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Exhibit 4 to Mediation Statement

TIME

1.1 tie takes issue with INTC 536 for a number of reasons, which include the following.

1.2 Infraco prosecutes its claim on the basis that a Notified Departure has occurred, which leads it into the territory of Clause 80. That approach is misconceived, and the factual matters relied upon by Infraco properly fall to be addressed, in principle, either entirely, or as to a substantial proportion, as a Compensation Event in terms of Clause 65 (although, for the reasons explained below, tie does not consider that Infraco has properly made out any entitlement for compensation in this respect).

1.3 Infraco asserts that the execution of Utilities Works has prevented it from progressing with the Infraco Works where the Utilities Works have not been completed, and this is the subject matter of INTC 536. It falls squarely within the definition of a Compensation Event:

(a) Compensation Event (d) is "the *execution of any Utilities Works or MUDFA Works*"[1];

(b) MUDFA Works are in turn defined as "*the works carried out by the MUDFA Contractor under its contract with tie.*[2]"; and

[1] Page 244 of Schedule part 1

(c) Utilities Works are defined as "*any works carried out, or to be carried out, by the Utilities or any other public utility company under contract with tie relative to the MUDFA Works.*[3]"

1.4 For the reasons explained at section 6 of the Mediation Statement above, where an occurrence falls within the definition of a Compensation Event, that occurrence *must* be addressed in terms of Clause 65, which will take precedence over the provisions of Clause 80 in the event of a conflict.

1.5 Furthermore, the nature of the events relied upon by Infraco is that they are said to have delayed commencement of parts of the Infraco Works. Infraco was still required to carry out the same work, but at a different time and possibly in a different sequence. It was not required to carry out *additional* work. Accordingly, there has been no change or variation to the scope of the Infraco Works, and Clause 80 is not applicable.

1.6 Accordingly, INTC 536 – as presented by Infraco – is doomed to fail, in that it proceeds on an incompetent contractual basis.

1.7 Should Infraco seek to re-present its claim as one pursuant to Clause 65, then that approach is now largely bound to fail. Clause 65.2 provides that to obtain additional time

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[2] Page 266 of Schedule part 1

and money "*Infraco must, as soon as practicable, and in any event within 20 Business Days after it first became aware that the Compensation Event had caused or is likely to cause delay, adversely affect the performance of Infraco's obligations, or cause the Infraco to incur additional costs*" provide certain notification and information as set out in Clauses 65.2.1, 65.2.2 and 65.2.3. Infraco has not complied with these obligations. That is fatal to its claim: compliance with those obligations is a condition precedent to its entitlement to make recovery, as is borne out by the following:

(a) The wording of Clause 65.2: "*to obtain such extension of time...and/or claim for such costs, the Infraco must...*"; and

(b) The wording of Clause 65.3: "*in the event that the Infraco has complied with its obligations under Clause 65.2.2 then...*" its entitlement will arise; and

(c) The wording of Clause 65.4: "*in the event that information required by Clause 64.2*[4] *is provided after the dates referred to that Clause, then the Infraco will not be entitled to any relief in respect of or during the period for which the information is delayed.*"

1.8 Furthermore, even if Infraco were able to overcome its failure to comply with the conditions precedent, it has not addressed the issues raised by Clause 65.8, which sets out what tie shall and shall not take into account in assessing a claim for extension of time, costs or other relief.

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[3] Page 287 of Schedule part 1

[4] This is clearly an error, and should refer to 65.2 rather than 64.2; nonetheless, both contain equivalent provisions

1.9 To take those provisions in reverse order, Clause 65.8.2 provides that tie shall only "*take into account*" an event or cause of delay to the extent that the Infraco is able to show that it took steps to mitigate the delay and/or costs arising from it. In this clause, the phrase "*take into account*" should be interpreted as meaning "*take into account as giving rise to a claim for extension of time, costs or other relief.*"

1.10 Clause 65.8.1 states that tie shall "*not take into account an event or cause of delay or costs which is caused by any negligence, default, breach of contract or breach of statutory duty of the Infraco or of the Infraco parties*". This means that no award of extension of time or costs is to be made in respect of any period of delay or costs which are the responsibility of Infraco, as opposed to the responsibility of tie: the words "*take into account*" in Clause 65.8.1 should be construed in the same way that they are in Clause 65.8.2.

