads to a significant discounting of that loss pursuant to apportionment legislation).

More interestingly, from a construction point of view, are the observations of Deane J more generally in relation to the application of the 'but for' test, as follows:

'There are however, in my view, convincing reasons precluding it's [the 'but for test'] adoption as a comprehensive definitive test of causation in the law of negligence. First, the clear weight of authority is against the substitution of such a formularized test of causation for a 'common sense idea of what is meant by saying that one fact is a cause of another' ... **[s]econdly, unqualified acceptance of the 'but for' test as even a negative or exclusionary test of causation for the purposes of the law of negligence would lead to the absurd and unjust position that there was no 'cause' of an injury in any case where there were present two independent and sufficient causes of the accident in which the injury was sustained. ... Thirdly, the mere fact that something constitutes an essential condition (in the 'but for' sense) of an occurrence does not mean that, for the purposes of ascribing responsibility or fault, it is properly to be seen as a 'cause' of that occurrence as a matter of either ordinary language or common sense.** Thus, it could not, as a matter of ordinary language, be said that the fact that a person had a head was a 'cause' of his being decapitated by a negligently wielded sword notwithstanding that possession of a head is an essential precondition of decapitation. Again, the mere fact that a person makes a gift of money to another is not, in any real sense, 'a cause' of the damage sustained by that other person when his agent

²¹ *Ibid.*

negligently loses the money notwithstanding that the loss would not have occurred 'but for' the original gift.²² (Emphasis added and citations omitted.)

*March's*²³ case has now been adopted in Australia and other common law countries²⁴ as applicable to causation in contract,²⁵ pursuant to statute²⁶ and other causes of action. It is therefore of general application.

Two recent cases in the High Court of Australia consider how to deal with concurrent causes of a loss, where the statutory provisions allowing apportionment on account of contributory negligence, do not apply. The first is the case of *Henville v Walker*.²⁷ In this case a developer (who was also an architect) prepared a feasibility study. That study disclosed that the project was viable. This conclusion depended upon two critical assumptions, being:

- (a) an estimate of the costs of the development (i.e. land acquisition costs plus construction costs); and
- (b) an estimate of the sale price of the condominiums.

Both estimates were wrong and had been prepared negligently. The estimate of costs of the development (being principally the construction costs) had been prepared by the plaintiff, a qualified architect. The projected sale costs used in the feasibility were taken from advice from the defendant, a real estate agent. The real estate agent had over estimated the likely sale price of the constructed condominiums. Had either the plaintiff or the defendant not been negligent, then the feasibility study would have disclosed that the project was not viable. Therefore, while neither the negligent conduct of the plaintiff nor the negligent conduct of the defendant was sufficient to cause loss, both co-operated and were necessary for the loss to be sustained.

The plaintiff chose to sue pursuant to the *Trade Practices Act 1974* (Cth). The relevant contribution legislation in Australia at that time did not apply to actions pursuant to the *Trade Practices Act* (and only applies in limited circumstances, still, to actions for breach of contract). If apportionment legislation had been applicable, the Court could have apportioned the loss between the plaintiff and defendant.

In relation to the question of causation, McHugh J observed as follows:

'The common law concept of causation recognises that conduct that infringes a legal norm may be causally connected with the sustaining of loss or damage even though other factors may have contributed to the loss or damage. Every event is the product of a number of conditions that have combined to produce the event. Some philosophers draw a

²² *Ibid.* 522–3.

²³ *Ibid.*

²⁴ Consider, for example, *Galoo Ltd (in liq) v Bright Grahame Murray (a firm)* [1994] 1 All ER 16.

²⁵ *Alexander v Cambridge Credit* (1987) 9 NSWLR 310 at 315, 350 and 351; *Commonwealth v Amann Aviation* (1991) 174 CLR 64 at 175; *Kenny & Good Pty Ltd v MGICA* (1999) 100 CLR 413 at 426, 448, 457.

²⁶ *Henville v Walker* (2001) 206 CLR 459.

