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Construction Newsletter
Issue No. 14

City Inn Upheld on Appeal – Extensions of time are to be "Apportioned" where there are competing genuinely concurrent delays

City Inn Limited v Shepherd Construction Limited **[2010] CSIH 68**

The most talked-about construction decision of late 2007 and most of 2008 was City Inn Limited v Shepherd Construction Limited [2008] 1 BLR 269, a Scottish decision by Lord Drummond Young. On 22 July 2010, the Inner House of the Scottish Court of Session handed down its decision in the appeal against Lord Drummond Young's decision. In this special edition of the Construction Newsletter, ***Sean Brannigan QC*** *and* ***Jennie Gillies*** *consider the significance and implications of the Court of Session's decision*.

Lord Drummond Young's decision in *City Inn* dealt with the methodology which should be employed when assessing the effects of concurrent causes on progress of works (where some causes of delay are Relevant Events and others are not). In particular (and controversially), Lord Drummond Young concluded that, where there were such competing events, the Contract Administrator could and should "apportion" the overall delay between those events, and assess the appropriate extension of time accordingly.

This decision attracted extensive comment and, indeed, criticism, with many commentators doubting the validity of the apportionment exercise which was carried out. The appeal of this decision has been eagerly awaited in the hope that some clarification might be provided.

On 22 July 2010 the Inner House of the Scottish Court of Session handed down its long-awaited decision. The Inner House upheld Lord Drummond Young's decision by a majority of 2:1. This result is likely to renew the debate about how concurrent causes of delay should be treated, and about what delays are to be regarded as "concurrent".

The Key Facts

Shepherd Construction (the "Contractor") had been retained by City Inn Limited (the "Employer") to build a hotel in Bristol pursuant to a contract executed in November 1998. The contract incorporated the conditions of the Standard Form of Building Contract (Private Edition with Quantities) (1980 Edition) together with additional separately negotiated provisions. The contract contained two relevant provisions:

- Clause 13.8 which required that, in circumstances where the Contractor considered an instruction to require amendment to the contract sum or an extension of time, written notice of the same would be provided (within 10 days), and that absent such written notice *"the Contractor shall not be entitled to any extension of time…"* and

- Clause 25 which contained provisions affording power to the Contract Administrator to award extensions of time where a Relevant Event had caused or was likely to cause the works to be delayed.

The works were delayed as a result of eleven factors; nine of which were ultimately found to have been caused by the Employer (as late instructions received from its architects) with the remaining two having been caused by the Contractor. The Employer-caused delays were 'Relevant Events' under clause 25 of the Contract which would have entitled the Contractor to an extension of time, whereas the events for which the Contractor was culpable would not have given rise to any entitlement to an extension of time. In the action, the Employer claimed that the Contractor was not entitled to any extension of time at all.

Procedural History: the Decisions Below

Following determination of a preliminary issue by Lord Macfadyen (which was itself appealed: [2003] 1 BLR 468), evidence was heard before Lord Drummond Young who gave judgment in November 2007 ([2008] 1 BLR 269). There were considerable disputes of fact between the parties.

Lord Drummond Young found in favour of the Contractor holding (amongst other things) that the late instructions had caused delay; and the delay which was caused by the late instructions overlapped with the delay which would have been suffered by virtue of the Contractor's own default. The Lord Ordinary proceeded to determine that:

- The procedural requirements set out in clause 13.8 did not apply late instructions which, simply because of their lateness, gave rise to a need for an adjustment of the contract sum or an extension of time. Thus, clause 13.8 did not prevent the Contractor from maintaining a claim for an extension of time because the Employer had caused delay through the late issue of instructions.

- As a matter of construction, the inclusion of the words 'fair and reasonable' in clause 25 pointed to a need for an apportionment exercise to be carried out when assessing whether an extension of time was due, and that it was appropriate to assess the degree of culpability involved in each separate cause of delay.

The Contractor was accordingly adjudged to be entitled to a 9 week extension of time.

The Decision of the Inner House, Court of Session

There were a number of aspects of Lord Drummond Young's decision which were challenged on appeal, including:

- Whether clause 13.8, on its proper construction, only applied where an instruction which, although late, was of a nature which would have resulted in a need to adjust the contract sum and/or grant an extension of time, whenever it had been issued; and

- Whether (as argued by the Employer) the interpretation of clause 25, and the use of an apportionment exercise where there are concurrent delays, was valid in law.

Clause 13.8: Late Instructions

As to Clause 13.8, Lord Osborne (giving the majority judgment) accepted the reasoning which had been provided by both Judges at first instance (Lords Macfadyen and Drummond Young), and agreed that it would be absurd for a Relevant Event – namely a late instruction – also to require written notice.

