Chapter 2
Time

2.1 Time of the essence

2.1.1 Definition

A term, the breach of which by one party gives the other party a right to treat it as repudiatory is sometimes said to be of the essence of the contract. At one time the common law took a strict view with the result that a contract had to be performed on the date stated, the only relief being obtained through the Court of Equity. However, for three-quarters of a century, time has not been automatically considered as of the essence of a contract unless equity would have so considered it prior to 1875.[1] There are probably only three instances where time will be of the essence:

- if the contract expressly so stipulates
- if it is a necessary implication of the contract and its surrounding circumstances
- if a party unreasonably delays its performance so as to be in breach, time may be made 'of the essence' if the other party serves a notice on the party in breach setting a new and reasonable date for completion.

The term must be so fundamental that its breach would render the contract valueless, or nearly so, to the other party.

2.1.2 Serving notice

It is noteworthy that where a term is not originally of the essence it may be made of the essence by one party giving the other a written notice to that effect.[2] In that case, failure to comply with the notice would be evidence of a repudiatory breach rather than a repudiatory breach itself. This may be of some limited use in cases where a contractor consistently fails to meet time targets for reasons which do not entitle it to an extension of time under the contract provisions. However, in the case of most standard form building contracts, the provisions for termination (e.g. for failure to proceed regularly and diligently) adequately cover the situation. Care must be taken in serving such a notice.

[1] Law of Property Act 1925, s. 41.
[2] *Behzadi v Shaftsbury Hotels Ltd* [1992] Ch 1.

Building Contract Claims, Fifth Edition. David Chappell.

In *Shawton Engineering Ltd v DGP International Ltd,*[3] an attempt was made to make time of the essence by service of a notice. Shawton made a claim for over £1.5 million. Shawton, a sub-contractor, was claiming against a sub-sub-contractor (DGP). DGP was responsible for five packages of drawings and work, for which there were five separate completion dates. These dates were exceeded, but a factor was the substantial number of variations ordered for each package, some ordered prior and some after the completion dates. It was agreed that, since there was no provision for extending time, DGP's obligation became an obligation to complete within a reasonable time. Argument revolved about the meaning of 'reasonable time'. It was also accepted that Shawton had agreed to accept delivery at substantially later dates than had been agreed. However, that did not result in Shawton being prevented from serving a notice subsequently.

Importantly, at the date Shawton purported to terminate the contracts, DGP had produced a substantial number of drawings and they had manufactured and delivered a significant proportion of the equipment. The Court rejected Shawton's appeal against an earlier decision in this dispute. In doing so, the Court questioned whether the notice given by Shawton was expressed sufficiently clearly to make time of the essence and held that DGP was not in breach at the time the notice was given.

That does not mean that, once a party agrees to allow extra time for delivery or completion of work, it will be prevented from issuing a notice putting a cap on the time. The position has been set out succinctly:

> 'It would be most unreasonable if the defendant having been lenient and waived the initial expressed time, should, by so doing, have prevented himself from ever thereafter insisting on reasonably quick delivery. In my judgment, he was entitled to give a reasonable notice making time of the essence of the matter.'[4]

And later in the same case:

> 'The case therefore comes down to this: there was a contract by these motor traders, the plaintiffs, to supply and fix a body on the chassis within six or seven months. They did not do it. The defendant waived that stipulation. For three months after the time had expired he pressed them for delivery, asking for it first for Ascot and then for his holiday abroad. But still they did not deliver it. Eventually, at the end of June, being tired of waiting any longer, he gave four weeks' notice and said: "at all events, if you do not supply it at the end of four weeks I must cancel the contract"; and he did cancel it. I see no injustice to the suppliers in saying that that was a reasonable notice. Having originally stipulated for six or seven months, having waited ten months, and still not getting delivery, the defendant was entitled to cancel the contract.'[5]

An example where time may be made of the essence may be if a contractor/developer has ordered proprietary timber frames from a supplier on the supplier's own terms to be installed in a series of housing units. There is unlikely to be provision for extending time but there will be a date for delivery. Clearly, in the context of

[3] [2005] EWCA Civ 1359.
[4] *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616 at 624 per Denning LJ.
[5] *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616 at 626 per Denning LJ.

construction of a commercial development, delivery on the due date will be very important. If the supplier fails to deliver on the due date and the contractor has done nothing to contribute to the delay, the supplier will be in breach of contract. Although the contract is unlikely to specify time as being of the essence, it would be open to the contractor to make time of the essence by sending the supplier a notice giving a reasonable time for delivery and making clear that failure to deliver on the new date would be treated as a repudiatory breach.

There is no general concept that time is of the essence of a contract as a whole. The question is whether time is of the essence in relation to a particular term. In the case of a hazardous or wasting asset, time can be made of the essence by service of notice to that effect even if the other party has not delayed unduly.[6]

2.1.3 Relevance of an extension of time clause

There is authority that time will not normally be of the essence in building contracts unless expressly stated to be so. This is because the contract makes express provision for the situation if the contract period is exceeded in the shape of an extension of time clause and liquidated damages.[7] In that context, making time of the essence would be contradictory and of little or no practical benefit to the employer although it was done in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* and apparently gave the employer the right to 'determine the contract at the end of' the period as extended by the architect.[8]

2.2 Time at large

2.2.1 Definition

Where a building contract does not provide any agreed contractual mechanism for fixing a new date for completion, time may become 'at large' if the contractor suffers delay due to some action, inaction or default on the part of the employer or persons for whom the employer is responsible. In such instances the contractor's duty will be to complete the Works within a reasonable time.[9] Provided a contractor has not acted unreasonably or negligently, it will complete within a reasonable time despite a protracted delay if the delay is due to causes outside its control.[10] In such circumstances time is said to be 'at large'.

Time may also be at large from the beginning of the contract if the parties have not agreed any date for completion. In such circumstances, the contractor's obligation will be to complete within a reasonable time. The determination of a reasonable time in such circumstances where there is no contractual date for completion and

[6] *British and Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] 3 All ER 492.
[7] *Lamprell v Billericay Union* (1849) 18 LJ Ex 282; *Babacomp Ltd v Rightside* [1974] 1 All ER 142.
[8] (1970)1 BLR 114 at 120 per Salmon LJ.
[9] *Wells v Army and Navy Co-operative Stores* (1902) 2 HBC 4th edition (vol 2) 346.
[10] *Pantland Hick v Raymond & Reid* [1893] AC 22.

no delaying event may be a difficult task. In *J & J Fee Ltd v The Express Lift Co Ltd*, where there had been correspondence about the date for completion, the court held that there was an agreed date, but ventured the opinion that in any event a reasonable date for completion would be implied as not later than the date which had consistently been put forward by Express Lift.[11]

2.2.2 Relationship with extension of time and liquidated damages

The question of time being 'at large' and the relationship between the extension of time clause and liquidated damages provisions in JCT contracts has been stated in this way:

> '1. The general rule is that the main contractor is bound to complete the work by the date for completion stated in the contract. If he fails to do so, he will be liable for liquidated damages to the employer.
> 2. That is subject to the exception that the employer is not entitled to liquidated damages if by his acts or omissions he has prevented the main contractor from completing his work by the completion date – see for example *Holme v Guppy* (1838) 2 M & W 387, and *Wells v Army and Navy Co-operative Society* (1902) 86 LT 764.
> 3. These general rules may be amended by the express terms of the contract.
> 4. In this case [which involved a contract in terms identical to JCT 63] the express terms of clause 23 of the contract do affect the general rule . . . '.[12]

In practice, very few building contracts are without a clause enabling the employer or the employer's agent to fix a new completion date after the employer has caused delay to the contractor's progress. All standard forms have clauses permitting the extension of time although not all of the terms are entirely satisfactory. Even where a building contract contains terms providing for extension of the contract period, time may yet become at large either because the terms do not properly provide for the delaying event or, because the architect has not correctly operated the terms. The latter is sadly all too common.

2.2.3 Common reasons for time becoming at large

The JCT series of contracts (other than MW and MWD) favour a list of events giving grounds for extension of time. Because the architect's power to give an extension of time is circumscribed by the listed events, there is a danger that the employer may delay the Works in a way which does not fall under one of the events. In such a case, time would be at large. For example, the 1980 edition of the JCT Standard Form did not include power for the architect to extend time for the employer's failure to give the contractor possession of the site on the due date. Therefore, if an employer failed

[11] (1993) 34 Con LR 147.
[12] *Percy Bilton v Greater London Council* (1982) 20 BLR 1 at 13 per Lord Fraser of Tullybelton, delivering the unanimous decision of the House of Lords.

to give possession on the due date the result was that time became at large and the contractor's obligations became a duty to complete the Works within a reasonable time. This was the situation even in cases where it was acknowledged by the court that the contractor had itself subsequently contributed to the delay.[13] It has been held that the architect has the power to give an extension of time if the employer causes further delay when the contractor is already in delay through its own fault, i.e. in culpable delay.[14]

By Amendment 4 in 2002, the JCT further improved JCT 98 by adding to the relevant events one which allowed an extension of time for any act or default of the employer – virtually a catch-all category. This is now the relevant event at clause 2.29.6 of SBC which refers to any impediment, prevention or default of the employer, the architect and others for whom the employer is responsible. The inclusion of this relevant event has enabled the JCT to dispense with some of the other relevant events which could be said to fall into this category, for example, the late provision of information by the architect.

Where the extension of time clauses are properly drafted, but the architect operates them incorrectly, time may become at large depending on all the circumstances. An example of this would be if the architect was late in delivering necessary drawing information to the contractor, but failed to give any extension of time. This is a clear case of the architect not taking advantage of the available mechanism. Another example is where the contract provision sets out a timetable within which the architect must operate to give an extension of time. If the power is not exercised within the relevant period, the architect's power to give an extension will end and time will become at large.

