FOR WANT OF A NAIL, THE KINGDOM WAS LOST...BUT WHAT IF THE FARRIER WAS ON STRIKE TOO?

CONCURRENT CAUSES OF DELAY: LEGAL UPDATE

a talk given by

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"There is nothing special or mysterious about the law of causation. One decides, as a matter of law, what causal connection the law requires and one then decides, as a question of fact, whether the claimant has satisfied the requirements of the law. There is, in my opinion, nothing more to be said"[1]

[1] Lord Hoffman (2005) 121 LQR 592

Introduction

1. It is perhaps sensible at of the outset for us to try to define the subject matter of this paper. We limit ourselves to the law of contract. As the title to the paper might suggest we are concerned with providing an update on the law as it applies to construction projects in circumstances where the completion of the project is delayed by two events. The particular subject matter of the contract is irrelevant: the principles considered below might apply equally to the construction of a retail development, oil rig or ship or the delivery of an IT project. We shall assume that the contract provides a date for completion, a mechanism for extending time and terms providing that liquidated damages can be levied in the event that the completion date is not achieved.

2. What then do we mean by the term concurrent delay? We use the term here in the sense of a period of delay which might sensibly be attributed to two discrete causes, so for example a particular week's work might be lost because of inclement weather and because of an absence of labour. It is when each party to the contract can be said to be responsible for one of the two causes of delay that tensions arise. The types of dispute that arise are common and we suggest that invariably they require consideration of two related issues:
   (i) what was the true cause of the delay?
   (ii) as between the contracting parties who takes the risk of the delay consequent upon any particular occurrence or event?

3. In answering issue 2 (i) we are inevitably concerned with matters of fact. How adverse was the weather? Did it stop work completely or simply slow progress? Did the adverse weather interfere with work that was critical to achieving the completion date? In many instances the factual enquiry will be determinative: if a typhoon stops all work on site for a week then that may be sufficient – the typhoon caused a week's delay and there is no need to trouble with the niceties of

defining a legal test for causation. If, however, the typhoon occurred during a week when the contractor's labour force had refused to work because they had not been paid, the answer to the question "what caused the delay?" may be more difficult. Lord Hoffmann (in his 2005 Blackstone Lecture at Pembroke College, Oxford) tells us that "...one decides, as a matter of law, what causal connection the law requires ....". What though is the causal connection that the law requires and how does one go about defining it? We suggest the answer may often be found by answering a question of contractual interpretation, and, practically speaking, may also be influenced by a proper understanding of the facts. Thus the answer to issue 2 (i), will for cases of concurrent delay, frequently be a question of mixed fact and law.

4. Issue 2 (ii) is potentially more straightforward – the contract may provide the answer, so it might expressly allocate the risk to one party or the other. In the example given above the contract might expressly provide that, in the event of a typhoon, irrespective of any other cause of delay, the risk is to be borne by the employer such that the contractor is to be entitled to an extension of time. At this point we make two preliminary observations. Firstly, despite the fact that disputes over the causes of delay are common, the extension of time clauses that seek to allocate risk often fail to address expressly issues of concurrency; and, secondly, it is rare to find such a clause drafted in terms that identify, clearly, the legal test of causation that is to be applied. From the point of view of the draftsman responsible for drafting extension of time clauses this can be an important consideration – it is not simply a question of allocating risks but in defining by whom and how the process of the assessment of the effects of that allocation is to be undertaken.

5. The most recent decision on the subject of concurrent delays is the Scottish case decided by the Court of Session Outer House in **City Inn Ltd v Shepherd Construction Ltd** [2008] BLR 269. For the purposes of this update we shall endeavour to review how, if at all, the decision in **City Inn** is consistent with the

more recent English decisions on the subject and in so doing hopefully provide a helpful summary of the current state of the law and of the uncertainties that remain.

6. **City Inn** is a decision that turns on the proper construction of the JCT Standard Form of Building Contract, 1980 Edition, and given that two of the reported English decisions are decisions on (substantially) the same form of contract we shall use the language of this form of contract as a vehicle for reviewing the underlying principles. Readers of this paper will no doubt be familiar with the basic contractual framework:

   (i) The responsibility for deciding whether or not the contractor is entitled to an extension of time is given to the architect.