1.11 Accordingly, issues of causation are key in considering a claim under Clause 65: to the extent that the delay and/or the incurring of cost has been caused by Infraco's own default, then it is not entitled to compensation in terms of Clause 65.

1.12 Even if it is the case that Infraco is entitled to prosecute its claim exclusively in terms of Clause 80 (which is denied), it also requires properly to address issues of causation. That is clearly envisaged by the provisions of Clause 80.19, as well as the words "*impact*" in Clause 80.4.3, and "*as a direct consequence of*" in Clause 80.4.10. Furthermore, Clause 80.4 requires Infraco to act reasonably in providing an opinion in the Estimate in relation to impact on the Programme and any requirement for an extension of time.

1.13 The delay analysis produced by Infraco makes no attempt to consider the actual causes of delay. Its delay analysis focuses solely on the delays to the actual and revised forecast completion dates for the MUDFA Works. It then impacts them into Revision 1 of Infraco's construction programme, which forms part of the Programme (and which is addressed in more detail below), as if they had occurred at the very beginning of the Infraco Contract period (May 2008), despite the base date for Infraco's Estimate being 31 July 2010. Accordingly, the delay analysis produced by Infraco takes no account of other events which may have had a delaying effect, for example:

(a) other pre-requisites to commencement, such as design;

(b) actual progress on the Infraco Works between May 2008 and July 2010;

(c) changes to the Infraco Works, whether introduced by tie or Infraco;

(d) changes to the order and manner in which Infraco has or intends to deliver the Infraco Works; and

(e) other delaying events which have impacted on the Infraco Construction Programme, the SDS Design delivery programme and the other elements that make up the Programme.

1.14 Infraco is not entitled to ignore these issues. Questions of causation require to be resolved by the application of principles of common sense[5]. That involves taking into account the

[5] *City Inn Limited* v *Shepherd Construction Limited* [2010] BLR 473 per Lord Osborne at paragraph 42

actual progress of the work in order to determine whether, as a matter of fact, any particular event had a causative delaying effect. For example, in terms of Clause 80.4.8, the Infraco must include within its Estimate its proposals as to how to mitigate the impact of the proposed tie Change. This requirement pre-supposes both a consideration of the actual state of progress of the works and, in addition, an updated Programme.

1.15 Infraco has failed to comply with its obligations in relation to the Programme. The Programme is defined as "*the programme set out in Schedule Part 15 (Programme) as developed and extended from time to time in accordance with this Agreement which shall include, the Maintenance Programme, the Consents Programme and Design Delivery programme but shall exclude any programme developed in respect of the completion of any Accommodation Works Changes*". Accordingly, it can be seen from this definition that the contractually defined "Programme" (i) consists of a number of parts and (ii) is not static, but rather can be developed and extended as required by the provisions of the Infraco Contract.

1.16 Schedule Part 15 provides that the "Programme" consists, *inter alia*, of the following:

(a) the Infraco Construction Programme;

(b) the Programming Assumptions;

(c) the On Street Construction Works Methodology;

(d) SDS Design Delivery programme V26; and

(e) SDS Consents Programme (derived from item (d)).

1.17 Thus, in considering the impact of any events upon the Programme (as Infraco is required to do by, for example, Clause 65.2.2 or Clause 80.4.3), Infraco is not entitled to restrict itself to the Infraco Construction Programme, but must have regard to all of the constituent parts of the Programme. It has failed to do so.

1.18 Furthermore, Infraco relies on an outdated version of the Infraco Construction Programme, namely Revision 1 dated 14 August 2008. Although that is the only version of that document which has been accepted by tie in terms of Clause 60, Infraco ought to have updated it in compliance with its obligations. Its attempts to do so, in terms of its submission of Revisions 1A, 2 and 3 have all been properly rejected as being inaccurate (with reference to Revision 1A) incompetent and non-compliant with the Section Completion Dates.

1.19 Clause 60.2 requires Infraco to "*update the Programme in accordance with the requirements of Schedule Part 2 (Employer's Requirements).*" Paragraph 12.2 of that Schedule Part 2 (page 231) makes provision with respect to "Programme Management". Amongst other things, this paragraph obliges the Infraco to "*undertake programme management including the implementation, regular updating and management of a fully detailed, comprehensive Programme illustrating how the Infraco proposes to execute the whole of the Infraco Works in compliance with the Project Programme.*" Further, the second last sub-paragraph of paragraph 12.2 (on page 234 of Schedule Part 2) provides that the Infraco "*shall update the Programme every four weeks in line with tie reporting periods to take full account of the Infraco progress in completing the Infraco Works*".

