



JONES DAY  
**COMMENTARY**

## EXTENSIONS OF TIME, CONCURRENT DELAYS, AND CAUSATION: *CITY INN v SHEPHERD* JUDICIAL GUIDANCE FROM THE UK COURTS AT LONG LAST

Concurrent delay is an issue that arises on most construction projects. Put simply, the issue arises where a project has not been completed on time because of two or more delaying events that operate at the same time—one of the delaying events is the responsibility of the project owner and the other is the responsibility of the contractor. For example, an owner instructs a contractor to undertake additional work via a change order. The parties acknowledge that completion of the project will be delayed because of the extra work. However, at the time of carrying out the additional work, the contractor has deliberately reduced its labor resources for reasons unrelated to the variation but, in the event, compound the delay effect of the variation. The delay caused by the additional work and the insufficient resources run concurrently and delay completion of the project by one month.

The question to be answered is, who is responsible for the one-month delay to completion of the project. Is it the contractor? In that case, the owner will be entitled to claim its delay-related damages, which are usually in the form of liquidated damages. Or is it the responsibility of the owner? If so, and depending on the terms of the contract between the parties, the contractor will be relieved from liquidated damages by extending the time for completion of the project and may also recover its delay-related losses, such as prolongation, disruption, and acceleration costs. Or is responsibility to be shared between the parties? If responsibility is to be shared, upon what basis is this determined?

Despite the prevalence of concurrent delays on construction projects, there has been a dearth of

judicial guidance in Commonwealth jurisdictions on how to resolve the vexing question of responsibility. The only substantial insight was found in the English decision of *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [1999] 70 Con LR 32. The judgment noted the common ground between the parties that:

it is agreed that if there are two concurrent causes of delay, one of which is a relevant event [e.g., the owner's change order], and the other is not [e.g., the contractor's insufficient resources], 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." (Also see the subsequent decision in *Royal Brompton Hospital NHS Trust v Hammond and Others* (No. 7) [2001] 76 ConLR 148, where it was held that the contractor "would be entitled to extensions of time by reason of the occurrence of the relevant events notwithstanding its own defaults.")

However, it was not necessary in *Malmaison* for the court to assess the period of delay caused by the relevant event. As such, the case stopped short of providing practical assistance on how the extension of time should be quantified or measured in circumstances where there are concurrent delays to project completion.

Possible bases of measurement advanced at an academic level and within the construction industry include the following (see John Marrin QC, "Concurrent Delay," paper given to the Society of Construction Law Hong Kong (18 March 2003)):

**Apportionment**—allocation of the time and money effects of the delay to project completion based on the relative causative potency or significance of the competing causes of delay;

**The American Approach**—the contractor is granted an extension of time relieving it of liability for liquidated damages but does not recover delay-related loss and damage because of its own culpable or inexcusable delay, *i.e.*, a "zero sum" outcome;

**"But For" Test**—a simplistic argument usually raised by contractors. It arises out of principles of causation in tort cases,

the effect of which is to ignore the contractor's delays and assert that "but for" the owner-caused delay, the contract completion would not have overrun;

**The Dominant Cause Approach**—using principles of causation under contract law by choosing one delay event over another according to which is the dominant cause of the delay to completion of the project, *i.e.*, only one delay event is determined to be the cause of the overrun to the exclusion of all other concurrent delays.

## THE *CITY INN* APPEAL

The recent Scottish appeal decision of *City Inn Limited v Shepherd Construction Limited* (Outer House, Court of Sessions, 30 November 2007) goes the extra yard and deals with the issue of concurrent delays, in particular the principles to be adopted when measuring extension of time where there are concurrent delays. Overall, the decision is based on common sense and should be welcomed by the engineering and construction industry. Not surprisingly, the case makes it clear that the answers to the questions raised by concurrent delays lie in the terms of the extension-of-time mechanism under the contract. According to the court, and in the context of the contract before it, concurrent delays should be dealt with by apportioning responsibility for the delay to completion of the project where the extension-of-time mechanism provides that the quantification of the extensions must be based on what is fair and reasonable. The court also held that the principle of apportionment should be applied when quantifying prolongation costs in circumstances where there are concurrent delays.

