

## City Inn Limited v Shepherd Construction

The Scottish Court of Appeal last month provided some useful guidance on the interpretation and working of the JCT extension of time machinery.

Some of the most contested cases in the construction industry involve arguments about entitlements to extensions of time. In projects that use JCT contracts the process involves, broadly, the contractor giving notice of delay to the employer/contract administrator citing the reasons for the delay as being one or more "relevant event". The employer/contract administrator then decides whether the delay notified by the contractor is likely to delay, or has delayed, completion of the project. If it has the employer/contract administrator must award a "fair and reasonable" extension of time.

Over the years there has been much debate on how any such entitlement to an extension of time is or may be affected by concurrent delays and a number of judges have grappled with the notions of concurrency in trying to interpret the JCT extension of time rules. The first instance decision in City Inn was one such case. In brief, City Inn employed Shepherd Construction to build a hotel in Bristol. Shepherd applied for various extensions of time and after a number of adjudications was awarded a total of five weeks. City Inn disagreed and issued proceedings for a declaration that Shepherd was not entitled to any extension to the contract completion date. After a detailed review Lord Drummond Young awarded Shepherd a nine week extension and ordered City Inn to repay liquidated damages previously deducted. City Inn appealed on a number of grounds generally but including the question of the proper interpretation of the JCT extension of time provisions and causation.

### The Decision

The Scottish Court of Appeal unanimously endorsed the decision of Lord Drummond Young and, in doing so, Lord Osborne put forward five clear and concise propositions regarding the proper approach to be taken when deciding on a party's entitlement under JCT to an extension of time. The propositions are:

1. For an extension of time claim to succeed it must be shown that the delay was caused by a relevant event and that, as a result, completion of the project has been, or is likely to be, delayed.
2. When deciding on whether a relevant event actually caused the delay to completion of the project, the decision maker should apply the principles of common sense rather than engage in a process of complex philosophical analysis.
3. In deciding causation, the decision maker can have regard to any factual evidence available to him/her. In this regard it may be that a critical path analysis is used and, if it is soundly based, it can be useful. However, the absence of a critical path analysis does not mean necessarily that the claim for an extension of time will fail.
4. If a dominant cause can be identified as a cause of a particular delay in the completion of the works, effect will be given to this by not considering causes that are shown not to be material. Therefore depending on whether the dominant cause is a relevant event, the extension of time claim will either succeed or fail.
5. Where there is a situation where there are two causes that are operative, one which is a relevant event and the other an event of contractor culpability, and neither can be described as the dominant cause, the claim for an extension of time will not necessarily fail. In this situation the decision maker can apportion the delay in the completion of the project as between the relevant event and the other event. In doing so, the decision maker must approach the issue in a fair and reasonable way and bear in mind the fact that there may be an entitlement to liquidated damages rather than a claim for an extension of time.

The decision of the Scottish Court of Appeal whilst is not binding on lower English Courts is persuasive. At first glance it might look like parties looking for an extension of time can do away with detailed critical

path analyses but this is not the case. It is still open to a party defending an extension of time claim to put forward what Dyson J in *Henry Boot Construction v Malmaison Hotel* (1999) referred to as a negative and positive defence to an extension of time claim. In other words, it is open to a party defending an extension of time claim to say, firstly, that the events complained of did not cause a delay because they were not on the critical path and, secondly, that there was some other reason for the delay for which the contractor is responsible. In this situation it will be up to the decision maker to use principles of common sense to decide on causation and, if necessary (because a relevant event and contractor culpable event are operative and neither is dominant) to apportion such delay between the two events in a fair and reasonable way.



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This briefing note is intended merely to provide a summary of the law in this area and is not a comprehensive guide. It is not intended to provide legal advice for specific cases. The law and practice in this note is stated as at the end of July 2010.

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