2.2.4 Whether time limits are mandatory

It has been said that such time periods are not mandatory, but simply directory on the authority of the Court of Appeal in *Temloc Ltd v Errill Properties Ltd*.[15] This appears to be an incorrect reading of the decision. The court in *Temloc*, in making that observation, were interpreting the provisions *contra proferentem* the employer who sought to rely upon them. The employer had stipulated '£nil' as the figure for liquidated damages and the Court of Appeal held that this meant that the parties had agreed that if the contractor finished late, no liquidated damages would be recoverable by the employer. The court went on to hold that the employer could not opt to claim unliquidated damages. The contract provided that after practical completion the architect must, within twelve weeks, confirm the existing date for completion or fix a new date. The architect exceeded the 12 weeks and the employer contended that the liquidated damages clause could be triggered only if the new date was fixed at the right time. Therefore, the employer could claim unliquidated damages

[13] *Rapid Building Group Ltd v Ealing Family Housing Association Ltd* (1984) 1 Con LR 1.
[14] *Balfour Beatty v Chestermount Properties Ltd* (1993) 62 BLR 1, where the judge held that the architect had such power under the slightly amended form of JCT 80 under consideration. The decision has been referred to with approval in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32 and *Royal Brompton Hospital NHS Trust v Hammond and Others (No 7)* (2001) 76 Con LR 148.
[15] (1987) 39 BLR 30.

for breach of an implied term. It was in this context that the court, in a view which is probably *obiter* in any event, suggested that the time period was not mandatory. They gave no real reasons, but a clue when it was said:

> 'The whole right of recovery of liquidated damages under clause 24 does not depend on whether the architect, *over whom the contractor has no control*, has given his certificate by the stipulated day.'[16] (emphasis added)

It seems that the court recognised that the architect is the employer's agent. Had the employer's argument succeeded, it would have been contrary to the established principle that a party to a contract cannot take advantage of its own breach.[17] The 12 week review period subsequently was confirmed in another case dealing with the JCT 80 contract, but it is thought that its principles are applicable to SBC, IC and ICD:

> 'The process of considering and granting extensions of time is to be completed not later than 12 weeks after the date of practical completion and the architect must, within that timescale, either finally fix the completion date or notify the contractor that no further extensions of time are to be granted.'[18]

However, there, the court seemed to hold the door slightly ajar. Its view was that the time limits in the JCT contract were 'neither rigid nor immutable'. The court was principally considering the issue of the final certificate and the pre-conditions which must be fulfilled before it is issued. After considering a number of authorities, it was concluded:

> 'It would be much more consistent with the mandatory language of the conditions and would give effect to that language if all the "shalls" are read in this way: the architect must issue the various certificates and the final certificate and in the sequence and with the prescribed time intervals between the successive steps. If the time limits prescribed by the conditions are not kept or maintained, the architect must still issue the certificates in question as soon as it is reasonably possible to issue them subject to the terms of any agreement as to their issue that has been reached or acknowledged by the parties. . . . The correct starting point is that the power is mandatory. It is then necessary to consider what the minimum relaxation would be that is necessary to give that mandatory requirement business efficacy. In that context, it can be seen that it is necessary to allow for a relaxation of the prescribed timescales subject to the imposition of a requirement of reasonableness. . . . Although the certifier has an implied power to issue certificates out of time, this power is limited since it would be unworkable and contrary to the presumed intentions of the parties for the power to issue certificates not to be subject to the obvious constraint that the parties should be notified of its intended exercise and should not be prejudiced by its exercise. In other words, the power must be exercised reasonably.'[19]

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[16] (1987) 39 BLR 30 at 39 per Nourse LJ.
[17] *Alghussein Establishment v Eton College* [1988] 1 WLR 587 HL.
[18] *Cantrell & Another v Wright & Fuller Ltd* (2003) 91 Con LR 97 at 147 per Judge Thornton.
[19] *Cantrell & Another v Wright & Fuller Ltd* (2003) 91 Con LR 97 at 136–40 per Judge Thornton.

These words are very instructive. The court is referring to certificates and, although the courts often refer to giving an extension of time as giving a certificate or certifying, it is notable that the court does not do so here. When later referring to extensions of time as one of the pre-conditions before a final certificate can be issued, the court refers to fixing a completion date or to notifying the parties. Nevertheless, it may be argued that all the considerations which apply to the issue of the final certificate as regards timing apply also to the final decision on extensions of time. Importantly, both are referred to in mandatory terms. Therefore, it seems at least arguable, on the basis of this case, that the architect may issue a final decision on extensions of time later than prescribed in the contract subject to some fairly stringent conditions:

- there must be a powerful reason for the late issue, and
- the issue must be as soon as possible after the end of the prescribed period, and
- the late issue must not prejudice either party, and
- the parties should be notified of the late issue.

However, it remains doubtful whether the contractor's failure to provide information in time to be considered would be considered a powerful reason for issuing the decision later than stipulated in the contract. It is suggested that, save for wholly exceptional circumstances, the time period in the contract should be treated as mandatory.

2.2.5 Damages if time at large

Contractors sometimes argue that time is at large and, therefore, liquidated damages are not recoverable. Although, in appropriate circumstances, that is a very strong argument, the consequences of time becoming at large are not necessarily to prevent the employer from recovering damages. Unliquidated damages, with a ceiling on recovery equal to the rate of liquidated damages could be recovered.[20] When these questions go before an adjudicator or an arbitrator it is likely that it is actually presented as a claim that the architect should have given an extension of time to the date of practical completion and a reasonable date for completion will be set by the tribunal and treated, for all intents and purposes, as if the architect had issued an extension of time to that date; thus permitting liquidated damages to be claimed thereafter. The occasions when a tribunal is asked for a declaration that time is at large appear to be rare.

2.3 Extension of time clauses in contracts

2.3.1 Basic principles

If the parties intend that liquidated damages are to be payable if the contractor fails to complete the Works, a date for completion must be stipulated in the contract. That is because there must be a definite date from which to calculate liquidated damages.[21]

[20] See the discussion on this point in Chapter 3, Section 3.12.
[21] *Miller v London County Council* (1934) 50 TLR 479.

There is an implied term in every contract that the employer will do all that is reasonably necessary to co-operate with the contractor[22] and that the employer will not prevent the contractor from performing.[23] In the context of a building contract, the employer's co-operation probably extends to little more than ensuring that the contractor has all necessary drawings and instructions at the right time and adequate access to the site to enable it to carry out the Works. In this respect, the employer also has a duty to ensure that any appointed architect carries out his or her obligations under the building contract properly although the duty does not arise until the employer becomes aware that the architect is failing to perform properly and that there is a necessity to bring such failure to the architect's notice.[24]

2.3.2 Hindrance by the employer

Alongside the implied term of co-operation, there must be in every contract an implied term that neither party will do anything to hinder or delay performance by the other.[25] Such a term was upheld as generally applicable to building contracts in *London Borough of Merton v Stanley Hugh Leach Ltd*.[26] An employer that does hinder the contractor can no longer insist that the contractor finishes its work by the contractual date for completion. This principle has the weight of judicial authority behind it. In *Holme v Guppy* it was said:

> '. . . and there are clear authorities, that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default.'[27]

That was a case where a builder agreed to construct a brewery in four and a half months subject to liquidated damages of £40 per week. Completion was late due to the default of the employer in failing to give possession of the site on the due date. It was said in a New Zealand judgment:

> 'There is an established principle . . . which is put in various ways: that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself; that a party is exonerated from the performance of a contract when the performance is rendered impossible by the wrongful act of the other contracting party; or more emotively, that a party cannot take advantage of his own wrong.'[28]

It is clearly not an immutable rule; it will depend on circumstances. For example, where a contractor has undertaken to carry out works including any alterations or

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[22] *Luxor (Eastbourne) Ltd v Cooper* [1941] 1 All ER 33.
[23] *Cory Ltd v City of London Corporation* [1951] 2 All ER 85.
[24] *Perini Corporation v Commonwealth of Australia* (1969) 12 BLR 82; *Penwith District Council v V P Developments Ltd*, unreported, 21 May 1999; *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* (2000) 82 Con LR 89.
[25] *Barque Quilpue Ltd v Brown* [1904] 2 KB 261.
[26] (1985) 32 BLR 51.
[27] (1838) 3 M & W 387 at 389 per Parke B.
[28] *Canterbury Pipelines Ltd v Christchurch Drainage Board* (1979) 16 BLR 76.

additions which the employer might choose to make, it can be bound to its undertaking. In *Jones v St John's College Oxford* it was said:

> '. . . the plaintiffs undertake not only to do by a given time the works which were specified, and which they had the opportunity therefore of forming their own judgment upon, but they also undertake to do the alterations, that is to say, such alterations as are contemplated by the contract, within the time originally prescribed for the performance of the works.'[29]

2.3.3 Defective clauses

It is not clear whether the judge was referred to *Jones* in *Wells v Army and Navy Co-operative Society Ltd* where the contractor was not liable to pay 'penalties' on account of exceeding the contract period.[30] The key facts seem to have been that although the contract provided for the contractor to complete by the due date notwithstanding variations, strikes and weather conditions, and subject only to any extension of time which the employer may (but was not obliged to) grant, it was not wide enough to cover the employer's own defaults. In general, the courts adopt the approach that 'it is not to be inferred that the one party meant to bind himself so very stringently, unless it is so stated.'[31] In *Wells*, it was said:

> 'In the contract one finds time limited within which the builder is to do the work. That means not only that he is to do it within that time but it means also that he is to have that time within which to do it . . . in my mind that limitation of time is intended not only as an obligation, but as a benefit to the builder . . . In my judgment where you have a time clause and a penalty clause (as I see it) it is always implied in such clauses that penalties are only to apply if the builder has, as far as the builder owner is concerned and his conduct is concerned, that time accorded to him for the execution of the works which the contract contemplates he should have.'[32]

In *Dodd v Churton* it was held that an employer who prevents the contractor completing within the stipulated time, cannot recover liquidated damages.[33] *Jones* was distinguished, because although there was a term which empowered the ordering of additional work and this was done, the contractor had not agreed that, notwithstanding the ordering of additional work, it would complete within the original period. Very clear words will be needed in order to bind a contractor to a completion date if the employer is the cause of the delay. This principle is now well established[34] and it seems unlikely that a modern court would take so stern a view as the 1870 court in *Jones*.