The following commentary analyses the court's decision, in particular the meaning and practical consequences of the apportionment method to deal with concurrent delays.

## THE FACTS

City Inn Limited ("Employer") engaged Shepherd Construction Limited ("Contractor") in October 1997 to construct a hotel in Bristol, England. The contract was an amended JCT Standard Form of Building Contract (Private

Edition with Quantities)(1980 edition) (“Contract”). The date of possession under the Contract was January 26, 1998, and the contractual completion date was January 25, 1999. Liquidated and ascertained damages were payable at the rate of £30,000 per week for the period between the contractual completion date and the achievement of practical completion. The initial architect appointed by the Employer (*i.e.*, the certifying party nominated in the Contract) was a firm called RMJM. This firm also acted as the structural, mechanical, and electrical engineer. However, RMJM was dismissed on December 2, 1998, and replaced by Keppie Architects (“Architect”). Also, the firm of Blyth & Blyth was appointed to replace RMJM as structural, mechanical, and electrical engineers.

The Architect issued a certificate of practical completion on April 27, 1999, certifying that practical completion was achieved on March 29, 1999. In fact, the Employer took partial possession of the works on March 29, 1999, and took possession of the remaining parts on April 13 and 30, 1999. On June 9, 1999, the Architect issued a certificate extending the contractual date for completion from January 25, 1999, to February 22, 1999. On the same date, the Architect issued a certificate of noncompletion certifying that the Contractor failed to complete the works by the extended contractual completion date. Consequently, the Contractor was awarded four weeks’ extension of time (*i.e.*, January 25, 1999, to February 22, 1999), but the Employer was, according to the Architect’s certificates, entitled to deduct liquidated and ascertained damages of £30,000 per week for the period of delay of five weeks between February 22, 1999 (the extended contract date for completion certified by the Architect) and March 29, 1999 (the certified date of practical completion). The Employer then proceeded to deduct the sum of £150,000 for liquidated and ascertained damages for the five weeks of delay.

Disputes subsequently arose between the Employer and the Contractor, which were referred to statutory nonbinding adjudication. The adjudicator held that the Contractor was entitled to a further five weeks’ extension of time (*i.e.*, a total of nine weeks) and directed the Employer to repay the sum of £150,000. The Employer commenced proceedings before the Scottish courts seeking a declaration in relation to its entitlement to withhold the sum of £150,000. The court at

first instance found in favor of the Contractor and declared that the contract completion date should be extended by a further five weeks to March 29, 1999, and ordered that the Employer repay the withheld sum (see *City Inn Limited v Shepherd Construction Limited* 2002 SLT 781). The Employer appealed the first instance decision to the Scottish Outer House, Court of Sessions, which was heard and decided by Lord Drummond Young.

## PARTIES’ RESPECTIVE POSITIONS

The Contractor’s position was that it was entitled to an extension of time of 11 weeks from January 25, 1999, to April 14, 1999, despite practical completion having been certified as being achieved two weeks earlier on March 29, 1999. The Contractor asserted that the 11-week delay for which it was entitled to extensions of time was caused by a number of late instructions by the Architect (“Relevant Events”). Some of these delay events were concurrent with each other.

In addition, the Contractor claimed £27,069 for direct loss and expense (*i.e.*, prolongation costs) incurred as a result of the Architect’s instructions and the resultant alleged 11-week delay.

The Employer argued that the Contractor was not entitled to the extension of time sought on the following bases:

- The Contractor failed to comply with the notice requirements under the Contract. (The Judge upheld the decision at first instance and concluded that the notice provisions relied on by the Employer were not applicable to the Contractor and/or the notice provisions had been waived by the Architect.)
- None of the instructions relied on by the Contractor caused any delay in completion. As a secondary argument, the Employer asserted that to the extent any instruction did cause delay to completion, those delays were concurrent with other delays that were the responsibility of the Contractor. These Contractor-caused delays related to the late completion of the elevator lift and stair balustrades. Consequently, the Employer contended that the Contractor was not entitled to any extensions of time for delays that might have been caused by the Architect’s instructions.