²⁷ *Ibid.*

distinction between a *condition* that is necessary only and a *cause* that is both necessary and sufficient to produce the event. The common law has avoided the technical controversies inherent in the logic of causation. **Unlike science and philosophy, the common law is not concerned to discover universal connections between phenomena so as to enable predictions to be made. The common law concept of causation looks backward because its function is to determine whether a person should be held responsible for some past act or omission. Out of the many conditions that combine to produce loss or damage to a person, the common law is concerned with determining whether some breach of a legal norm was so significant that, as a matter of common sense, it should be regarded as a cause of damage.**²⁸

...

'If the defendant's breach has 'materially contributed' to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage. As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage. In exceptional cases, where an abnormal event intervenes between the breach and damage, it may be right as a matter of common sense to hold that the breach was not a cause of damage. But such cases are exceptional.'²⁹

...

'Nothing in the common law, in s 52 or s 82 [of the *Trade Practices Act*] **or in the policy of the Act** supports the conclusion that a claimant's damages under s82 should be reduced because the loss or damage could have been avoided by the existence of reasonable care on the claimant's part. There is no ground for reading into s 82 doctrines of contributory negligence and apportionment of damages. No doubt, if part of the loss or damage would not have occurred but for the unreasonable conduct of the claimant, it will be appropriate in assessing damages under s 82 to apply notions of reasonableness in assessing how much of the loss was caused by the contravention of the Act. But that proposition is concerned with the items that go to the computation of the loss. **As I have pointed out, nothing in the judgments of the courts below shows that there was any unreasonable conduct on the part of Mr Henville in incurring costs or raising revenue.**³⁰
(Emphasis added and citations omitted.)

²⁸ *Ibid.* 490.

²⁹ *Ibid.* 493.

³⁰ *Ibid.* 505.

Here McHugh J accepts that it is possible that the total loss may be apportioned (or reduced) in circumstances where the plaintiff incurs expenditure, after the relevant wrongful act has occurred, which is unreasonably incurred. Such costs are not part of the loss attributable to the wrongful act. The judgment does not suggest that the loss should be apportioned simply because both the plaintiff and defendant were negligent, and both therefore caused the loss. The apportionment being referred to relates to unreasonable conduct **after** the occurrence of the cause which gives rise to the loss.

The High Court revisited these issues in the case of *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*.³¹ This case involved the plaintiff advancing a loan secured by a mortgage over land. Prior to the plaintiff agreeing to make the advance, the defendant had prepared a valuation of the land the subject of the mortgage. The defendant's valuation negligently overstated the value of the property. The plaintiff was negligent in agreeing to advance the loan because it had negligently undertaken its due diligence of the defendant's capacity to repay the loan. If either the plaintiff or the defendant had not been negligent then the plaintiff would not have agreed to advance the loan. Accordingly, the negligence of both the plaintiff and defendant were concurrent causes of the loss. In relation to causation generally, three of the High Court Judges (Gaudron, Gummow and Hayne JJ) commented as follows:

'There may be many acts or omissions that could be said to have contributed to the happening of an event. As has often been mentioned in learned articles on the subject of causation, the decision of a tortfeasor's great-great grandmother to have children can be identified as one factual cause for an event which is the subject of litigation. **To search for the single cause of an event is, therefore, to pursue an illusion. And, much more often than not, to speak of the 'effective cause' or the 'proximate cause' (or to use some similar expression) is to hide important assumptions that are made, or conclusions that are reached, about the attribution of responsibility for particular kinds of act or omission. That is why it is necessary to understand the purpose for making some inquiry about causation. Only when the purpose of the inquiry is known is it possible to identify and articulate how and why some circumstances are extracted 'out of the whole complex of antecedent conditions of an event' and identified by the law as a cause of it.**³² (Emphasis added and citations omitted.)

This marks a flexible approach to the question of causation. In addition to the requirement that the question be considered by reference to the notions of common sense is superimposed a requirement that regard be had to the purpose of the enquiry of common sense causation. In the context of extensions of time, the purpose is often twofold:

³¹ (2002) 210 CLR 109 (*I & L Securities*).

³² *Ibid.* 128.