1.20 Clause 60.3 provides that the Infraco must submit to tie for its acceptance any change to the Programme showing the revised order or manner in which the Infraco proposes to carry out the works, and Clause 60.4 entitles tie to accept or reject the Programme as submitted. In terms of Clause 60.6, it is only if a revised programme is accepted by tie that it forms and becomes the Programme.

1.21 Clause 60.7 provides that, if it should appear to tie that the actual progress of the works does not conform with the Programme, tie can require the Infraco to produce a revised programme.

1.22 Accordingly, Clause 60 envisages a continual updating of the Programme to reflect the position on the ground. Infraco has failed to comply with its obligations in this respect, and is in breach. It is not entitled to rely on this breach by making use of a Programme which is significantly out of date.

1.23 A spot check has been carried out of the version of the Infraco construction programme which Infraco has used in support of its claim, focusing on critical and near critical sections of the delay analysis. Numerous errors have been identified, for example the use of incorrect dates, the presence of superseded logic links and errors in calendars.

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SCOTTISH COURT OF SESSION EXTRA DIVISION, INNER HOUSE

22 July 2010

CITY INN LTD
v
SHEPHERD CONSTRUCTION LTD

[2010] CSIH 68

Before Lord OSBORNE, Lord KINGARTH, and Lord CARLOWAY

Concurrent delay — Extension of time — Fair and reasonable extension — How to assess — Apportionment between relevant and other events — Clause 25 of JCT standard form (private with quantities) 1980 edition.

Concurrent delay — Loss and expense — How to assess — Apportionment between relevant and other events — Clause 26 of JCT standard form 1980 edition.

Late instructions — Distinction between instructions causing delay by reason of their content and instructions causing delay by reason of the lateness of their issue.

City Inn, the reclaimers, were the employers under a building contract incorporating the JCT standard form of building contract (private with quantities) 1980 edition. Shepherd Construction, the respondents, were the contractor. The building contract related to the construction of a hotel in Bristol. The facts of the present case are set out at [2008] BLR 269 in the report of the decision of the Lord Ordinary, Lord Drummond Young.

The Lord Ordinary in the Inner House found that Shepherd Construction were entitled to an extension of time to the contractual completion date pursuant to clause 25 of the JCT standard form of building contract (private with quantities) 1980 edition of nine weeks having accepted evidence that Shepherd Construction were delayed in completing the works by relevant events within the meaning of the building contract concurrently with Shepherd's own delays to the works to stair balustrades and lifts. The Inner House held that the extension of time to which Shepherd Construction was entitled should be assessed by apportioning the delay as between the delay resulting from relevant events and the delays for which Shepherd Construction was itself responsible taking account of the relative causative importance and degree of culpability for those delays.

The Inner House also found that Shepherd Construction had incurred loss and expense by reason of delays resulting from both relevant events and from those matters for which Shepherd Construction was responsible. The Inner House held that Shepherd Construction was entitled to loss and expense in respect of those delays; that while the terms of clause 26 were such that a successful application for an extension of time would not necessarily entitle a contractor to prolongation costs, in this case prolongation costs should follow the result of the claim for extension of time, and that in circumstances where the delay was the result of concurrent causes it would be appropriate to apportion the prolongation costs arising from that delay in the same way as responsibility for the delay had been assessed within the context of Shepherd Construction's claim to an extension of time.

The Lord Ordinary having pronounced an interlocutor in the terms of paragraph 168 at [2008] BLR 269 at 284 the reclaimers appealed to the Inner House on the grounds that the Lord Ordinary erred in law on 17 grounds (see paragraph 16 of the judgment) in respect of two main aspects of the case. First, in the Lord Ordinary's interpretation of clauses 25 and 26 of the building contract and his conclusions that Shepherd Construction were entitled to a nine-week extension of time by reason of a process of apportionment as between events causing delay to the completion of the building works some of which were relevant events within the meaning of clause 25 of the building contract and some of which (stair balustrades and lifts) were events for which the contractor was itself responsible (grounds 1–4 of the appeal). The Lord Ordinary's judgment that Shepherd Construction were entitled to prolongation costs under clause 26 of the building contract again by a process of apportionment as between concurrent causes of delay including relevant events and events for which the contractor was responsible (grounds 5 and 6 of the appeal).