The Employer also sought a declaration that the Contractor was not entitled to the four-week extension granted by the Architect (*i.e.*, from January 25, 1999, to February 22, 1999) and argued that the contract completion date should remain as January 25, 1999. The amount of liquidated damages sought by the Employer was £270,000, *i.e.*, £30,000 per week for the alleged period of delay from January 25, 1999, to the date of practical completion on March 29, 1999, being approximately nine weeks of delay to completion.

## EXTENSION-OF-TIME MECHANISM

The extension-of-time mechanism under the Contract was set out in clause 25. Clause 25.2.1.1 provided as follows:

If and whenever it becomes reasonably apparent that the progress of the Works is being or is likely to be delayed the Contractor shall forthwith give written notice to the Architect of the material circumstances including the cause or causes of the delay and identify in such notice any event which in his opinion is a Relevant Event (compliance with Architect's instructions and late Architect's instructions are Relevant Events under the Contract).

The Architect's power to grant an extension of time is provided for in Clause 25.3.1:

If, in the opinion of the Architect, upon receipt of any notice, particulars and estimate under clause 25.2.1.1 and 25.2.2 ... (1) any of the events which are stated by the Contractor to be the 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 the Completion Date as he then estimates to be **fair and reasonable**. (Emphasis added.)

In addition, Clause 25.3.3 empowered the Architect to grant retrospective extensions of times:

After the Completion Date, if this occurs before the date of Practical Completion, the Architect may, and not later than 12 weeks after the date of Practical Completion, in writing to the Contractor ... 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...

## GENERAL CONSIDERATIONS IN RELATION TO CONTRACTOR'S OBLIGATION TO COMPLETE WORKS, THE PREVENTION PRINCIPLE, AND EFFECT OF EXTENSION OF TIME PROVISIONS

The Judge's analysis of the parties' positions started from first principles underlying the Contractor's completion obligations under the Contract and the interrelationship of those obligations with the extension-of-time mechanism. Quoting from the judgment in *Percy Bilton Ltd v Greater London Council* [1982] 1 WLR 794 at 801:

1. ...The general rule is that the main contractor is bound to complete the work by the date for completion stated in the contract. If he fails to do so, he will be liable for liquidated damages to the employer.
2. That is subject to the exception that the employer is not entitled to liquidated damages if by his acts or omissions he has prevented the main contractor from completing his work by the completion date...
3. These general rules may be amended by the express terms of the contract.
4. In this case, the express terms of clause 23 of the contract [corresponding to the present clause 25] do affect the general rule. For example, where completion is delayed "(a) by force majeure, or (b) by reason of any exceptionally inclement weather" the architect is bound to make a fair and reasonable extension of time for completion of the work. Without that express provision, the main contractor would be left to take the risk of delay caused by force majeure or exceptionally inclement weather under the general rule.

After considering a number of important Commonwealth decisions surrounding extensions of time, the Judge attempted to thread the pieces together with the following valuable overview of the relevant principles and law:

First, the [extension-of-time mechanism] recognizes an allocation of risk: the contractor is bound to complete the works by the completion date except to the extent that delay is caused by events that are not at

the contractor's risk. In general, as can readily be seen from the terms of clause 25.4, these are either events such as inclement weather which are extraneous to both parties or are events such as a variation which originate in a decision of the employer or the architect; the architect is for this purpose the employer's agent. Secondly, the architect's objective is to estimate the period within which the contract works as ultimately defined ought to have been completed, having due regard to the occurrence of non-contractor's risk events. The completion date is extended by that amount. 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 recognized 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 recognized 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, recognize that the critical question is to determine the delay caused by the non-contractor's risk events, and to extend the completion date accordingly.** Fifthly, the completion date as so adjusted is not to be fixed without reference to the original completion date; instead ... it is fixed by extending the contract period by an amount

that corresponds to the delay attributable to the non-contractor's risk events. (Emphasis added.)

## THE MEANING OF CONCURRENT DELAY

Disagreements and disputes involving concurrent delays are exacerbated by difficulties surrounding the meaning of the phrase "concurrent delay" in the context of engineering and construction projects. It is no wonder that extension-of-time claims often end up in a quagmire—apart from the complex factual disputes that invariably arise between the parties, and the jousting between experts over methodology to assess the impact of delay, there is also a divergence as to whether or not delays are concurrent at a conceptual level.