Extension of time clauses should be drafted so as to cover all delays which may be the responsibility of the employer, for example SBC clause 2.29.6 or ACA 3 clause

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[29] (1870) LR 6 QB 115 at 123 per Mellor J.
[30] (1902) 86 LT 764.
[31] *Roberts v Bury Commissioners* (1870) LR 5 CP 310 at 327 per Kelly CB.
[32] *Wells v Army and Navy Co-operative Stores* (1902) 2 HBC 4th edition (vol 2) 346 at 355 per Vaughan Williams LJ.
[33] [1897] 1 QB 562.
[34] *Percy Bilton v Greater London Council* (1982) 20 BLR 1.

11.5. Then, if the employer, either personally or through the agency of the architect, hinders the contractor in a way which would otherwise render the date for completion ineffective, the architect will have the power to fix a new date for completion and thus preserve the employer's right to deduct liquidated damages. The position was set out in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*:

> 'The liquidated damages and extension of time clauses in printed forms of contract must be construed strictly contra proferentem. If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employer's own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer. I am unable to spell any such provision out of…the contract [clause] in the present case.'[35]

In that case, the extension of time clause, after referring to certain events of a neutral character, i.e. they could not be said to be the fault of either contractor or employer, made reference to 'or other unavoidable circumstances'. This was the phrase on which the employer relied, but 'delay due to the employer cannot be said to have been an unavoidable circumstance to anyone save the contractor.'[36] A similar phrase is 'other causes beyond the control of the contractor'. It has been held that these words 'ought to be construed with reference to the preceding causes of delay, and ought not to receive such an extension as would make the defendants judges in respect of their own defaults'[37] This view was noted with approval in *Perini Pacific v Greater Vancouver Sewerage and Drainage District*.[38]

2.3.4 The prevention principle

It used to be thought that if the employer committed any act of prevention, the contractor was entitled to an extension of time whether or not it had complied with any notice requirements. That meant that if no extension was given, time would become at large and the contractor was relieved of its obligation to complete by the completion date in the contract. Instead the contractor's obligation was simply to complete the Works within a reasonable time. In an Australian case,[39] the employer claimed liquidated damages from the contractor for delay. The cause of delay was substantially down to the employer, but the contractor had failed to operate the strict requirement to give notice. An arbitrator found in favour of the contractor and this was upheld by the Supreme Court of the Northern Territory of Australia:

> 'Acceptance of [the employer's] submissions would result in an entirely unmeritorious award of liquidated damages for delays of its own making . . . '

Subsequently it has become clear that such an approach would allow a contractor to put time at large at will by simply ignoring notice provisions which would have

[35] (1970) 1 BLR 114 at 121 per Salmon LJ.
[36] (1970) 1 BLR 114 at 126 per Edmund Davies LJ.
[37] *Wells v Army & Navy Co-operative Society Ltd* (1902) 86 LT 764 at 765 per Wright J at first instance.
[38] (1966) 57 DLR (2d) 307 at 321 per Bull JA.
[39] *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] (2005) 21 Const LJ 71.

triggered the extension of time process. There is a strong argument that a contractor is entitled to use the contract terms for its own benefit since they have been agreed by both parties and, indeed in some instances, imposed by the employer. However, where there is a notice requirement, it is going too far to argue that the so-called 'prevention principle' overrides any failure by the contractor to comply with a duty to serve notice. It has since been held that if a contractor ignores a notice provision which is a condition precedent, there will be no entitlement to extension of time, even though there would otherwise be a clear basis on the grounds of the employer's acts of prevention.[40] Although the court was not called upon to decide the point, it provided a succinct analysis of the position:

> 'Whatever may be the law of the Northern Territory of Australia, I have considerable doubt that the *Gaymark Investments* case represents the law of England. Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent. If the *Gaymark Investments* case is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option the contractor could set time at large.'[41]

The courts have also considered the position where an extension of time clause can be read, whether on account of bad drafting or for some other reason, so as to convey two entirely different meanings:

> 'It seems to me that, in so far as an extension-of-time clause is ambiguous, the court should lean in favour of a construction which permits the contractor to recover appropriate extensions of time in respect of events causing delay. This approach also accords with the principle of construction set out by Lewison in *The Interpretation of Contracts* (3rd edn, 2004).'[42]

2.3.5 The architect's duty

In determining the appropriate extension of time, the architect must act fairly between the parties. This is an onerous duty, because in many instances the architect is put in the position of having to act as judge of his or her own behaviour. It is sadly common for an architect to give an extension of time on the grounds of exceptionally adverse weather conditions, a neutral event, rather than because an architect's instruction was late. An architect who tries to act fairly may often find that the employer is less than happy.

Architects should consult anyone who might be able to assist in arriving at the facts before making a decision. There is nothing wrong, and much to be gained, by

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[40] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* (2007) 111 Con LR 78.

[41] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* (2007) 111 Con LR 78 at 105 per Jackson J. Although obiter, this view was followed in *Steria Ltd v Sigma Wireless Communications Ltd* (2007) 118 Con LR 177 at 205.

[42] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* (2007) 111 Con LR 78 at 96 per Jackson J.

asking the employer, the clerk of works and other consultants. The architect should be seeking to establish the facts to enable the length of delays to be established with accuracy. It is essential that it is the architect who must decide the extension of time after considering all the evidence. Although not strictly necessary, architects will usually notify the employer as a matter of courtesy before giving an extension. In some instances, a client may not understand the situation and may attempt to instruct the architect about the length of extension or even that no extension can be given. The client is not entitled to give such instructions which amount to interfering with the architect's duties and effectively substituting the employer for the architect for the purpose of giving extensions of time.

In *Argyropoulos & Pappa v Chain Compania Naviera SA*,[43] the JCT Contract for Minor Building Works 1980 was being used. The architect reached the conclusion that the contractor was entitled to an extension of time and notified the contractor accordingly. The employer objected and refused to accept the extension and a later extension given by the architect as valid, at one point visiting site and telling the contractor that the architect had no power to give extensions of time. The employer went so far as to notify the architect that the employer's approval was required for any extension of time. In due course, the architect, on legal advice ceased to act. The resulting case dealt with several issues, among them the extension of time point in relation to which the judge said:

> '. . . the [employer] sought to interfere with the [architects'] performance of their duties under [the extension of time clause] which they very properly resisted. Some of [the employer's] letters were also very offensive and indicated a total lack of confidence in the [architects]. [The employer and their] Solicitors also undermined the [architects'] position in relation to the contractors. In my judgment the [employer's] letters, the Solicitors' letters and the [employer's] conduct were in breach of contract and the [architects] were amply justified in treating their engagement as at an end.'[44]

It is clear that the court's view was that the architect acted properly and the employer improperly. The architect was entitled to damages for the unlawful termination.

An architect must have dealt with all questions relating to extension of time before issuing a default notice prior to termination which notifies the contractor of a failure to work regularly and diligently.[45]

2.3.6 Further delays during a period of culpable delay

It is suggested that if the contractor, through its own culpable delay, is thrown into a season where weather conditions are less beneficial than during the original contract period, the contractor will have to put up with it. However, if during the period of culpable delay, the conditions are exceptional for that time of year, the contractor will be entitled to an extension of time if weather conditions are a ground

[43] Unreported, 1 February 1990; reported in abridged form in (1990) 7-CLD-05-01.
[44] Unreported, 1 February 1990 at 19 per Judge Newey.
[45] *Sindall Ltd v Solland* (2004) 80 Con LR 152.

for extension of time under that contract. In some contracts there is a term permitting the architect to extend time if any delays which are the responsibility of the employer or the architect occur after the contractual date for completion, but before practical completion. It is thought that the inclusion of such an express term precludes the architect from extending time if a neutral relevant event occurs after the completion date during a period of culpable delay. This approach appears to have received judicial approval.[46] Older authority from the Court of Appeal, however, suggests the contrary.[47]

2.3.7 Dealing with Christmas holidays

A question which often arises concerns the period around Christmas and New Year, when many contractors take two weeks as holiday. If a proposed extension of time takes in the Christmas period or would end during the period, should the whole of the two weeks be added to the extension? There are two views of this. One view is that the whole of the two weeks should be added because the Christmas holiday period is well established as a time when all the contractors are on holiday. The other, and better, view is that the contractor is entitled to the public holidays (Christmas Day, Boxing Day and New Year's Day) just like any other public holidays, but not to any other days, because the decision to take two weeks as the Christmas holiday is simply a choice made by many contractors. It is not a statutory holiday and many people in the construction industry, including some contractors, do work during this time.

2.4 Concurrency

2.4.1 Introduction

A question which frequently arises in regard to causation[48] is the method of dealing with loss which may be due to either or both of two causes. It is important to differentiate between the delaying event or cause and the delay itself. It is generally recognised that there are times when there are delays which may be the result of different causes, but that sometimes the causes will run at the same time or overlap. This makes it difficult to decide how to treat the delay, particularly if the causes originate from different parties or the delays are of different kinds. For example, under the Standard Forms of Contract, some causes of delay may give rise to an extension of the contract period, some causes may give rise to extension and possibly also loss and expense, while other causes may not entitle the contractor to any extension or loss and expense whatsoever. Take, for example, the following situations:

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[46] *Balfour Beatty v Chestermount Properties Ltd* (1993) 62 BLR 1, in which an amended JCT 80 was under consideration.
[47] *Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC* [1952] 2 All ER 452.
[48] See Chapter 8.

(1) A contractor is just starting to carry out the covering of a large roof when it receives an Architect's Instruction to change the covering to another material which will take a few days to arrive on site. Within hours, the weather takes a turn for the worse and the contractor has to pull all its operatives off site for several days. If the overall delay is six days, is the architect responsible or can the contractor only get an extension of time due to exceptionally adverse weather conditions – if that?
(2) A contractor is in delay through its own fault after the contract completion date and the architect postpones all the Works.
(3) The contractor is about to start some complex trench excavation in a confined space, but it has not received the architect's detailed drawings. The contractor decides to make a start where it can, but its machinery breaks down. By the time it is in working order, the architect has got the drawings to site. Who is responsible for the delay and what, if anything, can the contractor recover?