- (a) to relieve the Contractor from liability for a failure to complete by the due date, which would usually require the Contractor to pay the Owner liquidated damages (or put another way, to avoid the application of the prevention principle and thereby allow the Owner to enforce the due date for completion and any liquidated damages clause); and
- (b) the Contractor's entitlement to an extension of time may be directly or indirectly linked to an entitlement to prolongation costs. Where the link is direct, the Contract may stipulate that in the event that the Contractor is delayed, it is entitled to a liquidated sum in respect of each day for which an extension of time is given. When it is indirect, the rights to the extension of time may be a condition precedent to the right to prolongation costs, which are the costs incurred as a consequence of the delay.

Where the extension of time is not a condition precedent to the right to make a prolongation claim, it is possible that different conclusions may be reached in respect of causation.

For example, if there is a contemporaneously concurrent delay on two parallel critical paths, where the delay is of the same length and the Contractor is entitled to an extension of time and prolongation costs caused by one (only) of the two delays, then:

- (a) in these circumstances the Contractor may argue that the excusable delay 'caused' the delay and the Contractor is entitled to an extension of time. The Owner may counter that no extension of time should be granted because even if the excusable delay had not occurred, the delay would have still occurred. Which of these arguments should prevail depends upon the application of commonsense having regard to the purpose of the extension of time clause. In this case the purpose of the extension of time clause is primarily to relieve the Contractor from liability for liquidated damages and preserve the Owner's entitlement to enforce the Contractor's warranty to complete by the date for completion, where the delay is attributable to an excusable delay. Having regard to this purpose it is apparent that absent the existence of the non-excusable delay, the delay to completion would still have occurred. That is, the delay for which the Owner is responsible means that completion of the whole project is still delayed. It would be contrary to the purpose of the extension of time clause to refuse an extension of time and expose the Contractor to liquidated damages in circumstances where, had the delay for which the Contractor is responsible not occurred, the delay to completion would still have occurred. The imposition of liquidated damages in this case would see the Owner being recompensed for delay which would have occurred in any event. That is, the Owner would profit by application of liquidated damages in these circumstances. The purpose of the liquidated damages clause is to compensate the Owner for delay to completion. It would be contrary to the purpose of the

extension of time clause and common sense for the Contractor to be penalised for such a delay; and

- (b) likewise, when it comes to the question of compensation for prolongation costs, the Contractor will want to argue that as it is entitled to an extension of time for an event in respect of which it is entitled to compensation, it follows that the delay caused loss. However, this simplistic approach does not satisfy the common sense test having regard to the purpose of compensation for delay. Obviously the purpose of such compensation is to make the Contractor whole for the loss attributable to the delay. However, if the excusable delay had not occurred, then the Contractor would still have been delayed, by the non-excusable delay. Accordingly, if the Contractor received compensation in these circumstances, that compensation would not be making the Contractor whole, but putting the Contractor in a better position than it would have been had the compensable cause of delay not occurred. Accordingly, common sense, informed by the purpose of the enquiry, results in the conclusion that the excusable delay did not cause any loss.

This example demonstrates that the one excusable and potentially compensable delay can result in the conclusion that:

- (a) while the excusable delay caused a delay to completion entitling the Contractor to an extension of time;
- (b) the same delay did not cause any additional costs to be incurred, notwithstanding that time-related costs would have increased as a consequence of the delay to completion.

These apparently inconsistent results can be reconciled by the application of common sense informed by the purpose of each enquiry. Using the logic of the High Court of Australia in *I & L Securities*,³³ this is acceptable because in each case the purpose of the enquiry is different.

The cases noted above are all Australian cases. However, this does not mean that they represent only the common law of Australia. In the case of *Galoo Ltd (in liq) v Bright Grahame Murray (a firm)*,³⁴ the Australian position as set out in the New South Wales Court of Appeal decision of *Alexander v Cambridge Credit Corp Ltd*³⁵ and *March v M H Stramare Pty Ltd*³⁶ was accepted.

In that case, Glidewell LJ (with whom Evans and Waite LJJ agreed) stated as follows:

'The passages which I have cited from the speeches in the *Monarch Steamship* case [*Monarch Steamship Co Ltd v Karlshanns Oljefabriker A/B* [1949] AC 196] make it clear that if a breach of contract by a defendant is to be held to entitle the plaintiff to claim damages, it must

³³ (2002) 210 CLR 109.