The Judge attempted to deal with the problem of definition by applying practical common sense. The drift away from practical common sense during the recent past appears to be the result of the judgment of Judge Seymour Richard QC in *Royal Brompton Hospital NHS Trust v Hammond* (No. 7) (2001) 76 Con LR 148. When considering the meaning of concurrency, the court in *Royal Brompton* considered the example of concurrent delay provided in the *Malmaison* case (supra):

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.

Judge Seymour in *Royal Brompton* drew a distinction between situations on the one hand where work has been delayed because of contractor-risk event and then a relevant event occurs, and on the other hand cases where both of these events occur more or less simultaneously. The court in the *Royal Brompton* case held that the *Malmaison* case was concerned only with the latter situation, which gave rise to true concurrency for which the contractor would be entitled to an extension of time. However, the court in *Royal Brompton*

concluded that the former situation did not result in a relevant event causing delay to completion of the works, and the contractor is not therefore entitled to an extension of time.

The Judge in *City Inn* did not agree with the distinction drawn by Judge Seymour. Indeed, the distinction is on its face artificial and is detached from the reality of project life. Lord Drummond reasoned as follows:

I have some difficulty with this distinction. It seems to turn upon the question whether the shortage of labour and the relevant event occurred simultaneously; or at least it assumes that the shortage of labour did not significantly predate the relevant event. That, however, seems to me to be an arbitrary criterion. It should not matter whether the shortage of labour developed, for example, two days before or two days after the start of a substantial period of inclement weather; in either case the two matters operate concurrently to delay completion of the works. In my opinion both of these cases should be treated as involving concurrent causes, and they should be dealt with in the way indicated in clause 25.3.1 granting such extension as the architect considers **fair and reasonable**. (Emphasis added.)

To surmise, a contractor's claim for an extension of time in either situation cannot be dismissed out-of-hand simply because the works were also delayed by a contractor-risk event. On the other hand, it does not follow that the effects of the contractor-risk event are ignored. In the words of Dyson J in *Malmaison*: "In my judgment, it is incorrect to say that, as a matter of construction of clause 25, when deciding whether a relevant event is likely to cause or has caused delay, the architect may not consider the impact on progress and completion of other events." Put simply, the architect must take into account all material surrounding circumstances when determining a fair and reasonable extension of time, whether in the case of a stand-alone delay event or concurrent delay events.

## **"BUT FOR" RULE OF CAUSATION NOT APPLICABLE TO ASSESSMENT OF EXTENSIONS OF TIME**

The "but for" test of causation under principles of tort law was dismissed as having any application when determining the

effects of delays and assessing extensions of time. If this was not already clear from case law prior to *City Inn*, then Lord Drummond's judgment has put the issue to rest. Relying on Dyson J in *Malmaison*, his lordship held that:

the application of clause 25, a relevant event may still be taken into account even though it operates concurrently with another matter that is not a relevant event. In other words, the "but for" rule of causation, that an event A will only be a cause of a result B if B would not have occurred but for A, has no application. In the example given by Dyson J .... the delay would have occurred as a result of the shortage of labour by itself, regardless of the bad weather. On the approach to causation found in the general law of contract and delict, it could not be said that the bad weather caused the delay because the delay would have occurred in any event. Under clause 25, however, the architect may take the bad weather into account to the extent that he considers it fair and reasonable to do so. This perhaps emphasizes the general notion underlying clause 25, that it is designed to achieve fairness as between the contractor and the employer, and the architect is given a reasonably wide discretion in order to achieve that result.

## **APPORTIONMENT OF EFFECTS OF CONCURRENT DELAYS: KEY TO ASSESSING A FAIR AND REASONABLE EXTENSION OF TIME**

The Judge concluded that the delay in completion of the hotel was the result of concurrent causes. On the one hand, this included Relevant Events themselves (*i.e.*, Architect's late instructions) that ran concurrently with each other and, on the other hand, concurrency between Relevant Events and contractor-risk events (*i.e.*, late completion of the elevator lift and the stair balustrades).

