



LEGAL BRIEFING

City Inn Ltd v Shepherd Construction Ltd

[2010] ScotCS CSIH 68, Lord Osborne, Lord Kingarth and Lord Carloway

On 22 July 2010 the Inner House of the Scottish Court of Session handed down its decision on this long running dispute. The Inner House upheld Lord Drummond Young's decision by a majority of 2:1.

The Facts

Shepherd was engaged by City Inn to build a hotel in Bristol. The contract incorporated the JCT Standard Form of Building Contract (Private Edition with Quantities) 1980 Edition, with further bespoke amendments. At clause 25, the contract contained extension of time provisions that were broadly similar to the standard JCT provisions; the architect could award extensions of time where a relevant event had caused or was likely to cause the works to be delayed.

It was found that City Inn was responsible for nine causes of delay to the completion of the works (such as late instructions from the architect), with two causes of delay the responsibility of Shepherd. These causes for which City Inn was responsible were relevant events under clause 25. City Inn argued that Shepherd was not entitled to any extension of time, due to the concurrency of the delays caused by both parties.

The Issue

What is the correct approach to be taken when awarding extensions of time for concurrent delays under clause 25?

The Decision

By a 2 to 1 majority, the Scottish Court of Appeal, upheld the earlier decisions. Lord Osborne, who delivered the majority verdict, agreed, that where there are concurrent delays, caused by the employer and the contractor, delay may be apportioned between the competing causes. Following a review of relevant case law in Scotland, England and Wales and the United States, Lord Osborne put forward five propositions:

- (i) It must be established that a relevant event has occurred and is a cause of delay, and that completion of the works is likely to be delayed or has been delayed by that relevant event;
- (ii) Whether the relevant event has had or will have any causative effect is a question of fact to be determined by common sense;
- (iii) In deciding whether the relevant event has caused delay, the architect can consider any factual evidence he considers acceptable. A critical path analysis is not essential;
- (iv) If a dominant cause can be identified as the cause of a particular delay, effect will be given to that by leaving out of account any causes which are not material. Therefore, in those circumstances, the success of an extension of time claim will depend on whether the dominant cause is a relevant event; and
- (v) Where a situation exists in which two causes are operative, and one is a relevant event and the other is caused by the contractor, and neither can be described as a dominant cause, it will be open to the architect to approach the issue in a fair and reasonable way to apportion the delay between the causes.

In his dissenting opinion, Lord Carloway actually agreed with the overall result of the other judges, but he applied different reasoning. He considered that apportionment was not the correct method of awarding extensions of time between two concurrent causes of delay. He considered that the architect's sole task is to decide whether the relevant event is going to, or has, caused delay. If he considers that it has, then he should award an extension of time that is fair and reasonable. If a relevant event occurs, then the fact that the works would have been delayed because of a contractor culpable delay is irrelevant.

Comment

This decision does not alter the position from the previous hearing in 2007. In effect, the judgment, majority and dissenting view, that an architect making an award on an extension of time where there are concurrent causes of delay, should use his common sense, and approach the decision in a fair and reasonable manner. Perhaps the more interesting part of the decision is Lord Osborne's analysis of concurrent delays themselves. He states that when deciding if two or more delays are concurrent, an overly analytical view should be discouraged. An architect should not be chiefly concerned with the precise chronology of the delays, but should instead look at the effects of the delays on the completion date. It is this aspect of the decision which should provide some minor respite for those awarding extensions of time.

Chris Farrell
August 2010
