

Construction Law

Legal Update: September 2010

‘Trump Card’

In July 2010 the Scottish appeal court produced a 2:1 majority judgment in City Inn Limited –v– Shepherd Construction Limited [2010] on the topic of concurrent delay which has reinvigorated the debate on the meaning of concurrency.

In 1998 the contractor, Shepherd, entered into a JCT’80 contract with a schedule of amendments to construct a hotel in Bristol for City Inn Limited, a company registered in Scotland. The contractual completion date was 25 January 1999 and liquidated damages were set at £30,000 a week. In due course the architect granted a 4 week extension of time but ascertained a 5 week delay enabling the employer to deduct £150,000 delay damages. The question taken to court was “Whether the contractor was entitled to further time?”

As this is a Scottish judgment it is not binding on English courts however it might be a persuasive argument.

The majority judgment considered the previous English cases of Balfour Beatty Building Limited –v– Chestermount Properties Limited [1993], Henry Boot Construction (UK) Limited –v– Malmaison Hotel (Manchester) Limited [1999] and Royal Brompton Hospital NHS Trust –v– Hammond & Others [2001] all in the context of clause 25 of the standard JCT contract.

Clause 25.3.1 provides “If, in the opinion of the Architect... any of the events... stated... to be the cause of the delay is a Relevant Event, and [emphasis added]... the completion of the Works is likely to be delayed... the Architect shall... give an extension of time... as he then estimates to be fair and reasonable.”

The judgement is controversial.

To apportion or not to apportion?

If the English courts prefer the reasoning of the dissenting judge in City Inn then the way to interpret clause 25 is to ignore competing causes of delay altogether. The architect or tribunal (decision maker) simply determines if there was a Relevant Event (before the Completion Date) which is likely to or will delay the Completion Date, and then “fairly” assesses the extension of time. Note: if the contractor is already in the delay period beyond the Completion Date when the

Relevant Event occurs no extension of time will be due.

In contrast if the contractor is jeopardising the Completion Date through his culpable delay, and then a Relevant Event such as inclement weather occurs this is a fortuitous windfall for the contractor who then gets an extension of time (and reduction in LADs).

So, if you don’t like the way clause 25 of the JCT form might work, then amend it or don’t use JCT.

History

The majority judgment considered a large body of case law when reasoning the decision.

In Balfour Beatty it had been envisaged “*There may well be circumstances where a Relevant Event has an impact on the progress of the works during a period of culpable delay but where that event would have been wholly avoided had the contractor completed the works by the previously fixed completion date. For example, a storm which floods the site during a period of culpable delay... would have been avoided altogether if the contractor had not overrun the completion date. In such a case it is hard to see that it would be fair and reasonable... to extend the contractor’s time.*”

But this scenario did not address the problem created by concurrent delays having their origin in Relevant Events and culpable events. It was accepted in Henry Boot –v– Malmaison 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 a Relevant Event not withstanding the concurrent effect of the other event.*”

Divergence

But it was also held that clause 25 did not preclude the architect when deciding whether a Relevant Event is likely to cause or has caused delay, from considering the impact on progress and completion of other events. Then in Royal Brompton Hospital the court emphasised “*it is... necessary to be clear what one means by events operating concurrently. It does not mean... a situation in which, work already being delayed because the contractor had difficulty obtaining labour, a [Relevant Event] occurs which by reason of the existing delay, made no difference.*”

Although there is a Relevant Event the completion of the Works is not likely to be delayed thereby beyond the Completion Date”.

This is where the divergence over the operation of clause 25 begins. In City Inn, the majority looked at the issue where the Relevant Event and a shortage of labour occur more or less simultaneously and said it should not matter whether the shortage of labour developed 2 days before or 2 after the inclement weather as in either case the two matters operate concurrently to delay completion. “... they should be dealt with, by granting such extension as the architect considers fair and reasonable”.

5 propositions were formulated in City Inn and of these 4 and 5 are particularly noteworthy:

- 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 cause(s) which are not material regardless of which is the Relevant Event;
- 5 Where 2 causes are materially operative, 1 being a Relevant Event and the other not and neither is a dominant cause, it is open to the decision maker to apportion the delay between the events.

Strict Interpretation

The dissenting judge soundly rejected the proposition that delay caused by the contractor must also be taken into account. His opinion relies on a narrow interpretation of the JCT wording “clause 25.3.1 provides that it is in the power of the architect to form an opinion on whether a matter complained of is a Relevant Event and whether the completion of the Works is likely to be delayed thereby beyond the Completion Date.”

Importantly he stated, “This provision is designed to allow the contractor sufficient time to complete the Works, having regard to matters which are not his fault. This does not... involve any analysis of competing causes of delay or an assessment of how far other events have, or might have, caused delay beyond the completion date.” So if bad weather occurs the contractor would expect an extension. “It is of no moment that there was a contractor delay before, during or after the weather conditions.”

The judgment in Balfour Beatty was criticized where clause 25.3.3 had been described as being for the architect to decide whether an adjustment of the Completion Date is fair and reasonable having regard to the incidence of Relevant Events. That is not what the clause says. If the architect determines the delay was or

is likely to be caused by a Relevant Event then he fixes such later Completion Date as he considers to be “fair and reasonable”. So where a storm occurs after the Completion Date the correct approach is to ignore the storm as it would have not effected the Completion Date had the contract proceeded without contractor default.

The exercise remains one of looking at the Relevant Event and the effect it would have had on the Completion Date. 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 remains irrelevant. In that respect, the view in Royal Brompton Hospital that a Relevant Event falls to be disregarded if a pre-existing contractor default would nonetheless have caused the delay, appears to be in error. That may reflect how the law might regard causation operating in a situation of competing causes, but it is not what the contract envisages.

The dissenting judge therefore disagreed with the reasoning of the first instance decision and the majority on appeal in City Inn over their view that where there was 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 2 causes. He said that this was wrong. “That is not an exercise warranted by any term of the contract... What the architect must do is concentrate solely on the effect of the Relevant Event... It is not in short, an apportionment exercise... The words “fair and reasonable” in the clause are not related to the determination of whether a Relevant Event has caused the delay in the Completion Date, but to the exercise of fixing a new date once causation is already determined”.

Conclusion

Following the majority judgment in the Scottish case of City Inn the “fair and reasonable” approach has been interpreted so as to enable the decision maker to (a) choose the dominant cause, regardless of whether it is a Relevant Event competing with contractor’s culpable delay (in other words the dominant cause trumps the Relevant Event); and (b) where two causes are materially operative (one being a Relevant Event and the other not) with neither being a dominant cause, it is open to the decision maker to apportion delay.

We now have something of a hiatus over the meaning of clause 25 while it remains to be seen whether the English courts prefer the reasoning of the dissenting judge.

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