At first sight, it is difficult to see a clear answer to some of these problems. '*Keating on Construction Contracts*'[49] looks at a number of propositions as follows:

(a) *The Devlin Approach* which broadly contends that if there are two causes operating together and one is a breach of contract, the party responsible for the breach will be liable for the loss.
(b) *The Dominant Cause Approach* which contends that if there are two causes, the effective, dominant cause is to be the deciding factor.
(c) *The Burden of Proof Approach* which contends that if there are two causes, and the claimant is in breach of contract it is for the claimant to show that loss was caused otherwise than by its breach.
(d) *The tortious solution* which enables a party to recover in full by showing that a defendant caused or materially contributed to its loss.

2.4.2 The dominant cause

It is sometimes said that the case of *H Fairweather & Co Ltd v London Borough of Wandsworth*[50] is authority to the effect that the 'dominant cause' approach is incorrect. Fairweather entered into a contract to erect 478 dwellings for Wandsworth on JCT 63 terms. Long delays culminated in the architect giving an extension of time of 81 weeks for strikes. The contractor sought arbitration in an attempt to have the extension allocated under different heads. It mistakenly thought that an extension of time under appropriate heads was necessary before it could become entitled to any loss and/or expense. The contractor wanted at least 18 weeks designated as on account of architect's instructions or late instructions. The arbitrator decided that where it was not possible to allocate the extension among different heads of delay, the extension must be given for the dominant reason. What the judge actually said in that case was:

[49] Stephen Furst and Vivian Ramsey (2006) *Keating on Construction Contracts*, 8th edition, Sweet & Maxwell, p. 272–3.
[50] (1987) 39 BLR 106.

> '"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 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 his part.'[51]

Besides, being almost certainly *obiter*, this statement is nowhere near the kind of condemnation often suggested. Other cases, indeed, show that the courts have embraced the dominant cause approach quite happily.[52]

> 'One has to ask oneself what was the effective and predominant cause of the accident that happened, whatever the nature of the accident may be'.[53]

In *Fairfield-Mabey Ltd v Shell UK Ltd*, Shell entered into a contract with Fairfield-Mabey (FM) to fabricate parts of a gas platform in the North Sea. Sub-contractors were employed by FM to carry out weld-testing, etc. It was fast track work. Delays occurred and there followed claim and counterclaim. FM sued Shell and joined in Met-Testing (MT) claiming an indemnity against the counterclaim. The settlement reached was £280,000 to FM, but they then claimed £400,000 against MT. MT said that even if they were at fault regarding the testing, there was no damage because another sub-contractor had in any case caused the delay. It was held that the absence of approval for certain tests was not a cause of equal efficacy with the sub-contractor delays. The test was that of the ordinary bystander who would have said that the cause of delay was due to the sub-contractor.

Another case which is instructive is *Carslogie Steamship Co Ltd v Royal Norwegian Government (The Carslogie)*.[54] In 1941, the Heimgar, belonging to the respondents, collided with the Carslogie, which belonged to the appellants. The Carslogie was at fault. Temporary repairs to the Heimgar were carried out in England and the ship proceeded to the USA for permanent repairs. During her voyage, she suffered heavy weather damage which needed immediate repair. The ship remained in dock for 50 days and repairs to the collision damage and weather damage were carried out concurrently. It was agreed that 10 days should be allocated to the repair of the collision damage and 30 days to repair the weather damage. The respondents claimed damages for loss of charter hire during the 10 days attributable to the collision damage. It was held that the appellants were only liable for the loss of profit suffered by the respondents resulting from the appellants' wrongful act. During the

[51] *H Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106 at 120 per Judge Fox-Andrews.
[52] See, for example, *Fairfield-Mabey Ltd v Shell UK* (1989) 45 BLR 113 and *Yorkshire Dale Steamship v Minister of War Transport* [1942] 2 All ER 6.
[53] *Yorkshire Dale Steamship v Minister of War Transport* [1942] 2 All ER 6 at 10 per Viscount Simon.
[54] [1952] 1 All ER 20.

time that the Heimgar was detained in dock she was not profit-earning because the heavy weather damage had made her unseaworthy, therefore, the respondents had not suffered any damage, because the vessel was undergoing repairs in respect of the collision damage for 10 days. The case contains reference to further examples which are very instructive.

> 'It is well established that, if a ship goes into dock for repairs of damage occasioned by a collision brought about by the fault of another vessel, the owners of that other vessel must pay for the resulting loss of time, even although her owners take advantage of her presence in the dock to do some repairs which, though not necessary, are advisable. Thus, in *Ruabon S.S. Co. v London Assurance*,[1900] AC 6, the Ruabon suffered damage on the voyage which made it necessary for her to be put into dry dock. The owners (without causing delay or increase of dock expenses) took advantage of her being in dry dock to have made the survey of the vessel for renewing her classification, though this survey was not then due. It was decided that the expense of getting the vessel into and out of dock, as well as those incurred in the use of the dock, fell on the underwriters alone.'[55]

A case dealing with the question of dominance is *Galoo Ltd & Others v Bright Grahame Murray*[56] where it was held that the 'but for' test of causation was not sufficient and it was clear that if a breach of contract by a defendant was to be held to entitle a claimant to claim damages, it must first be held to be an effective or dominant cause of his loss.

2.4.3 If the contractor is also in delay

In considering whether a breach of duty imposed upon a defendant, whether by contract or in tort in a situation analogous to a breach of contract, was the cause of the loss or merely the occasion for the loss, the court had to arrive at a decision on the basis of the application of common sense. In *Henry Boot (Construction) Ltd v Malmaison Hotel (Manchester) Ltd*, it was said:

> 'Secondly, 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 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

[55] *Carslogie Steamship Co Ltd v Royal Norwegian Government (The Carslogie)* [1952] 1 All ER 20 at 24 per Viscount Jowitt.
[56] TLR, 14 January 1994.

> delay would have occurred in any event by reason of the shortage of labour.'[57] (emphasis added)

This *dicta* was adopted in subsequent cases and noted with approval by some commentators despite the fact that it was clearly not a judicial decision, but rather a note of what the parties had agreed ('. . . it is agreed . . . ').[58] Moreover the court qualifies the statement further by the words: '. . . if he considers it fair and reasonable to do so . . . '. Later in the judgment, the court appears effectively to contradict itself by accepting that the architect may say that the 'true cause of the delay was other matters, which were not Relevant Events and for which the contractor was responsible'. However, in a recent case, the court brushed that to one side. After noting that the judge in the *Henry Boot* case was apparently recording the agreement by counsel, the court said that 'the fact that he, as a judge with such wide experience in the field, noted the agreement without adverse comment is strong indication that he considered that it correctly stated the position.'[59] A useful view of concurrency and an interpretation of *Malmaison* was given in another case:

> 'However, it is, I think, necessary to be clear what one means by events operating concurrently. It does not mean, in my judgment, a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a Relevant Event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a Relevant Event, "*the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date.*"
>
> The Relevant Event simply has no effect upon the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, the works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a Relevant Event, while the other is not. In such circumstances there is a real concurrency of causes of the delay. It was circumstances such as these that Dyson J was concerned with in the passage from his judgment in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* at paragraph 13 on page 37 of the report which [Counsel] drew to my notice. Dyson J adopted the same approach as that which seems to me to be appropriate to the first type of factual situation which I have postulated when he said, at paragraph 15 on page 38 of the report: "*It seems to me that it is a question of fact in any case whether a relevant event has caused or is likely to cause delay to the works beyond the completion date in the sense described by Coleman J in the Balfour Beatty case*".'[60]

This seems to come nearest to the solution, but none of the cases provides a universal solution.

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[57] (1999) 70 Con LR 32 at 37 per Dyson J.

[58] See *Motherwell Bridge Construction Ltd v Micafil Vakuumtechnik and Another* (2002) 81 Con LR 44.

[59] *Steria Ltd v Sigma Wireless Communications Ltd* (2007) 118 Con LR 177 at 216 per Judge Davies.

[60] *Royal Brompton Hospital NHS Trust v Hammond & Others (No.7)* (2001) 76 Con LR 148 at 173 per Judge Seymour.

2.4.4 Apportionment

In *City Inn Ltd v Shepherd Construction Ltd*, the court expressed itself as having 'some difficulty; with the court's distinction in the *Royal Brompton Hospital* case.[61] The court continued:

> 'Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable. Precisely what is fair and reasonable is likely to turn on the exact circumstances of the particular case.'[62]

And later:

> 'In practice causation tends to operate in a complex manner, and a delay to completion may be caused in part by relevant events and in part by contractor default, in a way that does not permit the easy separation of these causes. In such a case, the solution envisaged by clause 25 is that the architect, or in litigation the court, must apply judgment to determine the extent to which completion has been delayed by relevant events. In an appropriate case apportionment of the delay between relevant events and contractor's risk events may be appropriate. Precisely when and how that should take place is a question that turns on the precise facts of the case.'[63]

The court then tried to give guidance on the way to carry out the apportionment:

> 'In my opinion two main elements are important: the degree of culpability involved in each of the causes of the delay and the significance of each of the factors in causing the delay. In practice culpability is likely to be the less important of these two factors. Nevertheless, I think that in appropriate cases it is important to recognize that the seriousness of the architect's failure to issue instructions or of the contractor's default may be a relevant consideration. The causative significance of each of the factors is likely to be more important. In this respect, two matters appear to me to be potentially important. The first of these is the length of the delay caused by each of the causative events; that will usually be a relatively straightforward factor. The second is the significance of each of the causative events for the Works as a whole. Thus an event that only affects a small part of the building may be of lesser importance than an event whose effects run throughout the building or which has a significant effect on other operations. Ultimately, however, the question is one of judgment.'[64]

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[61] [2007] CSOH 190.
[62] [2007] CSOH 190 and paragraph 18 per Lord Drummond Young upheld on appeal [2010] ScotCS CSIH 68.
[63] [2007] CSOH 190 and paragraph 22 per Lord Drummond Young upheld on appeal [2010] ScotCS CSIH 68.
[64] [2007] CSOH 190 and paragraph 158 per Lord Drummond Young upheld on appeal [2010] ScotCS CSIH 68.

This does not seem to point to any kind of system for assessing the delay and apportioning it. It may perhaps be doubted whether apportionment is a useful or even a valid tool in the architect's kit.

2.4.5 Kinds of concurrency

When faced with a problem of concurrent delays, it is always worthwhile pausing and asking whether the delays really are concurrent. Most delays are in fact consecutive. True concurrency is rare. Usually it can be seen that one delay occurs after the other.