However, Lord Carloway disagreed with this reasoning, and considered that the key to this issue was that clause 13.8 was directed towards an instruction which constituted a variation, and that a late instruction did not constitute a variation.

The logical reasoning provided by Lord Carloway is compelling. It should be straightforward to ascertain whether the substance of an instruction constitutes a variation and such a construction will be easier for any Employer, Contractor or Contract Administrator to administer on site than an argument reliant on the more nebulous concept of 'absurdity'.

Clause 25: Apportionment in cases of Concurrent Delay

The Court of Sessions was, regrettably, more divided on what is likely to be the key issue of interest to practitioners in this Jurisdiction: namely, the approach to be taken in cases of concurrent delay.

Lord Osborne gave the majority judgment, upholding Lord Drummond Young's interpretation of the effect of clause 25: i.e. that apportionment was not only permissible but appropriate in the right case. Lord Kingarth agreed. Lord Carloway dissented.

Following a lengthy review of case law from Scotland, the United States of America and England and Wales, five principles were cited by Lord Osborne as regards the proper approach to be taken to the application of clause 25.3 of the JCT contract:

1. For a claim for an extension of time to succeed, it must be established that a Relevant Event is in fact a cause of delay, and that completion of the works is likely to be delayed or has been delayed by that Relevant Event;

2. Whether the Relevant Event has had / will have any causative effect is a question of fact to be determined by common sense;

3. In determining whether the Relevant Event has had / will have any causative effect, the decision maker (i.e. a Contract Administrator or a tribunal) can consider any factual evidence acceptable to him;

4. If a dominant cause can be identified as the cause of some particular delay, effect will be given to that by leaving out of account any cause or causes which are not material. Thus, a claim for an extension of time arising out of a Relevant Event will be unsuccessful if it was not a dominant cause; and

5. Where a situation exists in which two causes are operative (one being a Relevant Event and the other some other event for which the Contractor is responsible) and neither can be described as the dominant cause, it will be open to the decision maker (i.e. a Contract Administrator or a tribunal) approaching the issue in a fair and reasonable way to apportion the delay in the completion of the works between the competing causes.

Determination of whether two (or more) causes are concurrent – and the term 'concurrency' – needs to be viewed in a broad sense. The focus for consideration by the decision maker is not whether the Relevant Events and other delaying events were concurrent, but rather whether there is concurrency in the consequences of those events (on the delay to the completion date): i.e. what is relevant is not precisely when the events happened but, rather, what their effect was. Whether a particular factor is or is not a dominant cause of delay is, essentially, an issue of fact.

The Dissenting Judgment

The dissenting judgment given by Lord Carloway disapproved of any apportionment exercise. He found that the relevant issue is one of contractual interpretation; there is a difference between the way in which the law might regard causation in a situation of competing causes, and how the JCT contract envisages that such a situation should be dealt with. He considered that the exercise which should be carried out under clause 25 (once an application for an extension of time has been made by the Contractor) is two-fold:

- First, the contract requires a Contract Administrator to assess whether the progress of the works *"is being or is likely to be delayed"*. This should not involve any analysis of competing causes of delay or any assessment of how far other events have, or might have, caused delay beyond the completion date. The only factor of relevance is the result of the Relevant Event in question.

- Second, a Contract Administrator should then fix such later date for completion as he considers fair and reasonable. The words 'fair and reasonable' in the clause are not related to the determination of whether a Relevant Event has caused delay in the Completion Date, but to the exercise of fixing a new date once causation has been determined.

If a Relevant Event occurs (no matter when) the fact that the works would have been delayed in any event because of a contractor default is irrelevant.

Conclusion: What next for concurrent delay in England?

The reasoning employed by Lord Osborne in the majority judgment, and the careful drawing together of the various threads in available case law, militates against a conclusion that a separate body of case law is developing in Scotland. Certainly Lord Osborne goes much further than has hitherto been the case in developing the concept of apportionment, but consideration of the effects of other delaying events in assessing whether a Relevant Event has caused delay has its origins in commentary and decisions made in the TCC (namely Dyson J in *Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited* (1999) 70 Con LR 32 and Judge Richard Seymour QC in *Royal Brompton Hospital NHS Trust v Hammond & Others (No 7)* (2001) 76 Con LR 148).

This does not make for an easy result in application. The clean cut analysis provided in Lord Carloway's dissenting judgment is certainly easier to apply. The emphasis upon determination of dominant causes and apportionment will give rise to considerable factual dispute between parties.