As a general point, the Architect must use his judgment to determine the extent to which completion has been delayed by a Relevant Event and, in doing so, assess a fair and reasonable extension of time. The Architect therefore has discretion—a discretion that must be exercised reasonably taking into account all relevant surrounding circumstances. This task can be difficult even when it involves a single delay

event. The difficulty increases significantly where there is true concurrency between a Relevant Event(s) and contractor-caused delay(s) “in the sense that both existed simultaneously, regardless of which started first.”

In such circumstances, the Judge held that it may be necessary to apportion responsibility for the delay between the two causes: “Obviously, however, the basis for such apportionment must be fair and reasonable. Precisely what is fair and reasonable is likely to turn on the exact circumstances of the particular case.” The Judge noted also that “[a]pportionment enables the architect to reach a fair assessment of the extent to which completion has been delayed by Relevant Events while at the same time taking into account the effect of other events which involve contractor default. Where the decision of the architect is challenged, the court must of course perform the same exercise.”

In support of the apportionment method, the Judge relied on cases decided by U.S. federal courts, in particular the decision of *Chas. I. Cunningham Co.*, IBCA 60, 57-2 BCA P1541 (1957) and *Sun Shipbuilding & Drydock Co.*, ANBCA 11300, 68-1 BCA (CCH) (1968). Lord Drummond quoted the following from the *Chas. I. Cunningham* case:

Where a contractor finishes late partly because of a cause that is excusable under this provision and partly because of a cause that is not, it is the duty of the contracting officer to make, if at all feasible, a fair apportionment of the extent to which completion of the job was delayed by each of the two causes, and to grant an extension of time commensurate with his determination of the extent to which the failure to finish on time was attributable to the excusable one. Accordingly, if an event that would constitute an excusable cause of delay in fact occurs, and if that event in fact delays the progress of the work as a whole, the contractor is entitled to an extension of time for so much of the ultimate delay in completion as was the result or consequence of that event, notwithstanding that the progress of the work may also have been slowed down or halted by a want of diligence, lack of planning, or some other inexcusable omission on the part of the contract.

## **PRINCIPLES TO BE ADOPTED WHEN UNDERTAKING AN APPORTIONMENT BETWEEN THE EFFECTS OF CONCURRENT CAUSES OF DELAY TO COMPLETION**

The Judge identified the following two important elements when undertaking an apportionment between concurrent causes of delays:

- The degree of culpability involved in each of the causes of delay; and
- The significance of each of the factors in causing the delay.

It was noted by the Judge that in practice the issue of culpability is likely to be the less important of the two elements. In terms of the causative significance of the concurrent events causing delay, there are two sub-elements that must be taken into account. The first is the length of delay caused by each causative event. This is usually a straightforward objective exercise. The second and more subjective sub-element is the significance of each of the causative events for the works as a whole. In the words of Lord Drummond: “Thus an event that only affects a small part of the building may be of lesser importance than an event whose effects run throughout the building or which has a significant effect on other operations. Ultimately, however, the question is one of judgment.”

## **OUTCOME OF APPORTIONMENT EXERCISE BY THE COURT**

The Contractor had claimed a total extension of time of 11 weeks, *i.e.*, from January 25, 1999, to April 14, 1999. However, the Judge considered that it was appropriate in the circumstances for some allowance to be given as part of the apportionment exercise to account for the delays caused by the Contractor in relation to the elevator lift and the stair balustrades and reduced the 11 weeks claimed accordingly. However, Lord Drummond concluded that the part of the total delay to be apportioned to Relevant Events claimed by the Contractor should be substantially greater than that apportioned to the two causes of delay asserted by the Employer. The process undertaken by the Judge to apportion the effects of the concurrent delay is helpfully illustrated by the following extract from the judgment:

In considering the extent to which that period should be reduced, the matters referred to at paragraph [157] [i.e., culpability and causative significance] must be considered. I do not consider culpability to be a major factor; nevertheless, the sheer quantity of late instructions following Keppie's appointment is I think significant; so is the fact that the failure to issue instructions occurred following requests for information which started (during the course of the Works) on 7 October 1998. So far as the causative significance of each of the events is concerned, all caused some delay, although the delay resulting from the gas venting instruction was concurrent with 3½ weeks of the delay resulting from the late instruction relative to the roof steelwork. The two items that had the longest lasting effect were the cooling to the refuse room and the stair balustrades, both of which concluded on about 12 April. In relation to the causative significance of each of the events for the Works as a whole, I must I think take account of the fact that items such as the ensuite fittings, the bedhead lights and the trouser presses affected all of the bedrooms in the hotel. Finally, I must take account of the fact that the number of Relevant Events is substantially greater than the number of items for which the defenders are responsible; moreover some of them, notably the gas venting and roof steelwork instructions, related to important matters that had significant effects on the overall progress of the Works. Taking all these circumstances into account, I am of opinion that the part of the total delay apportioned to Relevant Events should be substantially greater than that apportioned to the two items for which the defenders are responsible. I consider that a fair and reasonable result would be that the defenders are entitled to an extension of time of nine weeks from the original Completion Date. On that basis I conclude that completion has been delayed beyond the Completion Date by Relevant Events for a period of nine weeks, or until 29 March 1999.

Judge Drummond therefore reduced the Contractor's claim for extensions of time from 11 weeks to nine weeks. The practical consequence was that the completion date was extended to March 29, 1999, being the date of Practical Completion. Consequently, the Contractor was not liable to the Employer for liquidated damages. This was the same result arrived at by the statutory adjudication.

## RELEVANCE OF "DOMINANT" CAUSE TEST TO ASSESS CLAIMS FOR EXTENSIONS OF TIME

It is worth noting Lord Drummond's comments and conclusions regarding the dominant cause approach to dealing with delay events. One of the planks of the Employer's case was that the Contractor was not entitled to extensions of time because the alleged delay events relied on by the Contractor were not the dominant cause of delay to completion. Importantly, the Judge accepted that the dominant cause test is an appropriate method to determine the cause of delay to completion of the works in appropriate circumstances, e.g., where there are two delay events and one is quite clearly dominant over the other.

However, in the present case, the Judge did not consider that the dominant cause test was appropriate given the number of delay events in question and the complex manner in which they interacted. That being the case, Lord Drummond concluded that an apportionment based on judgment was necessary to arrive at a fair and reasonable extension of time.

## PROLONGATION COSTS

The Contractor claimed the sum of £27,069.10 said to have been caused by prolongation of the Works. The Employer argued that the Contractor was not automatically entitled to prolongation costs in the event that it succeeded with its extension of time claim. In particular, the Employer asserted if the Contractor incurs prolongation costs caused both by a Relevant Event and a contractor-risk delay acting concurrently, then the Contractor could only recover compensation to the extent that it can prove that the Relevant Event caused the loss and expense.

The Judge concluded that the requirements under JCT clause 26 were satisfied and that the Contractor was entitled to recover loss and expense in the nature of prolongation costs. In short, Lord Drummond was satisfied that the material progress of the Works had been materially affected by the Architect's failure to provide timely instructions.



Lord Drummond agreed with the proposition that prolongation costs do not follow automatically from an extension of time as both are recovered under different provisions of the Contract. However, he concluded that this was a case where the claim for prolongation costs should follow the granting of the extension of time. In dispensing with the Employer's argument regarding concurrency, the Judge relied on the recent decision of *John Doyle Construction Ltd v Laing Management (Scotland) Ltd*, 2004 SC 73, a case that dealt with a contractor's global claim. The *John Doyle* case is authority for the principle that where a loss is caused by concurrent delays, it is possible to apportion the loss between the two causes of delay in appropriate circumstances.

The Judge held that it was appropriate in the present case to apportion the Contractor's prolongation costs between the delays caused by the Employer, through the Architect, and those caused by the Contractor. The Judge applied the same principles of apportionment that he applied to quantifying the Contractor's claim for extensions of time, *i.e.*, "the causative significance of each of the sources of delay and the degree of culpability in respect of each of those sources, must be balanced." Accordingly, the Judge concluded that the Contractor was entitled to nine weeks' prolongations costs.

## CONCLUSION

The decision in the *City Inn* appeal should be welcomed by the engineering and construction industry. It is a helpful reminder of the underlying principles surrounding claims for extensions of time and prolongation costs. Importantly, it provides a practical common-sense approach to dealing with the vexed issue of concurrent delays. This does not necessarily mean an end to disputes over concurrent delays, but the judgment does at least provide guidance that has been missing in UK case law to date.

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