City Inn also appealed the decision of the Lord Ordinary on grounds that the Lord Ordinary had erred in his interpretation of the building contract with respect to the meaning and effect of clause 13.8, relating to the requirements for the contractor to give notice within 10 working days of receipt of an instruction of the contractor's proposed adjustments of the contract completion date and contract sum and the Lord Ordinary's decision that the requirements for such notice within the specified time had been waived by or

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on behalf of the employer or the employer was barred from relying upon the terms of that clause (grounds 8–17 of the appeal).

(In view of the length of the judgment and the limited general interest of the discussion of waiver and personal bar we have omitted paragraphs 67–97 of the judgment. A full transcript may be accessed at www.bailii.org/scot/cases/ScotCS/2010/2010CSIH68.html)

————*Held*, by the Inner House, Extra Division (Lord OSBORNE and Lord KINGARTH, Lord CARLOWAY dissenting in part):

(1) The Lord Ordinary had not erred in law in his interpretation of clause 25 of the JCT standard form building contract (private with quantities) 1980 edition or in applying the rules of causation relevant to that clause in deciding that an extension of time may be assessed by means of an apportionment as between the delaying effect of relevant events and of other events when those events are together the cause of delay to completion (Lord Osborne and Lord Kingarth, Lord Carloway dissenting).

Obiter (Lord Osborne) the following principles can be identified from the relevant authorities:

(1) Before any claim for an extension of time can succeed, it must plainly be shown that a relevant event is a cause of delay and that the completion of the works is likely to be delayed thereby or has in fact been delayed thereby.

(2) The decision as to whether the relevant event possesses such causative effect is an issue of fact which is to be resolved, not by the application of philosophical principles of causation, but rather by the application of principles of commonsense.

(3) The decision-maker is at liberty to decide an issue of causation on the basis of any factual evidence acceptable to him. In that connection, while a critical path analysis, if shown to be soundly based, may be of assistance, the absence of such an analysis does not mean that a claim for extension of time must necessarily fail.

(4) If a dominant cause can be identified as the cause of some particular delay in the completion of the works, effect will be given to that by leaving out of account any cause or causes which are not material. Depending on whether or not the dominant cause is a relevant event, the claim for extension of time will or will not succeed.

(5) Where a situation exists in which two causes are operative, one being a relevant event and the other some event for which the contractor is to be taken to be responsible, and neither of which could be described as the dominant cause, the claim for extension of time will not necessarily fail. In such a situation, which could, as a matter of language, be described as one of concurrent causes, in a broad sense, it will be open to the decision-maker, whether the architect, or other tribunal, approaching the issue in a fair and reasonable way, to apportion the delay in the completion of the works occasioned thereby as between the relevant event and the other event.

(Lord Carloway dissenting) Clause 25 requires the architect or tribunal to consider only the effect on completion of the relevant event and not of the effects of events which are not relevant events. The clause does not require the architect or tribunal to address any issue of causation as between concurrent causes of delay where it is satisfied that the delay to completion was caused by a relevant event.

Obiter (Lord Carloway) Clause 25 requiring the architect or tribunal to consider only the effects on completion of relevant events, the architect or tribunal should have regard only for relevant events that have the effect of delaying the originally stated completion date or the completion date as previously extended by reason of other relevant events. Thus, if a relevant event occurs after the original completion date in circumstances where completion has been delayed beyond that completion date by events for which the contractor is responsible then no extension of time is due in respect of the relevant event for the relevant event has not caused a delay to the contractual completion date.

(2) The Lord Ordinary was correct to construe the provisions of clause 25.4.6 of the building contract to the effect that the relevant date by which to assess whether or not the contractor had unreasonably delayed in its request for instructions was the date for completion of the works as at that date extended and not by reference to the original contractual completion date.

(3) The Lord Ordinary did not err in the interpretation of clause 26 of the contract in concluding that the contractor's prolongation costs should be apportioned to reflect the causative significance of and relative culpability of the parties for the various causes of delay that he had concluded were concurrent or in concluding that the contractor was entitled to nine weeks' prolongation costs in this case.

(4) Clause 13.8 had been correctly interpreted by the Lord Ordinary to relate to delays to the completion date resulting from the content of an

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architect's instruction and not simply by reason of the lateness of the instruction itself.