   (ii) The contractor's rights to an extension of time are set out in clause 25. The events entitling the contractor an extension of time are listed in clause 25.4 and include events such as adverse weather and compliance with architect's instructions.

   (iii) During the course of the performance of the contract the contractor is required to notify the architect of events that either have caused or are likely to cause delay and in response to such a notice if the architect is satisfied that the event is a "Relevant Event" and that completion is likely to be delayed then he is to grant an appropriate extension of time.

   (iv) Following Practical Completion the architect is to review the position and to fix a later completion date if in his opinion the fixing of such a later completion date is fair and reasonable.

The particular clauses are set out in the judgment and are in the following terms:

<u>During Performance</u>

> **"If, in the opinion of the architect, upon receipt of any notice, particulars and estimate under clauses 25.2.1.1 and 25.2.2**

.1 **any of the events which are stated by the Contractor to be a cause of the delay is a Relevant Event and**

.2 **the completion of the Works is likely to be delayed thereby beyond the Completion Date the architect shall in writing to the Contractor give an extension of time by fixing such later date as he then estimates to be fair and reasonable…"**

Following Practical Completion

> **"After the Completion Date, if this occurs before the date of Practical Completion, the architect may, and not later than the expiry of 12 weeks after the date of Practical Completion shall, in writing to the Contractor…**
>
> **.1 fix a Completion Date later than that previously fixed if in his opinion the fixing of such later Completion Date is fair and reasonable having regard to any of the Relevant Events, whether upon reviewing a previous decision or otherwise and whether or not the Relevant Event has been specifically notified by the Contractor under clause 25.2.1.1…"**

The Underlying Objective

7. The operation of the extension of time clause mechanism was the subject of a detailed judgment from Colman J in **Balfour Beatty Building Ltd v Chestermount Properties Ltd** (1993) 62 BLR 1. Colman J described the underlying objective of the relevant contractual provisions as follows:

> **"The underlying objective is to arrive at the aggregate period of time within which the contract works as ultimately defined ought to have been completed having regard to the incidence of non-contractor's risk events and to calculate the excess time if any, over that period, which the contractor took to complete the works. In essence, the architect is concerned to arrive at an aggregate period for completion of the contractual works, having regard to the occurrence of non-contractor's risk events and to calculate the extent to which the completion of the works has exceeded that period."**[2]

We suggest that this summary is likely to be applicable to many such clauses – time is to be extended to take into account the effect of the occurrence of events

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for which the employer is responsible – "non-contractor risk events". What is required is to make an assessment of the actual delay caused by the events for which the employer is responsible.

8. The point was emphasised later in the judgment in the following words:

> **"In order to test this point one again returns to the purpose of the architect's powers under clause 25. He looks back after the most recently-fixed completion date and, under clause 25.3.3, perhaps after practical completion, and assesses the extent to which the period of contract time available for completion ought to be extended or reduced having regard to the incidence of the relevant events. His yardstick is what is fair and reasonable. For this purpose he will take into account amongst other factors the effect that the relevant event had on the progress of the works. Did it bring the progress of the works to a standstill? Or did it merely slow down the progress of the works? The function which he performs under clause 25.3.3 must as a matter of construction be in substance exactly analogous to that which he performs under clause 25.3.1. The difference is that under the former clause he does it after the completion date and not before it. But in both cases his objective must be the same: to assess whether any of the relevant events has caused delay to the progress of the works and, if so, how much. He must then apply the result of his assessment of the amount of delay caused by the relevant event by extending the contract period for completion of the works by a like amount and this he does by means of postponing the completion date."**[3]

The emphasis is ours – the objective is described as one where the architect is to assess whether any of the relevant events caused delay and if so how much. How though is the architect (or any tribunal) to undertake the assessment – whether or not a particular relevant event caused delay? Though the judgment in **Chestermount** provides a valuable review of the operation of extension of time clauses it is necessary to recognise that the court was not being asked to decide how those clauses were to be operated so as to resolve issues of concurrency.

