CONCURRENT DELAY AND THE RECENT JUDGMENT IN
CITY INN LTD V SHEPHERD CONSTRUCTION LTD

By Jonathan Gold

An issue that often arises on construction projects is concurrent delay: where there is more than one cause, or potential cause, of delay; each event on its own would have caused the delay; and one cause would entitle the contractor to be compensated, and another would not.

There is much debate as to whether in such circumstances the contractor is entitled to compensation. There is, however, a relative paucity of caselaw on this issue, which is why the judgment in City Inn Ltd v Shepherd Construction Ltd [2010] ScotCS CSIH68 has caused such excitement.

Lord Osborne, who gave the majority decision, endorsed the decision at first instance that:

“where there is true concurrency between a relevant event [entitling the contractor to compensation] 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”.

This is a departure from the latest cases on concurrent delay in England and Wales (Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR 32, and Steria Ltd v Sigma Wireless Communications Ltd [2008] 118 Con LR 177). In those cases apportionment was not considered to be appropriate; and the contractor was entitled to an extension of time for the
full period of the relevant delay, notwithstanding that there was a concurrent cause of the delay for which the contractor was responsible.

The above comments were in respect of time, not money: the contractor’s claim for an extension of time rather than its claim for prolongation costs. The distinction is important because the extension of time provisions in the contract (a JCT Standard Form of Contract) provided for “a reasonable and fair" extension of time to be awarded, as “estimated" by the Architect, where certain events were “likely" to have caused delay. This is arguably a more relaxed test than whether or not certain events directly caused delay, which might allow for apportionment. Whereas the loss and expense provisions in the contract, under which the prolongation costs were being claimed, simply provided that such costs would be payable if these were incurred as a result of certain events, which is more akin to the common law rules on causation.

However, the court also endorsed the first instance judge’s application of the same principles of apportionment to the contractor’s claim for prolongation costs, as he had applied to the extension of time claim. Lord Osborne said “the reasoning applicable to an extension of time seems to me to be equally applicable to a claim for direct loss and expense”.

Lord Osborne summarised the dilemma faced by the first instance judge and his conclusion, with which he agreed, as follows:

“[the judge] was also faced with a submission that, if a contractor incurred additional costs that were caused both by what might be called an employer delay and by a concurrent contractor delay, the contractor should only be entitled to recover direct loss and expense to the extent that it was able to identify the additional costs caused by the employer delay, as opposed to the contractor delay. If the contractor would have incurred the additional costs in any event, as a result of contractor delay, he would not be entitled to recover those additional costs. ... He expressed the view that [apportioning the loss between the causes] was what ought to be done in the present case. Thus he observes that this case was one where delay had been caused by a number of different causes, most of which were the responsibility of
the employer, through the architect, but two of which were the responsibility of the contractor. It was accordingly necessary to apportion the respondents’ prolongation costs between these two categories of causes. He considered that the same general considerations, the causative significance of each of the sources of delay and the degree of culpability in respect of each of those sources, had to be balanced.”

The judgment in City Inn is obviously of great interest. However, it must be remembered that it is a Scottish case, and it is unclear whether it will be applied and followed by the courts in England and Wales, where there is currently conflicting caselaw, albeit at first instance.

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