³⁴ [1995] 1 All ER 16.

³⁵ [1987] 9 NSWLR 310 (NSW CA).

³⁶ (1991) 171 CLR 506.

first be held to have been an 'effective' or 'dominant' cause of his loss. The test in *Quinn's* case [*Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370], that it is necessary to distinguish between a breach of contract which causes a loss to the plaintiff and one which merely gives the opportunity for him to sustain the loss, is helpful but still leaves the questions to be answered, 'How does the court decide whether the breach of duty was the cause of the loss or merely the occasion for the loss?'

The answer in my judgment is supplied by the Australian decisions to which I have referred, which I hold to represent the law of England as well as Australia, in relation to a breach of a duty imposed on a **defendant whether by contract or in tort in a situation analogous to a breach of contract. The answer in the end is 'By the application of the court's common sense'.³⁷**

This is particularly interesting, for reasons which will be discussed below. The Court here concludes that the expression 'effective or dominant' cause is code for determining whether, as a matter of common sense, the relevant event caused the loss the subject of enquiry.

6 Construction cases dealing with concurrent causes of delay

Having considered the general cases relating to concurrent causes it is necessary to consider the construction cases dealing specifically with concurrent causes of delay and test the logic used in those cases against the accepted logic from the cases discussed above.

In *H Fairweather & Co Ltd v London Borough on Wandsworth*,³⁸ Judge Fox-Andrews QC considered how to deal with concurrent causes of delay. The concurrent delays were strikes and acts or omissions of the architect (in issuing instructions) which delayed the Contractor. Both delays entitled the Contractor to an extension of time. However, delays caused by strikes did not entitle the Contractor to any further remuneration on account of delay whereas delays attributable to instructions of the architect did. The architect had concluded that the Contractor was entitled to an extension of time as a consequence of the strikes but gave no extensions of time on account of the delays caused by the instructions of the architect (any such delay being concurrent with the delay caused by the strikes). The Contractor contended that some of the extension of time should be attributed to the architect's instructions and further it should be paid prolongation costs for such delay. Ultimately, Judge Fox-Andrews QC concluded that nothing turned on the way in which the architect had granted extensions of time. The entitlement to prolongation costs was independent of the extension of time provisions in the contract. That is, an extension of time

³⁷ [1995] 1 All ER 16 at 29.

³⁸ (1988) 39 BLR 106.

was not a condition precedent to the entitlement to recover additional remuneration on account of delay caused by architect's instructions. However, Judge Fox-Andrews QC went on to consider the alternative position, in case he was wrong on this principal finding. Therefore, what follows was obiter dicta. When considering this issue, he concluded as follows:

'Dominant' has a number of meanings: 'Ruling, prevailing, most influential'. On the assumption that condition 23 is not solely concerned with liquidated or ascertained damages but also triggers and conditions a right for a contractor to recover direct loss and expense where applicable under condition 24 then an architect and in his turn an arbitrator has the task of allocating, when the facts require it, the extension of time to the various heads. **I do not consider that the dominant test is correct.** But I have held earlier in this judgment that that assumption is false. I think the proper course here is to order that this part of the interim award should be remitted to Mr Alexander for his reconsideration and that Mr Alexander should within six months or such further period as the court may direct make his interim award on this part.'³⁹ (Emphasis added.)

Accordingly, the judge did not go on to consider what was the correct test in these circumstances or provide any guidance as to identifying the cause of delay for the purpose of allocating the delay to a particular head under the extension of time clause. Accordingly, the case provides little guidance. Interestingly, this is an example of a case where the 'but for' test provides no assistance. The two delays in question were contemporaneously concurrent. By applying the 'but for' test to each of the causes, the answer is that neither caused the delay. It is therefore necessary to apply common sense to allocate the delay which occurred to a particular head of delay if that is required for the purposes of the contract. As indicated in the cases discussed above, it is apparent that all loss (or in this case delay) will have many causes. The question is: having regard to the purpose of the enquiry, as a matter of common sense, should the delay entitle the Contractor to further remuneration and an extension of time?

