EXTENSIONS OF TIME: CITY INN v SHEPHERD CONSTRUCTION

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AGENDA

• Extensions of Time

• *City Inn v Shepherd Construction*
  – Background
  – Impact of the Decisions

• Do I need to do anything following *City Inn v Shepherd Construction*?

• Subsequent decisions
  – English v Scottish approach
EXTENSIONS OF TIME

Why do we have Extension of Time provisions?

– **EoT provisions are to the benefit of both Employer and Contractor**

– So the Employer can recover *LADs* – otherwise the Employer is left to recover *‘common law’ damages*.

– So the Contractor is not forced to complete by the completion date where an employer-risk delay event has occurred. *‘Prevention Principle’* – Employer cannot profit from its own breach

– To avoid *‘time becoming at large’* – Contractor then has a *‘reasonable time’* to complete the works.
Dealing with EoT – The practicalities

• Take the contract off the shelf
  – What *events* create the Contractor’s entitlement to an EoT
  – Employer-risk events
  – JCT – Relevant Events
  – NEC – Compensation Events – clause 60.1

• Are there any timescales or any other requirements which the Contractor must satisfy in applying for an EoT? – *Conditions Precedent*

• Project Manager to provide a *fair and reasonable assessment* of the EoT acting *independently* of the Employer and Contractor

• Is there *Concurrency*?

• if so, what is the *Dominant Cause* of the delay?
The existing English case-law before City Inn v Shepherd

**Balfour Beatty v Chestermount (1993) - the ‘But for’ test**
- **Test:** “Would the delay have occurred but for the event complained of”?
- If answer is “yes”, it would have occurred in any event – then there is said to be **no causal link**.
- produces the non-sensical answer that neither of the events caused the delay

**Henry Boot v Malmaison (1999)**
- The contractor is to be granted an extension of time even though a contractor-risk event was concurrent with the employer–risk event

**Royal Brompton v Hammond (2001) – the ‘first in line approach’**
- Where two events causing delay
- The event that occurred first is the one that causes the whole delay

**Dominant Cause** –
- This approach seeks to resolve the issue of concurrent delay by determining which event was the 'Dominant Cause' of that delay
- The contractor will be entitled to an EoT if the dominant cause of delay is an employer-risk event (rather than a contractor-risk event).


City Inn v Shepherd Construction

THE PARTIES
Employer = City Inn Limited
Main Contractor = Shepherd Construction Limited

THE PROJECT
- 168 bedroom hotel at Temple Way, Bristol

THE CONTRACT
- With a Schedule of Amendments
## City Inn v Shepherd Construction

### PROJECT TIMELINE

<table>
<thead>
<tr>
<th>Date of Possession</th>
<th>Date of Contract</th>
<th>Original Contractual Completion Date</th>
<th>Contract Administrator award of 4 week extension time</th>
<th>Certificate of Practical Completion</th>
<th>Actual works complete</th>
</tr>
</thead>
</table>

**Adjudicator award of additional 5 week extension of time**

- Potential LADS of £30,000 per week for 9 weeks
City Inn v Shepherd Construction
FOLLOWING PRACTICAL COMPLETION……..

SO THE FINANCIAL POSITION WAS:
- Shepherd had been repaid 9 weeks’ LADs (£270,000) and associated loss & expense (£120,000)

AND, THE LEGAL POSITION WAS:
City Inn commenced legal proceedings to claw back LADs and loss & expense - £390,000

Shepherd counterclaimed – entitled to an EoT up to date of actual completion (14 April 1999) and the loss and expense incurred (£11,519 x 11.2 weeks =) £129,998.

- Court looked at issue of EoT afresh
  - burden of proof lies with City Inn to overturn the Contract Administrator award of 4 weeks
  - burden of proof lies with Shepherd Construction to prove its entitlement to the adjudicator award of 5 weeks
City Inn v Shepherd Construction
THE PARTIES’ POSITIONS

CITY INN’S POSITION:

- Shepherd entitled to no extension of time beyond the original contractual completion date:

- clause 13.8: a bespoke condition precedent

SHEPHERD’S POSITION:

- Shepherd entitled to an 11 week extension of time:

- clause 13.8: a penalty clause
- clause 13.8: only applies to instructions liable to cause delay by virtue of their content (rather than their timing)
- clause 13.8: waived by City Inn

clause 25: none of the instructions issued by the Contract Administrator caused delay to completion; or, if they did, those delays were concurrent with delays caused by Shepherd Construction

- clause 25: the instructions issued by the Contract Administrator caused delay to completion
**City Inn v Shepherd Construction**