(Lord Carloway dissenting as to the construction but not as to the conclusion) Clause 13.8 relates only to instructions which constitute variations and not other instructions that are late.

The following cases were referred to in the judgment:

Amec Civil Engineering Ltd v Secretary of State for Transport [2005] EWCA Civ 291, [2005] 1 WLR 2339;

Balfour Beatty Building Ltd v Chestermount Properties Ltd (1993) 32 Con LR 139, (1993) 62 BLR 1;

Blinderman Construction Co Inc v United States [1982] USCAFED 64; 695 F 2d 552;

Charter Reinsurance Co Ltd v Fagan [1997] AC 313;

Chas I Cunningham Co 1957 WL 139 (IBCA) 60;

City Inn v Shepherd Construction Ltd 2002 SLT 781;

County Ltd and another v Girozentrale Securities [1996] 3 All ER 834;

Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1990) 70 ConLR 32;

Henry Boot Construction Ltd v Central Lancashire New Town Development Corp (1980) 15 BLR 1;

Heskell v Continental Express Ltd and another [1950] 1 All ER 1033;

Holladay v East Kent Hospitals NHS Trust [2003] EWCA Civ 1696;

John Doyle Construction Ltd v Laing Management (Scotland) Ltd 2004 SC 713;

Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd [1918] AC 350;

Monarch Steamship Co Ltd v Karlshamns Oljefabriker (AB) [1949] AC 196;

Neodox Ltd v Borough of Swinton and Pendlebury (1958) 5 BLR 38;

Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1970) 1 BLR 111;

Percy Bilton Ltd v Greater London Council [1982] 1 WLR 794;

RP Wallace Inc v United States (2004) 63 Fed Cl 402;

Robinson, Administrator of Robinson v United States (1922) 261 US 486;

Royal Brompton Hospital NHS Trust v Hammond (No 7) (2001) 76 ConLR 148;

SMK Cabinets v Hili Modern Electrics Pty Ltd [1984] VR 391;

Sun Shipbuilding & Drydock Company ASBCA 11300, 68-1 BCA (CCH) P 7054;

Wells v Army & Navy Co-operative Society (1902) 86 LT 764.

The Dean of Faculty QC and Higgins, instructed by McGrigors LLP, appeared for the reclaimer; McNeill QC and Borland, instructed by Pinsent Masons, appeared for the respondent.

COMMENTARY

The decision by the Inner House, by a majority, has confirmed the conclusions and, in very large measure, the reasoning of the Lord Ordinary in the Outer House in relation to the interpretation of clauses 25 and 26 of the JCT standard form of building contract (private with quantities) 1980 edition as to the appropriate way for an architect to assess what extension of time (and loss and expense pursuant to clause 26) should be granted in cases where a contractor's works are delayed by concurrent events when one or more of those events are relevant events within the meaning of the contract and others are the responsibility of the contractor.

As we commented in our commentary to the decision of the Inner House ([2008] BLR 269) while the approach to the interpretation of the provisions of clause 25, and in particular the words requiring the architect to consider what would be "fair and reasonable" in the circumstances, intellectually had much to commend it, there are nonetheless difficulties in an approach that required an architect to apportion the amount of time granted by way of extension to the contract completion date to reflect his assessment of the relative culpabilities of the parties for the delays. These practical difficulties have received no further elucidation in the majority decision of Lord Osborne and Lord Kingarth in the Inner House.

Lord Osborne's judgment includes a wide ranging review of Scots, English and American authorities relating to the interpretations that have been adopted to clauses in contracts providing for extensions of time to agreed dates for contract completion and in respect of causation more generally. Interestingly Lord Osborne concluded that the two English authorities often cited as providing important guidance upon the question of causation in contract where two events can be said to have had

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causative relevance to an outcome — *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* and *Heskell v Continental Express Ltd* — were not relevant to the issues as the court saw them.