Therefore, before the question of concurrency arises at all, it must be established that there are two competing causes of delay operating at the same time and affecting the critical path or paths of the project. There are two kinds of concurrency and it seems that the courts regularly get them confused. This is what seems to lead to the apparent inconsistency and the difficulty the courts have in laying down any really useful guidance. The kinds of concurrency are:

(1) Where two delays act during the same period on two different activities, for example if during the same week, there is a delay caused to plastering and also a delay caused to the installation of drainage.
(2) Where two delays act during the same period on the same activity, for example if during the same week, the architect has failed to provide details of the kitchen layout and also the supply of the kitchen fittings is delayed.

If the delays act on different activities, the matter is relatively easily resolved by using computerised programming software. Inputting the delays, one at a time into the contractor's programme. Because it is only delays which the particular contract allows as grounds for extension of time which must be inputted, delays which are the fault of the contractor will be ignored. That will be in accordance with what one might describe as the *Henry Boot* dictum.

It is the effect of two delays on one activity which causes most problems. Fortunately, its occurrence is rare. If a computer analysis is being carried out in order to arrive at the extension of time, it will be necessary for the architect to critically examine each alleged delay before inputting it into the programme. The architect will be checking that it actually occurred, when it occurred and how long it lasted. If two causes of delay affect one activity during the same period, one being a relevant event and one being the contractor's own delay, the architect will be obliged to form a judgment about the actual cause of the delay before inputting it into the programme.

2.4.6 A practical approach

Examining the situations set out at the beginning of this section:

(1) The delay is clearly caused by the architect's instruction which makes it impossible for the contractor to work for the 'several days' it will take to receive the new roof covering. That is the cause of the delay and any extension to the completion date. The bad weather, even if satisfying the criteria for 'exceptionally

adverse weather', has no effect on the completion date which is already being delayed. Of course, if the roof covering arrives, but the bad weather continues, the bad weather will take the place of the late roof covering as a cause of delay.

(2) This, in essence, is the *Balfour Beatty v Chestermount* scenario. There is no actual concurrency of either the delaying event or the delay itself, because what happens in this example is that although the contractor is in delay, it is still working on site, trying to finish. When the architect postpones the work, the contractor stops working on site and it is the postponement which is causing the delay until the architect brings the postponement to an end.

(3) It can be seen that there is no real delay until the contractor's machinery breaks down. Before it is repaired, the architect's drawings are issued. They are certainly late and it is a delaying event under most contracts, but the late drawings did not delay the completion date.

This is the approach outlined in *Royal Brompton Hospital* and what can be drawn from *Malmaison* if the *dicta* referred to earlier are read in context with succeeding paragraphs.

Assuming that the criteria for concurrency have been satisfied and assuming further that there are the same two causes in each case (one the fault of the contractor, the other the fault of the employer or the architect) acting on one activity, there are four possible situations.

The third situation just discussed is shown in Figure 2.1(a), following the authorities, no extension of time is due to the contractor. Figure 2.1(b) is the converse: work is stopped awaiting the architect's information. During the delay, the contractor's machinery breaks down and is repaired again before the architect's information arrives. In this instance, the machinery breakdown had no effect on the completion date, because it was already being delayed by the late information from the architect and four days of extension of time is due.

Figures 2.1(c) and 2.1(d) are not specifically dealt with in either *Royal Brompton Hospital* or *Henry Boot*, but useful conclusions can be drawn from them. In Figure 2.1(c), the late information causes a delay. It continues for three days and affects the completion date similarly, because it is on the critical path. On the second day, the contractor's machinery breaks down, but it has no effect on the completion date which is already delayed due to the late information. However, when the information is provided, the machinery remains inoperative for a further day and, during that day, it and not the late information affects the completion date. The total delay is four days of which the appropriate extension of time is three days.

The final situation is shown in Figure 2.1 (d). In this instance, the machinery breaks down and causes a delay to the completion date lasting three days. On the second day, the architect's information should arrive, but it is delayed for three days. During the first two of those days, the late information has no effect on the completion date, but when the machinery is repaired, the remaining day of delay is caused by the architect's late information. Therefore, the appropriate extension of time would be one day although the total delay is four days.

The same principles can be applied if the concurrency involves a cause which would give an entitlement to extension of time and another cause which not only gives an entitlement to extension of time, but also, if the contractor makes

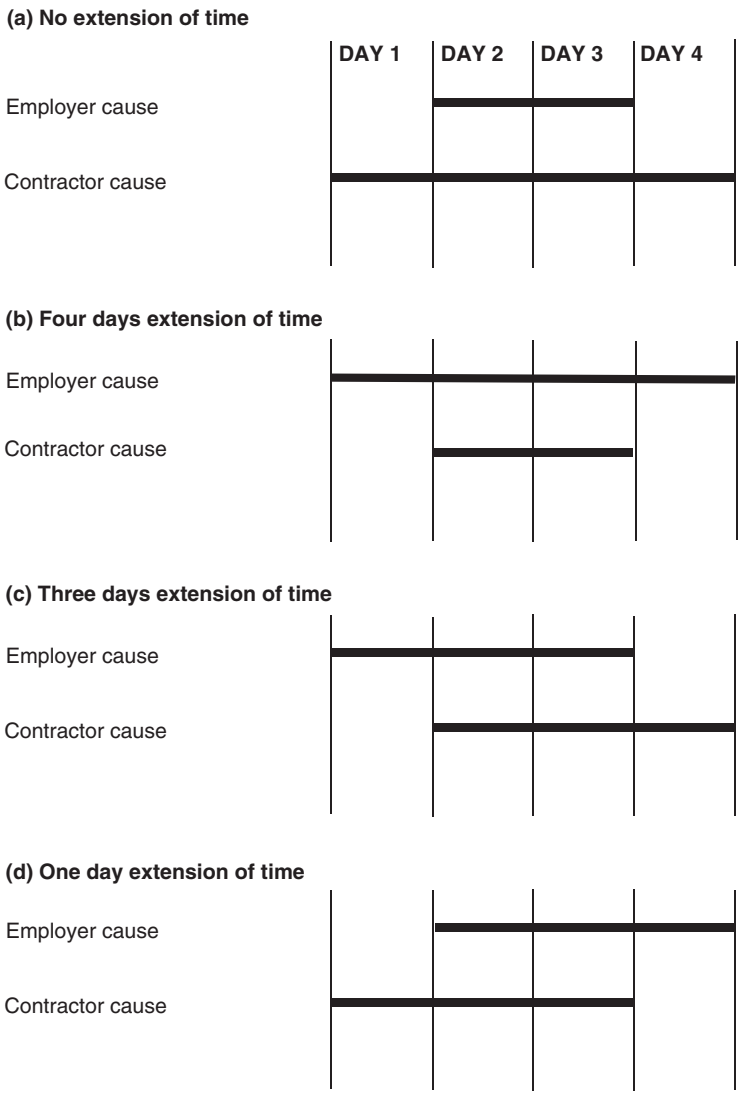

Figure 2.1 Concurrency

application, to loss and/or expense. Chapter 6, Section 6.7.2, considers concurrency and loss and/or expense.

2.5 Acceleration

2.5.1 Definition

'Acceleration' has been usefully defined as follows:

> '"Acceleration" tends to be bandied about as if it were a term of art with a precise technical meaning, but I have found nothing to persuade me that that is the case.

> The root concept behind the metaphor is no doubt that of increasing speed and therefore, in the context of a construction contract, of finishing earlier. On that basis "accelerative measures" are steps taken, it is assumed at increased expense, with a view to achieving that end. If the other party is to be charged with that expense, however, that description gives no reason, so far, for such a charge. At least two further questions are relevant to any such issue. The first, implicit in the description itself, is "earlier than what?" The second asks by whose decision the relevant steps were taken.
>
> The answer to the first question will characteristically be either "earlier than the contractual date" or "earlier than the (delayed) date which will be achieved without the accelerative measures". In the latter category there may be further questions as to responsibility for the delay and as to whether it confers entitlement to an extension of time. The answer to the second question may clearly be decisive, especially in the common case of contractual provisions for additional payment for variations, but it is closely linked with the first; acceleration not required to meet a contractor's existing obligations is likely to be the result of an instruction from the employer for which the latter must pay, whereas pressure from the employer to make good delay caused by the contractor's own fault is unlikely to be so construed.'[65]

The reasons for acceleration usually fall into one the following categories:

(1) By agreement between the parties or, if the contract so provides, on the instruction of the architect.
(2) Unilaterally on the initiative of the contractor, often categorised as 'mitigation' by the contractor or as 'using best endeavours' by the employer.
(3) Constructive acceleration where the contractor argues that it has no real alternative in the circumstances.

2.5.2 By agreement or instruction

Under the general law, the architect has no power to instruct the contractor to accelerate work. The contractor's obligation is to complete the work within the time specified, or where no particular contract period is specified – within a reasonable time. The contractor cannot be compelled to complete earlier than the agreed date unless there is an express contract term authorising the architect to require acceleration.

A few standard form contracts give the architect power to order the contractor to accelerate, but it is not the norm. ACA 3 clause 11.8 empowers the architect, at any time, to issue an instruction to bring forward dates shown on the time schedule for the taking-over of any section or part of the Works. The architect must exercise this power reasonably and the contractor must comply immediately. The architect must certify a fair and reasonable adjustment to the contract sum. Alternatively, the architect, before instructing the acceleration, may request an estimate from the contractor. PPC clause 6.6 provides that the client's representative may instruct acceleration of any date in the project timetable and any such instruction is to be treated as a change.

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[65] *Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd* (2000) 16 Const LJ 316 at 331 per Judge Hicks.

These are quite unusual clauses. More often, if an acceleration clause exists at all, it amounts to provision for the parties to agree to accelerate. It could be argued that the parties are entitled to agree anything whether or not there is such provision in the contract. MC clause 3.16, MP clause 19, GC/Works/1(1998) clause 38 and NEC 3 clause 36 are examples of clauses of that kind.