**CLAUSE 13.8**

**BESPOKE CLAUSE**
- Condition precedent to contractor’s entitlement to an extension of time under clause 25
- Contractor to give written notice of cost and time consequences before proceeding with instruction
- Employer has opportunity to decide whether or not to proceed

**DEBATE DECISION**
- Not a penalty clause, but an enforceable condition precedent
- BUT…Lord McFadyen said:

"In my view a distinction falls to be drawn between, on the one hand, a late instruction which, simply because of its lateness, gives rise to a need to adjust the contract sum and/or grant an extension of time and, on the other hand, an instruction which, although late, is of such a nature that it would, whenever issued, have given rise to a need to make such an adjustment or grant such an extension. The latter category of instruction falls, in my view, within the scope of cl 13.8, whereas the former does not."

- Waiver
1. Did a Relevant Event occur?

2. Did that Relevant Event *cause* the completion of the Works to be delayed beyond the Completion Date?

3. To what extent should the period of contract time available for completion of the Works be extended having regard to the occurrence of a Relevant Event?
City Inn v Shepherd Construction
THE COURT’S DECISION
30 NOVEMBER 2007

THE COURT HELD:

- that clause 13.8 was waived by City Inn
- in any event, clause 13.8 only applies to instructions causing delay because of their content
- the instructions complained of here only caused delay due to their timing
- the various causes of delay operated concurrently
- no delay event was ‘dominant’
- it was therefore appropriate to conduct an exercise of apportionment, reducing an 11 week award to a 9 week award
- Shepherd was entitled to:
  • a 9 week extension of time;
  • no LADs payable to City Inn;
  • 9 weeks loss and expense was awarded to Shepherd
City Inn v Shepherd Construction
THE APPEAL COURT’S DECISION
22 JULY 2010

Upheld the Court’s decision - 5 propositions for the proper approach to applying clause 25

1. A Relevant Event must exist, and must be a cause of delay (or likely delay) to the completion of the works.

2. Whether the Relevant Event possesses that causative effect is an issue of fact to be resolved by applying common sense, rather than "philosophical principles of causation".

3. The architect (or court) can decide issues of causation on the basis of any factual evidence acceptable to it. A sound critical path analysis may be of assistance, but its absence is not fatal to a claim for an extension of time.

4. If a dominant cause of delay can be identified, that will be given effect to. The claim for an extension of time will then succeed or fail, depending on whether or not that dominant cause is a Relevant Event.

5. Where two causes are operative (one a Relevant Event and the other not), and neither is dominant, the claim will not necessarily fail. These are described as concurrent causes, and the contract administrator (or court) may then apportion the delay on a fair and reasonable basis.
City Inn v Shepherd Construction
CONCURRENCY

City Inn v Shepherd Construction:
- no clear definition of concurrency
- some confusion

Concurrent events
Two or more delaying events that take place at the same time. Only one may have any bearing, in causative terms, on the completion date

Concurrent causes of delay
True concurrency (Royal Brompton)
City Inn v Shepherd Construction
IMPLICATIONS OF THE DECISION

- Application of legal principles of causation
- Critical path analyses
- Certainty?

- Reliance on the specific facts
- “Common-sense” approach
- “Fair and reasonable” view
City Inn v Shepherd Construction
IMPLICATIONS OF THE DECISION.....

Clause 13.8

– Drafting of clauses like ‘clause 13.8’ (i.e. conditions precedent; time bar provisions)

– How to avoid the issue of waiver

• Non-waiver clause?
• Comply with contractual provisions/ conditions
• Reserve your rights
City Inn v Shepherd Construction
IMPLICATIONS OF THE DECISION.....

Clause 25
The English Courts’ use of City Inn v Shepherd so far…..

– De Beers v Atos (2010)
  • The court’s judgment does not expressly refer to City Inn v Shepherd
  • The court was of the opinion that the English law position on concurrency is to allow an EoT rather than to apportion.

– Adyard Abu Dhabi v SD Marine Services (2011)
  • The court was also of the opinion that that the English law position on concurrency is to allow an EoT rather than to apportion.
What do you need to take away from today?

Conditions Precedent – enforce or reserve rights

The delay event must still cause the delay being claimed by the contractor. Use common sense to decide whether the delay event has the causative effect being claimed.

If there is Concurrency and a Dominant Cause – should the Dominant Cause be an employer-risk event the contractor is entitled to an EoT

If there is Concurrency but no Dominant Cause - look at apportioning the amount of delay attributed to each delay event.

The absence of a critical path analysis will not remove a contractor’s entitlement to an EoT – cannot ignore other factual evidence presented by the Contractor

BUT – Always read the contract to establish whether the contract changes this position.