This decision is an important one: it is likely to be cited in any case in the future where the operation of Clause 25 of the JCT Standard Form – and indeed where issues of "concurrent" delays – form part of the issues between the parties.

Equitable Set-Off: a single, clear and workable test

Geldof Metaalconstructie NV v Simon Carves Ltd [2010] EWCA Civ 667
This important decision of the Court of Appeal has cut through the complex and problematic case-law which bedevilled the law on equitable set-off. The law with regard to equitable set-off can now be stated simply. **David Friedman QC** and **Alex Hickey** represented the successful appellant.

Set-off operates as a defence. Thus it can be deployed in answer to an application for summary judgment. It may often be the only available defence and most litigators are accustomed to arguments about whether a cross-claim is or is not a set-off. The effect of the numerous previous authorities was that reliance upon equitable set-off gave rise to a host of conceptual difficulties, including: the application of the problematic

'impeachment' test; the extent to which claim and cross-claim were required to be connected (i.e. should they be 'inseparably' connected?); whether the claims should arise from the same contract; and a lack of clarity surrounding the requirement for there to be 'manifest injustice' were set-off to be refused.

The Court of Appeal's decision in *Geldof* has resolved these difficulties. There is now a clear and workable test. The test is whether the cross-claim is so closely connected with the claimant's demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.

This is a single test although it has two elements. Lord Justice Rix, giving the leading judgment, described the first element, the need for a close connection, as a formal requirement. He described the second, the need for manifest injustice, as a functional requirement. One need not be over-concerned, or perhaps concerned at all, with these labels. They are useful when considering earlier authorities. Some were primarily concerned with the formal requirement; others with the functional requirement. For the future what is most important is the fact that there is now a clear statement of the test to be used in all cases.

This decision is now the leading judgment on equitable set-off, and consideration of earlier authorities can be brief. By way of conclusion, it is now clear that:

- The impeachment test should no longer be used.
- There has to be a close connection between claim and cross-claim but there does not have to be an "inseparable connection".
- The cross-claim does not have to arise from the same contract or transaction as the claim, nor from the dealings and transactions which gave rise to the claim. It is sufficient if it is closely connected with the transaction which gave rise to the claim.
- Manifest injustice is an essential ingredient of the test.

A point arose in *Geldof* which had not arisen in any earlier authority. *Geldof* was a two contract case. It was held that, even if initially the two contracts were not sufficiently connected, there could be conduct by the parties which provided the necessary link and satisfied the manifest injustice requirement. There was such conduct in this case. Geldof refused to perform an installation contract unless payment was made under a separate supply contract. SCL relied on this refusal when terminating the installation contract. Thus the cross-claim arose from the use made by Geldof of its supply contract claim. Conduct created a close connection and it would be manifestly unjust to allow the claim to be enforced without taking account of the cross-claim.

Property Developer's Loss of Profits

Aldgate Construction Company Ltd v Unibar Plumbing & Heating Ltd [2010] EWHC 1064 (TCC)
This was a case concerning the measure of loss where a property developer claims loss of a chance to profit from a development. Mr Justice Akenhead's judgment reflects the TCC's pragmatic approach and is a useful guide to measuring loss in such cases. **Michael Taylor** represented the Defendant.

Aldgate was a family business, which had an established policy of developing two properties on the same site in tandem. As a consequence of Unibar's breach of contract, one of Aldgate's newly-built properties was burnt down. The rebuild had an impact on Aldgate's cash flow and prevented it from continuing its dual property policy. Aldgate claimed loss of profit which it said it would have otherwise earned on three sets of dual properties.

After reviewing the authorities, Akenhead J stated three successive steps had to be taken when considering the recoverability of the losses claimed:

1. First, the Court must determine whether the type or kind of loss claimed falls within either limb of *Hadley v Baxendale*;
2. Next, it must determine *"simply as a matter of fact on the balance of probabilities"* whether the loss was actually caused by the breach of contract; and,
3. Finally, the loss may not be recoverable if all or any part is caused by another event, which may or may not be the fault of the claimant, but was not reasonably foreseeable by the defendant at the time of contracting.

Unibar accepted that it was within the parties' contemplation when contracting that a fire at Aldgate's property might cause it to lose an investment opportunity and this, in turn, might have knock on effects in terms of Aldgate's future trading. Akenhead J therefore concentrated on what would have happened in terms of Aldgate's trading activities if there had been no fire. He took a methodical approach to this question by breaking it into stages, such as obtaining planning permission, design, build times and sale. In terms of the build time of each development, Akenhead J was inclined to be conservative, drawing on the TCC's *"extensive experience in numerous other cases of the sort of problems that can arise"*. Applying *Allied Maples Group Ltd v Simmonds & Simmonds* [1995] 1 WLR 1602, distinction was made between the Claimant's own potential actions – to be determined on the balance of probabilities – and opportunities that would be contingent on the actions of third parties, which would lead to a percentage reduction to the losses awarded.