MC deals with acceleration in clause 3.16 which refers to a very complex schedule 6 for the procedure which involves seeking a quotation from the contractor. The architect may only issue an instruction seeking an acceleration quotation should the employer so require. MP contains a considerably simpler clause 19 which states that the employer may invite proposals from the contractor if it is desired to investigate the possibility of achieving practical completion before the completion date. GC/Works/1(1998) clause 38 is to similar effect, if somewhat longer. NEC 3 clause 36.1 authorises the project manager to instruct the contractor to submit a quotation to accelerate.

It is often thought that provisions in JCT contracts such as SBC clause 2.28.6.2 and IC and ICD clause 2.19.4.1 give the architect power to instruct acceleration. Reliance is placed on the particular wording of the clause which refers to the contractor doing '*all that may reasonably be required*' to the satisfaction of the architect to proceed with the Works. The clause is actually included to require the contractor to continue to proceed diligently. In doing so, the contractor must take note of the architect's requirements, but the architect can neither require the use of significant additional resources nor instruct that the Works are completed by any particular date other than the date for completion in the contract.

However, it is not unknown for an architect to instruct acceleration albeit the contract does not provide for it. If the contractor simply refuses to carry out the instruction, there is no difficulty. The problem arises if the contractor obeys the instruction. In that situation it is doubtful that the contractor has any entitlement to payment. If it is clear that the architect has no power to instruct acceleration, the contractor should be aware and cannot subsequently plead lack of knowledge. Otherwise everything will depend upon the authority, whether ostensible or implied, of the architect to give the instruction as agent for the employer. In most cases, the architect will not have such authority. Obviously, there should be no difficulty in the contractor obtaining payment where the architect, in the exercise of powers under a contract, orders acceleration of the Works or the employer and the contractor otherwise agree acceleration.

In practice, instructions to, or agreements with, the contractor to accelerate occur towards the end of a contract period when it is very obvious that the completion date will be exceeded and the employer is desperate to have the project finished by a specific date. The best time to accelerate is as soon as it seems likely that the contract period will be exceeded, because that gives the maximum time to the contractor to put the acceleration measures in place.

The only sensible acceleration instructions or agreements are those which require completion by a specific date, indeed it is essential that the agreement specifies the date for completion whether that is the original completion date or a different date. Inevitably the contractor will require additional payment and a quotation is essential so that it can be accepted by the employer and both parties know exactly where they stand.

If the acceleration simply amounts to the contractor agreeing to add specific resources and work during a specified number of extra hours per week, that is very unsatisfactory, because the contractor does not undertake to finish by a specific date and, after all the extra resources and overtime working have been applied, there may be no difference whatever in the projected date for completion, because the contractor may be inefficient.

There are four basic situations which may result in an acceleration agreement:

(1) Where it is unlikely that the contractor will complete by the contractual completion date, because of delays for which the contractor would be entitled to an extension of time.
(2) Where it is unlikely that the contractor will complete by the contractual completion date, because of delays caused by the contractor.
(3) Where it is unlikely that the contractor will complete by the contractual completion date, because of delays caused by a mixture of the two previous reasons. This is probably the most common situation.
(4) Where there is no delay, but the employer wishes the contractor to complete before the original completion date.

Situations 1 and 3 may be considered together. In each case, without acceleration the architect would be obliged to give an extension of time. The acceleration agreement is effectively a variation to the contract. It provides that despite the fact that the contractor is likely to finish after the completion date for reasons which would entitle it to an extension of time, it undertakes to complete by the original completion date or at least a date which is earlier than any extended date. Situation 4 is in a similar category, because in each of situations 1, 3 and 4, the contractor is undertaking to complete earlier than required under the terms of the contract. Therefore, in each of these situations, there is consideration on the part of the contractor in that it is agreeing to do something not required by the contract.

The somewhat different scenario presented by situation 2 raises a problem, because in the agreement to accelerate, the contractor is simply undertaking to do that which it is already obliged to do under the terms of the contracts. It is an old rule that simply agreeing to carry out a duty already imposed by a contract between the same parties is not consideration for a further payment.[66] Therefore, the question is: what is the consideration for which the contractor is entitled to be paid for simply doing what it is already being paid to do? The answer may be found in the modern Court of Appeal authority *Williams v Roffey Brothers & Nicholls (Contractors) Ltd.*[67]

In that case Williams, a carpenter, entered into a contract with Roffey Brothers, a contractor, to carry out carpentry work on 27 flats for the sum of £20,000. Williams ran into financial difficulties, because the price as agreed was too low and he had failed to supervise his workmen properly. The contractor was concerned that Williams should continue the work to completion, because it would take time to engage another carpenter and they risked being late and incurring liquidated damages. Therefore, it was agreed that the contractor would pay Williams an additional £10,300 to be paid at the rate of £575 for each flat completed. The matter was originally heard

[66] *Stilk v Myrick* (1809) 2 Camp 317.
[67] [1990] 1 All ER 512.

in the county court and the Court of Appeal confirmed the findings of the Assistant Recorder. Essentially, the Court held that there was consideration for the agreement and the contractor accepted that the agreement provided it with benefit, because it ensured that Williams would continue work, that the contractor would not suffer liquidated damages and that it would avoid the expense and trouble of engaging others to finish the work.

Another point against the agreement being valid was discussed. It was that Williams took unfair advantage of the difficulties he would cause by declining to continue unless the contractor paid an increased price. In such a case, the agreement might be voidable on the grounds of economic duress.[68] The Court found on the facts that there was no economic duress in that case. The Court set out what it described as 'the present state of the law on this subject' as follows:

> '(i) if A has entered into a contract with B to do work or, or to supply goods or services to, B in return for payment by B; and
> (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and
> (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and
> (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and
> (v) B's promise is not given as a result of economic duress or fraud on the part of A; then
> (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.'[69]

Although the Court did not purport to overrule *Stilk v Myrick*, but merely to distinguish it, it is not clear how the two can be reconciled.[70]

Any question of the absence of consideration can be resolved quite easily if the parties take the simple expedient of executing the agreement as a deed, when consideration is not required. In each agreement, the grounds which would normally entitle the contractor to an extension of time are subsumed into the agreement so that the completion date as stated in the agreement becomes the new completion date for the contract. If the contractor fails to complete by the newly agreed date, the employer is entitled to recover liquidated damages in the usual way.

There is a further very important question. What is the employer's position where the contractor fails to complete by the contract completion date and, in fact, fails to deal with any of the delay or alternatively deals with only part of the delay? Clearly, the employer would be entitled to liquidated damages for the period of delay, but in some of the situations the employer would have been entitled to such damages even if there was no acceleration agreement. Moreover, liquidated damages have been held to be exhaustive of damages for delay.[71]

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[68] *Carillion Construction Ltd v Felix (UK) Ltd* [2001] BLR 1.
[69] [1990] 1 All ER 512 at 522 per Glidewell LJ.
[70] See the discussion on this case in *Chitty on Contracts* (2004) 29th edition, Sweet & Maxwell, London at paragraphs 3.068 and 3.069.
[71] *Temloc Ltd v Errill Properties Ltd* (1987) 39 BLR 30.

Plainly, a contractor failing to comply with the agreement would be in breach of contract. So is it simply the case that the employer would be entitled to damages in addition to any liquidated damages which may be recoverable for failure to comply with the building contract requirement to complete by the completion date? It may be argued that damages for breach of the agreement would not be attributable to the same breach for which liquidated damages are recoverable and, therefore, they would not be caught by the *dicta* in *Temloc v Errill*. Breach of the agreement could be distinguished from breach of the building contract in the same way as the Court of Appeal isolated an entirely separate *benefit* to the contractor in *Williams v Roffey Brothers* even though, on its face, it seemed as if Williams was simply undertaking to do what he had agreed to do under his contract. In this instance, the contractor would be in breach of an agreement to provide a separate benefit, i.e. achieving an earlier completion date or maintaining the completion date despite delays.

Alternatively, it has been suggested that where an employer and a contractor enter into an acceleration agreement they are doing no more or less than varying the building contract in respect of the completion date. In making the agreement, they will take into account, the amount by which the contractor is in culpable delay, the amount of any extension of time which would be applicable and the rate of liquidated damages. The price paid by the employer to vary or confirm the completion date will take account of all these factors including the fact that in the event of a failure by the contractor to achieve the completion date, the only remedy will be the liquidated damages. In other words, the parties will simply negotiate in full knowledge of the circumstances. That appears to be the better view.

If further delays occur after the agreement which would entitle the contractor to an extension of time under the particular contract in use, the architect must deal with them in the normal way with reference to the newly agreed completion date.

2.5.3 Unilateral acceleration

This is the situation where a contractor accelerates without any agreement with the employer or instruction from the architect. No pressure has been placed on it by the refusal of an extension of time, indeed in this situation it may be that the contractor is reasonably confident of getting an extension to the contract period. The contractor may nevertheless decide to place more operatives on site. The reason for so doing may be in order to find work for operatives from another project which is drawing to a close. The result may be that some time is recovered and an extension of time is not required.

With the assistance of computer programming, it is possible to indicate the extent to which the completion would have been exceeded had the contractor not accelerated. This can be used to support the cost of acceleration when compared with the alternative prolongation costs. It is by no means clear, however, under what contract provision the contractor could be paid even if the architect was sympathetic.

In most such cases, the contractor will find it difficult to contend that it was doing other than using its best endeavours to reduce delay. However, the contractor may find some degree of comfort in the *Ascon* case below.

2.5.4 Constructive acceleration

An argument sometimes advanced by a contractor is based on the architect's failure to give an extension of time to which the contractor believes it is entitled. A contractor will commonly put more resources into a project than originally envisaged and then attempt to recover the value on the basis that it was obliged to do so in order to complete on time, because the architect failed to make an extension of the contract period. The contractor contends that, as a direct result of the architect's breach, it was obliged to put more resources on the project so as to finish by the date for completion for fear that otherwise it would be charged liquidated damages. This claim is advanced whether or not completion on the due date was actually achieved. A failure in this respect is usually explained as a result of yet more delaying events which the contractor was powerless to control.