The next case of significance is *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*,⁴⁰ a decision of Dyson J. This case is often cited as authority for the proposition that where there are two concurrent causes of delay, one of which is a relevant (excusable) event and the other is not, then the Contractor is entitled to an extension of time for the period of the delay. The primary matter being dealt with in that case was the jurisdiction of an arbitrator. The Contractor contended that the arbitrator did not have jurisdiction to hear a defensive case prepared by the Owner, asserting that the real causes of delay were events other than those which had been set out in the Contractor's pleading.

³⁹ *Ibid.* 120.

⁴⁰ (1999) 70 Con LR 32 ('*Malmaison Hotel*').

The judgment includes the following paragraph:

‘Second, 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.’⁴¹ (Emphasis added.)

Accordingly, rather than being a decision of Dyson J, it is a record of an agreement between counsel as to the correct position. The relevant issue was not tested by adversarial argument, nor is the proposition a function of a judgment.

However, once again, it is a good example of concurrent causes of delay. The conclusion reached by counsel (and accepted by the judge) is capable of being supported by application of the common sense test, having regard to the purpose of the extension of time clause. The extension of time clause has at least two purposes:

- (a) to relieve the Contractor from the imposition of liquidated damages; and
- (b) to preserve the Owner's right to claim liquidated damages and thereby avoid the operation of the prevention principle.

Where there is contemporaneous concurrency of the type discussed in this case and the ‘but for’ test is applied, neither event is found, by application of that test, to be the cause of the delay. This is clearly an illogical outcome. Both events caused the delay. Following the logic of *I & L Securities* (where the loss was attributable, and would not have been sustained, but for the negligence of both the plaintiff and defendant), the Contractor is entitled to an extension of time if it can show that a cause of the delay is a relevant event and, having regard to the purpose of the clause, common sense dictates that an extension of time should be given. The primary purpose of the extension of time is arguably to relieve the Contractor of the obligation to pay liquidated damages. If an extension of time was not given for the delay considered in this case, the Owner would receive liquidated damages for a delay which would have occurred in any event. That is, if the Contractor had been able to avoid the delay caused by the non-excusable event, then the completion date would have remained the same, as the relevant event would have continued to delay.

⁴¹ *Ibid.* 37.

Accordingly, a decision which proceeded on the basis that the non-relevant delay was the dominant or controlling delay, would lead to injustice.

The agreement referred to in the *Malmaison Hotel*⁴² case has been followed in a number of other English cases and text books. For example, in *Keating on Construction Contracts* (8th Edition) the authors state:

'[I]t now appears to be accepted that a contractor is entitled to an extension of time 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. 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'.⁴³ (Emphasis added and citations omitted.)

The authority relied upon for the proposition is the *Malmaison Hotel*⁴⁴ case.

However, as we have seen, in the *Malmaison Hotel* case relied upon, the case merely records the agreement of counsel. In previous editions of *Keating* it was suggested that where there were concurrent delays, the appropriate enquiry was to establish what was the 'dominant cause' of the delay. In this edition of the text book, this notion has been replaced with the idea that where there are two delays of 'equal 'causative potency'' and one of those delays is a relevant event, then the relevant event will have caused the delay and will entitle the Contractor to an extension of time.

Such an analysis is not supported by the more general cases relating to concurrent causes of loss. All losses will have multiple causes. The authorities referred to, which establish the 'common sense' approach, suggest an altogether different analysis. With respect to *Keating*, it is suggested that the appropriate approach in respect of concurrent delays is as follows:

- (a) apply the 'but for' test;
- (b) if the two delays are contemporaneously concurrent, then the 'but for' test will not provide a satisfactory answer. This is so because the application of such tests will demonstrate that the two concurrent causes did not cause the loss (i.e. but for one of those causes, the delay will still have been suffered);
- (c) consider the purpose for which the extension of time or compensation is being granted. That purpose may be a single purpose, such as to relieve the Contractor of liability in relation to liquidated damages and to

⁴² *Ibid.*

⁴³ D Keating, S Furst and V Ramsey, *Keating on Construction Contracts* (2006) at [8] ('*Keating*').