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The Tests for Causation

9. The formulation of the legal test for causation has been variously expressed. The language used is familiar: e.g. use "common sense", the "but for" test, the effective cause, the dominant cause, a material and significant cause. Perhaps the common thread between all of these tests, however expressed, is that they produce an all or nothing result: if the relevant causal connection is made out the claimant succeeds, if not he fails. In contract, there has been limited judicial consideration of apportionment; contributory negligence is generally unavailable. The decision in **Tennant Radiant Heating Ltd v Warrington Development Corporation** [1998] 1 EGLR 41 is something of an exception in that the Court of Appeal in a dispute between landlord and tenant as to damage caused by an accumulation of rainwater (each in part being responsible for the damage caused) felt able to approach the problem as one of apportionment:

> **"The problem which this court faces, on the claim and counterclaim alike, is in my judgment a problem of causation of damage. On the claim, the question is how far the damage to its goods which the lessee has suffered was caused by the corporation's negligence notwithstanding the lessee's own breach of covenant. On the counterclaim, the question is how far the damage to the corporation's building which the corporation has suffered was caused by the lessee's breach of covenant, notwithstanding the corporation's own negligence. The effect is that on each question, apportionment is permissible."**

However, in **Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd** [1990] 1 QB 818, Lord Justice May giving the judgment of the court said of the decision in **Tennant**:

> **"We merely add respectfully our view that the scope and extent of this last mentioned case would have to be a matter of substantial argument if the principle there applied were to arise for consideration in another case."**[4]

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10. In terms of the application of any particular test for causation, specifically in the context of concurrent delays, there remains surprisingly little judicial guidance. As matters currently stand the "but for test" receives little support; see **City Inn** at paragraphs 15 and 17 and the cases there cited. This might suggest that the approach to be adopted lies in approaching the issue as one of effective or dominant cause. There is little considered authority on the point.

11. The most direct observations on the point are those of Mr Justice Dyson (as he then was) in **Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd** (1999) 70 Con LR 32 at paragraph 13:

> **"Secondly, it is agreed 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 the Relevant Event notwithstanding the concurrent effect of the other event. Thus, to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a Relevant Event), but also because the contractor has a shortage of labour (not a Relevant Event), and if the failure to work during that week is likely to delay the Works beyond the Completion Date by one week, then if he considers it fair and reasonable to do so, the Architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour."**

Applying this approach the answer in respect of cases where there is concurrent delay is that the contractor is entitled to an extension of time. We suggest that there are three points that merit comment:

(i) as the judge records, the conclusion is one that is based on the agreement of counsel;

(ii) the judgment does not formulate or express any legal test for causation; and

(iii) it would appear that because of the agreement between counsel there was no discrete analysis of the law or of the contract.

12. The approach adopted in **Henry Boot** has recently been applied by HH Judge Stephen Davies in <u>**Steria Ltd v Sigma Wireless Communications Ltd**</u> [2008] BLR 79. The extension of time clause that Judge Davies had to consider was a bespoke clause for the IT contract that had given rise to the dispute but the Judge clearly regarded the judgment in **Henry Boot** as a statement of general principle; see paragraphs 130 and 131 of the judgment. The judge in adopting the approach taken by Dyson J cited with approval a passage from Keating on Construction Contracts (8th edition) at paragraph 8-021 where the editors suggest that in the light of the decision in **Henry Boot**:

> **"It now appears to be accepted that a contractor is entitled to an extension of time notwithstanding the matter relied on by the contractor is not the dominant cause of delay, provided that it has equal 'causative potency'..."**

The conclusion expressed in **Steria** was one where the Judge records (at paragraph 130) that:

> **"The parties have not directed submissions to me specifically on this point".**

13. In between the decisions of **Henry Boot** and **Steria** there had been the judgment of HHJ Seymour QC in <u>**Royal Brompton Hospital NHS Trust v Hammond (No.7)**</u> [2000] EWHC 39 (TCC), (2000) 76 Con LR 148. Having referred to the decisions in **Chestermount** and **Henry Boot**, he continued as follows (at paragraph 31):

> **"However, it is, I think, necessary to be clear what one means by events operating concurrently. It does not mean, in my judgment, a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a Relevant Event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of an existing delay, made no difference. In such a situation, although there is a Relevant Event, 'the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date.' The Relevant Event simply has no effect upon**

the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, the works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a Relevant Event, while the other is not. In such circumstances there is a real concurrency of causes of the delay."

This case was not mentioned in the judgment in **Steria**.