The important question to be asked before this kind of argument can be entertained is the extent to which pressure is put on a contractor. The contractor's problem is one of causation. Where the architect wrongfully fails to make an extension of time, either at all or of sufficient length, the contractor's clear route under the contract is adjudication or arbitration. If, as a matter of fact and law, the contractor is entitled to an extension of time, it may be said that it should confidently continue the work, without increasing resources, secure in the knowledge that it will be able to recover its prolongation loss and/or expense, and any liquidated damages wrongfully deducted, at adjudication or arbitration. If it increases its resources, that is not a direct result of the architect's breach, but of the contractor's decision.

In practice, it must be acknowledged that a contractor in this position may not be entirely confident. The facts may be complex and the liquidated damages may be high. Faith in the wisdom of the adjudicator, arbitrator or even the judge, may not be total. It may be cheaper, even without recovering acceleration costs, for the contractor to accelerate rather than face liquidated damages with no guarantee that an extension of time will ultimately be made. As a matter of plain commercial realism, the contractor may have no sensible choice other than to accelerate and take a chance as to recovery. Unless the contractor can show that the architect has given it no real expectation that the contract period will ever be extended and in those circumstances the amount of liquidated damages would effectively bring about insolvency, this kind of claim probably has little chance of success.[72] Having said that, the principle of constructive acceleration has been accepted in the USA and there is an English case which appears to support that approach.

Acceleration was considered in *Motherwell Bridge Construction Ltd v Micafil Vakuumtechnik & Another*.[73] In the course of an extremely long judgment, the court concluded that the contractor was entitled to recover the cost of acceleration if an extension of time was justified, but refused, and the liquidated damages were 'significant':

> '[The contractors] say that since they incurred these costs in attempting to comply with [the employer's] wish for the contract to be kept to time and against the

[72] *Perini Corporation v Commonwealth of Australia* (1969) 12 BLR 82.
[73] (2002) 81 Con LR 44.

> background of [the employer's] refusal to grant appropriate extensions of time, they are entitled to be paid for the work which they did in trying to accelerate the work to keep up with the schedule . . . I am satisfied that they were incurred by [the contractors] in an attempt to recover time lost in completing the work in circumstances where [the contractors] were subject to significant penalties for delay if they failed to complete the work on time. The causes were, in particular, the restrictions which [the contractor's] encountered when they entered on site and the very substantially increased scope of the work . . . '.[74]

Although the judgment was long, much of it was a recital of facts and the *ratio* for the decision is difficult to decipher although pressure from the employer appears to have been a significant factor. Moreover, the court appeared to agree that the contractor was additionally entitled to loss and/or expense for the prolongation which would, but for the acceleration, have taken place. That seems to give the contractor, not two bites at the cherry, but two cherries for the price of one.

It is thought that the better view is the one earlier set out in *Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd* where it was said that there could not be

> '. . . both an extension to the full extent of the employer's culpable delay, with damages on that basis, and also damages in the form of expense incurred by way of mitigation, unless it is alleged and established that the attempt at mitigation, although reasonable, was wholly ineffective.'[75]

2.6 Sectional completion

2.6.1 Where there is just one date for completion

Employers and contractors often run into difficulties where the employer has chosen to incorporate sectional completion into the contract. It should be noted that, where there is just one date for completion in the contract, sectional completion cannot usually be achieved by simply inserting intermediate dates in the specification or bills of quantities[76]. Moreover, although a court may be prepared to imply a date for completion of the Works in the absence of agreement, dates for sectional completion will not be implied,[77] certainly not in JCT contracts which have a clause giving priority to the printed form over other contract documents.

In such cases, the single completion date will take precedence despite a multitude of intermediate dates in the subordinate document. Where JCT contracts are not involved and there is no equivalent priority clause, the ordinary rule will apply that 'type prevails over print' and any intermediate or sectional completion dates stated in the bills of quantities or specification would apply. This would immediately give rise to a number of contractual difficulties, for example, most standard form

[74] (2002) 81 Con LR 44 at paragraphs 544 and 548 per Judge Toulmin.
[75] (2000) 16 Const LJ 316 at 332 per Judge Hicks.
[76] *M J Gleeson (Contractors) Ltd v Hillingdon Borough Council* (1970) 215 EG 165.
[77] *Bruno Zornow (Builders) v Beechcroft Developments* (1990) 6 Const LJ 132.

contracts provide for only one certificate of practical completion, one certificate of making good defects and one defects liability period (or their equivalents). Not least, such contracts refer to extension of time in relation to the completion *date* or fixing a new completion *date*. Such problems can only be resolved by goodwill on both sides or with the assistance of an adjudicator, arbitrator or judge. The adoption of sectional completion into a standard building contract requires a considerable number of contract amendments. Reference to the multitude of small changes required by the JCT sectional completion supplement to JCT 98 illustrates the point.

2.6.2 Dependent sections

A common problem occurs where sectional completion has been properly incorporated, but two or more of the sections are interdependent. For example, a school project may be divided into four sections, but section 3 may be dependent on section 1 in the sense that the contractor cannot be given possession of section 3 until section 1 has reached practical completion. That may be because the occupants of section 3 have to be moved to section 1.

Invariably, the dates for possession and completion of each section are inserted into the contract as a series of dates. The date for completion of section 1 may be 25 March and the date for possession of section 3 may be 30 March to allow the transfer of pupils and staff from one section to another. The problem arises when, almost inevitably, section 1 is not finished by the completion date. This could be because the contractor has been inefficient or it may be because events have occurred which entitle the contractor to an extension of time. Where a project is split into sections, any extensions of time must be given in respect of the particular section affected by the delaying event. Therefore, if the contractor is entitled to an extension of time, it is in connection with section 1 only. Whether or not it is so entitled is irrelevant, because in any event, when the 30 March arrives, the contractor is still working on section 1 and the occupants of section 3 cannot be transferred. The result is that the employer cannot give the contractor possession of section 3 on the due date. If no extension of time is due for section 1 and the cause of the delay is entirely the fault of the contractor, the architect may say that the contractor has itself to blame and cannot expect possession of section 3 on the due date.

This approach is to misunderstand the situation entirely. The principles of causation must be applied. The cause of the delay to possession of section 3 is not the contractor's delay to section 1, but the fact that the two sections are linked. If they were not linked, the contractor's delay to section 1 would not affect section 3 in the slightest degree. However, where the dates for possession and completion are simply expressed as a series of dates, there is nothing to put the contractor on notice of the likely problem. The contractor is likely to argue that the employer is in breach of contract and it would be correct. There are two immediate aspects to this problem:

- What can the architect or the employer do to retrieve the situation?
- What could have been done to avoid it in the first place?

If there is provision for the employer to defer possession of any of the sections by the appropriate amount, the employer will be obliged to take that route and the

contractor will be entitled to an extension of time and probably whatever amount of loss it has suffered as a result of the deferment of possession. If there is no deferment provision, the correct analysis of the situation appears to be that there is a breach of contract which, dependent upon its likely duration, may become repudiatory in nature. In any event, the contractor would be entitled to recover as damages the amount of loss it has suffered as a result. That is fairly straightforward and the amount payable to the contractor, whether by virtue of a loss and/or expense clause in the contract or as damages for the breach may not be substantial. The contractor would have to demonstrate its loss and, essentially, the situation is simply that section 3 has been pushed back in time.

In the absence of a provision for the delay situation in the contract (SBC, IC and ICD all include grounds for extension of time based on the employer's default), the architect would be unable to make any extension of time with the result that the contractor's obligation with regard to section 3 would be to complete within a reasonable time. Therefore, liquidated damages would not be recoverable for this section.

To prevent the situation occurring, the employer should indicate the links in the sections. Therefore, in the example above, section 1 would have a date for possession and a date for completion, but section 3 would not have a date for possession. That section of the contract would simply state 'the date for possession is X days after the date of practical completion of section 1'. In that way, a delay to completion in section 1 would be reflected in the date of possession of section 3 and breach of contract, damages and extension of time to section 3 would not be relevant. Moreover, the contractor would be aware of the situation and it could make some provision for it in its price. The date for completion of section 3 would not be inserted, but rather the following kind of phrasing used: 'The date for completion is X weeks after the date possession of this section is taken by the contractor.' It seems doubtful that the contractor could make any financial claim on the employer in this situation for delays to section 1 which cause a delay to the possession of section 3.

The courts have recently considered extensions of time in relation to completion of the Works in sections.[78] In *Liberty Mercian v Dean & Dyball*, the parties were in contract under JCT 98. The date for possession of the first section was a specific date, but the date for possession of each of the remaining sections was dependent on the date of practical completion of the previous section. That seems to be eminently sensible and in accordance with the suggestion in the previous paragraph. However, the completion dates for each section were specific dates. The contractor was in delay for eight weeks in the first section and the architect gave four weeks extension of time and four weeks extension for each of the following sections. That resulted in a period of culpable delay to the first section amounting to four weeks for which the employer deducted liquidated damages of £48,000. The contractor's difficulty was that it then found itself in a period of culpable delay for each of the succeeding sections, because in the case of each section, the date for possession was delayed by up to eight weeks each time, but only four weeks extension of time had been given. It was the contractor's case that for each section after the first section, the extension of time should reflect the initial eight weeks delay to the first section which

[78] *Liberty Mercian Ltd v Dean & Dyball Construction Ltd* [2008] EWHC 2617 (TCC).

irretrievably fixed the date of possession of the following sections. Indeed, the contractor argued that the liquidated damages had become a penalty and that they were unenforceable.

However, the court concluded that the liquidated damages were not a penalty and they were recoverable for all the weeks of culpable delay in each section. The court said:

> 'Attractively though this point was argued, I do not accept [counsel's] submission. It seems to me that it shies away from the critical feature of this contract, namely that the building works were always going to be carried out sequentially, and that the work on one section could not start until the work on the previous section had reached practical completion or (in certain instances) the stage of completion identified in the sectional completion schedule. It is plain from that schedule, and from the sectional completion agreement as a whole, that both sides were aware that culpable delay of 4 weeks on section 1 would automatically mean that work on sections 2, 3, 4 and 5 would start 4 weeks late.
> . . . I consider that this is the only sensible construction of the sectional completion agreement . . . and the only construction which gives effect to the words used. What is more, such a result cannot be regarded as unfair. On the contrary, if the contractor is in culpable delay for 4 weeks in relation to section 1, which inevitably means that section 2 is also going to start 4 weeks late, so that the contractor's default has caused the delay to section 2, he should therefore be liable for the liquidated damages that will flow in consequence.'[79]

A rather different situation occurred in *Trollope & Colls Ltd v North-West Metropolitan Regional Hospital Board*.[80] The contract was divided into three sections. Each section had a separate contract sum and set of conditions. The contract had a provision that the third section should commence six months after the issue of the certificate of practical completion for section 1, but that it must be completed by a specified date. However, a delay occurred to section 1 and it delayed the issue of the certificate of practical completion and, therefore, delayed the commencement of section 3. But the completion date for section 3 was fixed, therefore, the period available to the contractor for carrying out the section 3 work was reduced from 30 months to 16 months.