Mr Justice Akenhead found that, but for the fire, Aldgate would have developed 5 further properties on which it would have earned significant profits.

This case, while not novel in law, is a master class in its application to facts. Practitioners who need to articulate a similar case for developer's loss of profits will benefit from Akenhead J's clear structure.

Guidance for exercise of the court's discretion when making orders for sale

Packman Lucas Ltd v Mentmore Towers Ltd and Charles Street Holdings Ltd [2010] EWHC 1037 (TCC)
This case continues the Mentmore Towers saga (see Issues No. 11 and 13). It provides guidance on orders for sale pursuant to CPR r. 73.10. **Nicholas Vineall QC** represented Packman, the Claimant and applicant.

There is a long history to this matter. The Claimant architects, Packman, carried out work for the defendant single-purpose companies ("Mentmore") which had been developing various high-profile properties, including a luxury hotel. Packman obtained adjudication decisions in respect of unpaid fees. When the sums awarded remained unpaid, Packman sought enforcement in the TCC and obtained judgment against Mentmore on 3 August 2009. After continuing non-payment, on 16 October 2009, final charging orders were made against Mentmore in relation to various properties, including the Mentmore Towers property. This hearing concerned Packman's subsequent application for orders for sale.

Coulson J stated that there could be no doubt that the Companies were *"in serious and contumelious default"*, having *"set their face against honouring their debts or complying with the numerous orders of this court made against them by three different TCC judges."*

In terms of jurisdiction, Coulson J discussed the potential tension between CPR r.73, which makes plain that an order for sale can be made by any division of the High Court, and paragraph 4.2 of PD 73, which notes that a claim for an order for sale of land must be started in Chancery Chambers. The judge had previously identified this tension in *Harlow and Milner Ltd v Teesdale (No. 3)* [2006] EWHC 1708 (TCC), where he concluded that – while it will usually be appropriate to seek such orders in the Chancery Division – there will be occasions where it is both proportionate and sensible for other divisions to make orders of sale. Coulson

J stated this case was a very good example of such an occasion, given the *"long and lamentable history"* of this action and the connected action in the TCC.

In relation to the orders for sale, Coulson J made useful observations of general application. First, when identifying the minimum sale price for the purposes of an order for sale, the court should approach the issue on a relatively conservative basis. This reflects the need to protect the owner from the risk of a fire sale which does not recoup the true worth of the asset. Secondly, Coulson J considered the notes in the White Book, which suggest it would not normally be a proper exercise of discretion to make a charging order on an asset of substantial value in relation to a relatively small debt. The judge stated that, on proper analysis, the case cited as authority for this proposition (*Robinson v Bailey* [1942] 1 Ch 268) merely suggested size of debt was a factor, not the critical issue. It was, he said, potentially dangerous for a court to identify any hard and fast rules on this matter, particularly because the question of whether the debt is "small" is so context specific. Coulson J concluded that the size of debt and its comparative value were only two factors to weigh in balance; there were no presumptions or rules. Thirdly, Coulson J stressed that where there is the possibility of an imminent sale of the property in issue, the court must pay particular attention when deciding whether to cut across that arrangement, and potentially undermine it, by making an order of sale.

Applying these principles to the facts, Coulson J inserted a minimum price to be achieved by sale of Mentmore Towers, while stressing the parties had liberty to apply to seek revision if the figure became wholly unrealistic, and held that an order for sale would be inappropriate for the Charles Street properties at this stage.

Valuers in breach of duty but not liable in negligence because their figures were within a reasonable bracket

K/S Lincoln & ors v Richard Ellis CB Hotels Ltd (No. 2) [2010] EWHC 1156 (TCC)
In this case, Coulson J applied the decision in *Goldstein v Levy Gee (a firm)* [2003] EWHC 1574 (Ch) and confirmed that, whilst a property valuer might be in breach of duty because he fell below the standard of a reasonable valuer in his methodology, that valuer will not be liable in negligence if it can be shown that, notwithstanding the error, the valuation figure that he produced was within a reasonable bracket. As a consequence, the defendant valuers were not negligent, even though they had overvalued four hotels, because the valuation figures were within a permissible 10% margin of error. It was further held that the claimant buyers did not rely on the mis-statements. **Anthony Speaight QC** appeared for the claimants.

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