⁴⁴ (1999) 70 Con LR 32.

preserve the Owner's right to liquidated damages by ensuring that the prevention principle does not apply. Alternatively, the extension of time provision may have those purposes and also constitute a condition precedent to the right to claim delay costs. Irrespective, it is submitted that where one of the purposes is to relieve the Contractor from liquidated damages (or preserve the Owner's right to claim liquidated damages), then if one of the causes of delay is a relevant matter, the Contractor is entitled to an extension of time;

- (d) if the delays are not contemporaneously concurrent, that is there are two delays at different times on a non-critical activity the first of which is a relevant event (consuming the float) and the latter is not, then both are necessary and neither is sufficient to cause the delay. The application of the 'but for' test will establish that only the second delay caused a delay to completion. Again, by application of the common sense principles and the rules identified above, the Contractor should be entitled to an extension of time if one of the causes of the delay is an excusable event. This is so because as a matter of common sense that event was one of the events that caused the delay. This fact is not altered by the happenstance that another event was also part of the same causal chain. In such circumstance it makes little sense to try to weigh the contribution which two events necessary for the delay to occur had and to reach a conclusion that one cause was dominant (or equal) or it was not. Whether it is considered in some undefined weighing process to be not dominant or equal does not change the fact that it is a cause of the delay.

The most recent English case dealing with the question of concurrency is *Steria Ltd v Sigma Wireless Communications Ltd*.⁴⁵ There, Judge Davies commented in respect of the rationale advanced by Keating (quoted above) as follows:

'Furthermore, the rationale suggested by the editors of *Keating* appears to me, with respect, to be compelling, and to apply as much to this case as it does to the particular case in the *Henry Boot* case and indeed to extension of time clauses generally. Accordingly, I propose to adopt that approach as correctly representing the proper approach to extensions of time under clause 6.1 of the subcontract.

It follows in my judgment that my task is to:

- (a) identify whether, and if so to what extent, the delays in completing each of the tasks in schedule 6 of the subcontract were due, whether dominantly or equally with other causes, to one of more of the circumstances referred to in clause 6.1;
- (b) consider whether Steria gave written notice of the circumstances giving rise to the delay within a reasonable time — or if not

⁴⁵ [2008] BLR 79.

whether Sigma waived compliance or is estopped from relying on non-compliance;

- (c) consider what extension of time is justified in all of the circumstances by reason of the occurrence of those circumstances ...⁴⁶

This reasoning suggests that in a complex world, it is possible to give the numerous causes which give rise to an event a weighting so that it is possible that a particular cause is either dominant, equal with other causes or less than equal. This, it is submitted, confuses the complexity of the task. There are three broad possibilities as follows:

- (a) the cause under consideration is one of a number of essential causes necessary for the loss or event to occur. That is, without the event, the loss or delay in question would not have been suffered. In those cases, presumably the event is both necessary and sufficient, to give rise to the delay. In those cases, for legal purposes only, it may be considered to be the sole cause of the delay;
- (b) there are at least two events which are necessary but neither is sufficient to cause the delay. For example, successive delays on a non-critical path which destroy all of the float available on the non-critical path and are then so extensive as to cause a delay to completion. In such cases, both cause the loss. If the two causes of delay are considered by reference to the 'dominant or equal tests' suggested by *Keating* and accepted by Judge Davies, it is probable that the second delay is the dominant delay. If that delay is not an excusable event, then the Contractor will not be entitled to an extension of time. This would not satisfy the purpose of the provision. There would be little doubt that the early relevant delay which consumed the float was a cause, albeit arguably not the dominant or equal cause;
- (c) there are two or more events which occur both of which are sufficient to cause the delay. How are each of these to be weighed for the purposes of the test suggested by *Keating*? It may be that they will be regarded as equal. If so the result will be the same as would be achieved applying the common sense test.