Matters came to a head because there was provision in the contract for the nomination of sub-contractors and the contractor required the employer to nominate sub-contractors who could carry out their work within the reduced period. The employer could not find sub-contractors who could do so. Therefore the employer said that there must be a term implied in the contract to the effect that the section 3 completion date must be extended by the amount of any extension of time given to the contractor for delay in section 1. The court declined to imply such a term. The result was that the parties would be obliged to negotiate an extension to the completion date of section 3 with a resulting cost increase. If the delay had been shorter, the consequence might have been that the contractor was faced with a shortened work

[79] *Liberty Mercian Ltd v Dean & Dyball Construction Ltd* [2008] EWHC 2617 (TCC) at paragraphs 23–24 per Coulson J.
[80] (1973) 9 BLR 60.

period for section 3. This case does not appear to have been referred to in the *Liberty Mercian* case.

2.7 The SCL extension of time Protocol

In October 2002, the Society of Construction Law produced its 'Delay and Disruption Protocol' after some months of consultation throughout the industry. The object of the Protocol is stated in the introduction as providing useful guidance on some of the common issues arising in connection with extension of time and claims for compensation for time and resources. The Protocol purports to provide a means for resolving such matters and avoiding disputes.

There are two important points to make about the Protocol. The first is that it cannot replace the terms of the particular contract in use. Therefore, it will avail the parties nothing to quote the Protocol if the terms of the contract are at variance with it. The Protocol recognises this and suggests that its contents should be considered when contracts are being drafted. The second point is that the Protocol is not suitable for simply incorporating into any particular building contract. It is not written in the same way as a contract and the individual sections would conflict with standard building contracts. If an attempt is made to incorporate the Protocol as a complete document, the parties are likely to have great difficulty in working out how the Protocol fits with the contract provisions. The areas of conflict between the two documents would not be easy to resolve.

The document is divided into sections. In view of the publicity given to the Protocol, the sections will be briefly examined in order and comments given. Where appropriate, references to relevant parts of this book are given in brackets.

2.7.1 Core principles relating to delay and compensation

This section sets out the principal items on which guidance is given later.

2.7.2 Guidance notes section 1

Extensions of time

The summary of the extension of time position is generally good and the advice is sound although fairly general in nature.

Float as it relates to extensions of time

This part of the Protocol is a broadly accurate statement, but somewhat confused by references to hypothetical situations which appear to allow the contractor an extension of time although the contract date for completion is not exceeded. This would be an extraordinary outcome which runs counter to the reason for extending time.

The contract would have to contain special clauses to permit this result and no standard form contract currently has this type of provision.

Concurrency as it relates to extensions of time

The Protocol's approach seems to be to take a particular position on the subject of concurrency on the basis that it is a complex topic and a compromise solution is necessary. A basic principle is that no concurrent cause of delay which is the result of any fault of the contractor should reduce the extension of time to which it would otherwise be entitled. For the reasons stated elsewhere in this book, this approach is not considered to represent the true position in law and it is not recommended.

Mitigation of delay

This is a consideration of the general law duty to mitigate (see Chapter 6, Section 6.4).

Financial consequences of delay

This is a clear and accurate statement that entitlement to extension of time does not automatically entitle the contractor to any money.

Valuation of variations

The Protocol recommends a mechanism similar to the 1998 JCT price statement for dealing with the valuation of variations and associated extension of time and loss and expense.

Compensation for prolongation

It is rightly stressed that ascertainment must be based on actual additional costs incurred by the contractor. However, there appears to be some confusion between a contractor's claims for loss and expense under the contract machinery and claims for damages for breaches of contract. The former are reimbursable under most standard form contracts while the latter, being a claim outside the contract, are not so reimbursable.

There appears to be a half suggestion that payments to the contractor might be simplified by being dealt with by a reverse kind of liquidated damages clause. This approach was suggested many years ago and the appropriate clause to be inserted in the contract was termed 'Brown's clause' after the person who proposed it. Anything which can simplify and cheapen the loss and/or expense process while achieving a result which does not vary too much from the strictly accurate entitlement is to be welcomed, but the Brown's clause had a number of practical and legal difficul-

ties then and there is no reason to suppose that a similar clause now would be any better.

Relevance of tender allowances for prolongation and disruption compensation

It is refreshing to see that the Protocol considers that tender allowances have little or no relevance to the evaluation of the costs of prolongation or disruption.

Concurrency as it relates to compensation for prolongation

This appears to be a straightforward summary of the position.

Time for assessment of prolongation costs

Another straightforward summary.

Float as it relates to compensation

Where a contractor plans to complete before the contract date for completion, the Protocol recommends that it is entitled to compensation, but not an extension of time, if it is prevented from completing to its own planned date, but finishes before the contract date for completion. This is a complicated topic to which the Protocol does not do justice. However, the basic recommendation must be rejected. The position is that in deciding this question, all the circumstances must be taken into account (see Chapter 8, Section 8.3).

Mitigation of loss

A clear exposition of the situation. More could have been said about the contractor's rights, or otherwise, to claim the reasonable costs of mitigation (see Chapter 6, Section 6.4).

Global claims

It is good to see that global claims are discouraged in the Protocol (see Chapter 9).

Claims for payment of interest

Although this survey of the position seems to be broadly correct, it is not made clear that for interest to be claimable, it must be shown to be part of the loss and/or expense and not, as suggested here, a result of it (see Chapter 7, Section 7.3.10).

Head-office overheads

This is a clear and concise explanation (see Chapter 7, Section 7.3.3).

Profit

Very brief and to the point (see Chapter 7, Section 7.3.4).

Acceleration

This is a broadly correct interpretation of the position, but the reference to the possibility of accelerating by instructions about hours of working and sequence of working is to be doubted (see Section 2.5 of this Chapter).

Disruption

The definition of disruption does not adequately explain that disruption can also refer to a delay to an individual activity not on the critical path where there is no resultant delay to the completion date. It is also stated that most standard forms do not deal expressly with disruption. That, of course, is true. But it is also true that most standard forms do not expressly deal with prolongation. For example, JCT forms refer to regular progress being materially affected. That appears to be quite broad enough to encompass both disruption and prolongation (see Chapter 6, Section 6.7.3).

2.7.3 Guidance section 2

This deals with guidance on preparing and maintaining programmes and records. Stress is placed on obtaining an 'Accepted Programme'. That is a programme agreed by all parties. There are several problems with this. Perhaps the foremost is that an architect will be unlikely to have the requisite skills and/or experience or indeed the information required to accept the contractor's programme. The architect is probably capable of questioning parts of it, but highly unlikely to be possessed of sufficient information to be able to make a properly informed conclusion that the programme is workable. The Protocol, rightly, accepts that the contractor is entitled to construct the building in whatever manner and sequence it pleases, subject to any sectional completion or other constraints. The Protocol then states:

> 'Acceptance by the CA merely constitutes an acknowledgement by the CA that the Accepted Programme represents a contractually compliant, realistic and achievable depiction of the Contractor's intended sequence and timing of construction of the works.'

This is placing a responsibility on the architect (or CA as the Protocol prefers) which the architect is not required to carry. There appears to be no need for a programme

to be accepted. It is sufficient if the contractor puts it forward as the programme to which it intends to work. The architect is entitled to question any part which appears to be clearly wrong or unworkable. But, in the light of the contractor's insistence that it can and will carry out the Works in accordance with the submitted programme, it is difficult to refuse a programme (certainly under JCT contracts) unless firm objections can be raised. There is not a great deal of guidance on maintaining records generally (see Chapter 10).

2.7.4 Guidance section 3

This section deals with guidelines for dealing with extensions of time during the course of the project. It provides much good practical advice including the importance of calculating extensions of time by means of various programming techniques. Although every architect should be familiar with such techniques, careful consideration should be given to the aptness of any particular technique in a given situation. It is still possible to work out an extension of time perfectly well using old fashioned inspection techniques applied to the programme if the programme and the delays are not complicated.

2.7.5 Guidance section 4

This deals with disputed extension of time after completion of the project and spends some time examining the different types of analysis that can be employed.

2.7.6 Appendices

There are four appendices to the Protocol. Appendix A is a very useful glossary, B is a model specification clause intended for use when drafting a specification although the content appears more suitable for inclusion in the contract itself – if at all. Whether and to what extent one wishes to use the clause will depend on whether one wishes to go totally down the road pointed out by the Protocol. Appendix C is another sample clause to cover the keeping and submission of records. Finally, Appendix D graphically represents various situations involving concurrency, float and critical delays of various kinds.

2.7.7 Conclusion

The Protocol sets out ways of dealing with delays and disruption. Most of it is in line with what is generally understood to be the law on these matters. In some instances, the Protocol steps outside this boundary in order to suggest what it clearly considers to be a simpler or fairer way of dealing with the practicalities. All parties involved in construction contracts must be aware that the Protocol does not take precedence over the particular contract in use unless it is expressly so stated in the contract itself.

Therefore, the recommendation should be viewed with caution. Architects, contract administrators or employers cannot evade responsibility by arguing that they have acted strictly in accordance with the Protocol if the contract prescribes action of a different sort. On this basis, it is difficult to see why it was ever thought appropriate to produce such a protocol. One can see the benefit of a combined attempt to interpret the provisions of a standard form, such as SBC or ACA 3, in a practical way which will be useful for professionals trying to operate the provisions of these contracts. However, one struggles to see the benefit in producing a methodology such this, not as part of a contract, but entirely divorced from any contract.