City Inn v Shepherd

14. The judgment in **Steria** was handed down some two weeks before the decision of the Court of Session in **City Inn**. The judgment of Lord Drummond Young is one that considered both the judgment of Colman J in **Chestermount** and Dyson J in **Henry Boot.** The Judge expressly addressed, in respect of the JCT form, the issue of concurrency. He said (at paragraph 16) that he had some difficulty with the distinction drawn by HHJ Seymour QC in **Royal Brompton** in the passage quoted above; that he considered it to be based on an arbitrary criterion. The judgment at paragraph 13 contains the following analysis:

> **"Thirdly, this process involves certain inherent uncertainties. For example, a contractor's risk event and a non-contractor's risk event may operate concurrently in such a way that delay can be said to result from both, or indeed either. Another possibility is that a non-contractor's risk event merely slows the progress of the Works, rather than bringing them to a halt. Because of these uncertainties, the architect is given power to adjust the Completion Date retrospectively, because it is clearly only with hindsight that the causative potency of each of the sources of delay can be properly assessed. Fourthly, the inherent uncertainties in the process are recognised in the scheme of clause 25. The architect is not expected to use a coldly logical approach in assessing the relative significance of contractor's risk events and non-contractor's risk events; instead, as the wording of both clause 25.3.1 and clause 25.3.3.1 makes clear, the architect is to fix such new Completion Date as he considers to be 'fair and reasonable'. That wording indicates that the architect must look at the various events that have contributed to the delay and determine the relative significance of the contractor's and non-contractor's risk events, using a fairly broad approach. Judgment is involved. It is probably fair to state that the architect exercises discretion, provided**

that it is recognised that the architect's decision must be based on the evidence that is available and must be reasonable in all the circumstances of the case. The decision must, in addition, recognise that the critical question is to determine the delay caused by non-contractor's risk events, and to extend the Completion Date accordingly."

Lord Drummond Young recognises, and we suggest with some force, the fact that, as part of the post contract review, the architect, under the JCT Form, is to fix a later date for completion if in his opinion the fixing of such later date is "fair and reasonable". What Lord Drummond Young does is to construe the contract and by construing the contract he arguably defines the legal test for causation – the legal test being that which is fair and reasonable. It is we suggest important to recognise that what Lord Drummond Young does is to take the analysis one stage further than in **Chestermount** and to consider clause 25 in terms that were not addressed at all by Dyson J in **Henry Boot**. Based on this analysis the judgment proceeds to the conclusion that in cases of concurrent delay, applying the test of what is fair and reasonable, it may be appropriate to apportion responsibility for the delay; see the judgment at paragraph 18. The conclusion reached by Lord Drummond Young contemplates a result that might be quite different from that given in **Henry Boot** and **Steria**, i.e. the winner takes all result does not necessarily follow.

15. Thus in applying the approach commended to us by Lord Hoffmann, one decides as a matter of law what causal connection the law requires, and in order to answer that question one first turns to the terms of the contract. Under the JCT Form, and one sees many similar provisions which call for a discretion to be exercised, there is a persuasive argument for saying that the contract does not just allocate risk but that it describes how the assessment of the effects of that allocation of risk is to be undertaken.

16. The decision in **City Inn** has not been without its critics, we understand that it is subject to appeal and it remains to be seen if **City Inn** will be followed in

England. However, whatever view one might take as to the correctness of the result in **City Inn**, we would respectfully suggest that the underlying approach taken by the court has some attractions. In principle, we suggest that there is no impediment to a contract providing that where competing causes of delay occur then the problems arising from such an occurrence are to be resolved through the application of principles analogous to those applied in cases of contributory negligence.

Conclusion

17. In answering the question posed by Lord Hoffmann (as to what causal connection the law requires), one's starting point is likely to be the wording of the contract. Where the contract is silent as to what is to happen in the event of concurrency, and where there is no discretion conferred on the relevant decision-maker, then one has regard to more general legal principles. The effect of these would appear to be that, where an extension of time clause confers on the contractor an entitlement to an extension of time for a particular event or events, then the contractor will be entitled to an extension even where there is a concurrent delay for which he is responsible; the contractor will not thereby be deprived of the extension of time.

18. **City Inn** opens up a different approach where discretion is given to the relevant decision-maker. The scope of the discretion is, of course, critical. Depending on the wording of the contract, the judgment that has to be made need not be constrained to the application of any particular (or traditional) legal test for causation.