Accordingly, it is submitted that the approach suggested in *Keating* and adopted in *Steria*,⁴⁷ at best, disguises the correct enquiry and should not be followed. To borrow the words of the High Court of Australia in *I & L Securities*, to require the cause to be dominant or equal with another cause hides 'important assumptions that are made or conclusions that are reached about the attribution of responsibility for particular kinds of acts or omissions'.⁴⁸

⁴⁶ *Ibid.* [131]–[132].

⁴⁷ *Ibid.*

⁴⁸ (2002) 210 CLR 109 at 140.

Nothing is to be gained by hiding the assumptions and logic as this makes it difficult to predict the outcome in difficult cases. For lawyers to be able to advise (and argue), the correct logic must be apparent.

7 Apportioning between concurrent causes

As discussed previously, in the Scottish case of *City Inn*,⁴⁹ the judge characterised the causes of delay as being 'concurrent' and then sought to apportion the gross delay between relevant causes and other matters. However, on a review of the facts in that case, the Judge was unable to identify the extent of delay attributable to each of the causes. Accordingly, he was faced with a task of considering the Contractor's entitlement to extensions of time having regard to the gross delay to completion which had occurred and the various events which were potentially causes of that delay. Such a claim is analogous to a global claim made in respect to compensable events. Viewed in this way, the case is of limited relevance to cases where it is possible to identify how much of the gross delay is attributable to each delaying event, using CPM methods.

In *City Inn*, the Judge held that the clauses in the Contract which required the granting of an extension of time which was 'fair and reasonable' in the circumstances allowed apportionment of the type undertaken in that case. While such an approach is defensible in the context of a case where no CPM analysis could be done of the delays, that is not the case where it is possible to do the usual CPM analysis. For the reasons explained above, the purpose of the extension of time provision is to relieve the Contractor of liability in relation to liquidated damages and to avoid application of the prevention principle. With these dual purposes in mind, it is not fair or reasonable to apportion delay in circumstances where one of the causes of delay is a relevant event. This is so because the relevant event is one (perhaps of many) events, that caused the whole of the delay. In those circumstances an extension of time should be granted because to allow liquidated damages to be levied in such circumstances would be neither fair nor reasonable.

8 Conclusion

The three cases discussed above, *March, Henville v Walker* and *I & L Securities* all support the application of the 'common sense' test of causation. These cases are not authority for the abandonment of the 'but for' test, but condition the answers which are obtained by use of that test. In the vast majority of cases, the 'but for' test will produce the correct result. However, in certain circumstances it will not. This is particularly relevant to the question of delay in a construction case, as in circumstances where there is contemporaneous concurrent delay, the simple application of the 'but for' test will result in a conclusion that neither delaying event caused a delay to

⁴⁹ [2008] BLR 271.

completion (because absent (only) one of the delaying events, the delay would still have occurred). In other cases, the event might be so remote to be a sensible cause, but that event is still on the causal chain to satisfy the 'but for' test. It would be inappropriate to logically connect such a remote cause to the event which has occurred. Ultimately it will always be a question of common sense to be applied in the relevant circumstances. As part of the application of common sense it is essential to have regard to the purpose of the enquiry, as the purpose will provide the touchstone for determining which of the many antecedent events, which caused the delay, should be regarded as a legal cause. While this appears to give significant latitude, the cases identified above require extreme circumstances before a cause on the causal chain is so remote as not to be regarded as giving rise to liability. Therefore:

- (a) in *March's* case, the negligence of the plaintiff while driving intoxicated did not mean that the defendant was excused of liability for parking his truck illegally. This is so because it was reasonably foreseeable that another driver may have been negligent (and intoxicated) and could therefore suffer loss as a consequence of the way in which the truck was parked. It is important to understand that while the apportionment legislation avoided significant injustice in this case, absent such apportionment legislation and using the modern logic in relation to causation (rather than the old contributory negligence logic), the mere fact that the negligence of the defendant was one of the causes of the loss would not prevent the defendant being liable (presumably for 100% of the loss); and
- (b) the application of common sense requires a consideration of the purpose of the legislation (or in the context of a contract, the provision). While this may produce slightly different answers depending upon the purpose, where the purpose is to compensate for wrongdoing, a lenient approach is likely to be taken.