Lord Osborne's judgment (paragraph 42) sets out a series of principles which lead to the court's conclusion that it is appropriate for an architect to undertake an exercise in apportioning the amount of time granted by way of an extension of time when there are concurrent delays operating to cause the overall delay. These have been set out in the headnote above but include, obviously, the need to show that as a matter of fact delay has been caused or is likely to be caused by a relevant event. Without that foundation no entitlement to a contractual extension of time can arise. While the court recognised that if one of the potential causes of delay could be identified to be dominant (the test in *Heskell v Continental Express Ltd*) then it should be regarded as the cause to the exclusion of other potential causes, if no cause could be identified as the dominant cause a claim for an extension of time should not fail. To this point in the reasoning there is little to distinguish between the approach that would be taken in England (or it appears America — *RP Wallace Inc v United States* — cited in paragraph 40 of Lord Osborne's judgment), we suggest. However, it is the court's final proposition: that where no one cause can be said to be dominant upon a common sense factual assessment, "it will be open to the decision-maker, whether the architect, or other tribunal, in approaching the issue in a fair and reasonable way, to apportion the delay in the completion of the works occasioned thereby as between the relevant event and the other event" (paragraph 42) that may still form the key divergence between current Scots law and the law in England and Wales. It is not clear from which of the authorities referred to in the judgment of Lord Osborne the court considered that the proposition could clearly be drawn. As in the decision of the Lord Ordinary in the Outer House Lord Drummond Young's own previous decision in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* (that in appropriate circumstances an apportionment could be made to assess loss and expense claimed under clause 26 of the JCT standard form of building contract (private with quantities) 1980 edition where a global claim to loss and expense had been made) was clearly influential.

In the English courts there has not yet been clear acceptance of the approach in *John Doyle v Laing* after full argument of the point. In *London Underground Ltd v Citylink Telecommunications Ltd* ([2007] BLR 391) Ramsey J considered a challenge to an arbitrator's award relating to the contractor's application for an extension of time. The parties agreed before the judge that the approach in *John Doyle v Laing* was appropriate for the arbitrator to adopt when considering Citylink's claim to an extension of time. The learned judge accepted that agreement and proceeded to decide the arbitration appeal on that basis. The learned judge did not therefore decide that the reasoning in *John Doyle v Laing* is necessarily the correct approach to be taken in England to the question of assessments of extensions of time. Nonetheless the learned judge's acceptance of that position may indicate that the approach may yet gain acceptance in the English courts.

In our view the approach adopted by the Inner House still has the potential to give rise to the potential practical problems that we identified in our commentary to the decision of the Outer House — that any assessment of the relative culpability and significance of delaying events may lead to no better answer than an apportionment on a 50:50 basis, which arguably may lead to a laxity in the approach of decision-makers to difficult factual questions of causation. It is to be hoped that when the issue comes to the English courts for full consideration the opportunity will be taken to address these practical problems.

One method for avoiding the intellectual complexities of assessing relative casual potency of delaying events within the context of contract terms providing for extension of time for named events is that set out in the dissenting decision of Lord Carloway. Lord Carloway's reasoning was that the only events that are relevant for the purpose of deciding whether to grant an extension of time are those agreed by the parties to be relevant events as nominated in the contract; if a relevant event causes a delay then the fact that another (non-relevant) event also causes the delay is irrelevant — the contractor is entitled to an extension of time to reflect the period of delay caused by the relevant event. In this respect Lord Carloway's reasoning is reminiscent and supportive of the position from which Dyson J started (again as a result of the agreed position between the parties rather than upon his own determination after full argument) in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*. The reasoning of Lord Carloway is that the reference to a "fair and reasonable" estimate of the delay caused by the relevant event is not an invitation to consider the causative potency of non-relevant events; the common law principles of causation in relation to cases of competing causes are not required when the contract provides that an extension of time may only be granted when delay to completion is caused by a relevant event. That is, the "fair and reasonable" estimate is an exercise in determining the amount of delay caused and is not relevant to the question whether the

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relevant event caused the delay in the first place. In this respect Lord Carloway's interpretation, while strict, may be said to provide a more certain means of assessing a contractor's entitlement to an extension of time. The problem that arises with a strict reading of the clause is that identified by Dyson J in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*: that reading requires one to disregard surrounding circumstances which may have an important impact in fact on the actual delay incurred. The result may be to require the decision-maker to jump through intellectual hoops, for the question whether a delay has been incurred by reason of a relevant event or by another event is intimately linked with the question "how much delay", both being aspects of the same temporal assessment. It is not immediately obvious how a decision-maker should disregard other events in deciding whether a relevant event caused a delay while taking account of those events in deciding how long a delay.

Friday, 25 June 2010

JUDGMENT

Lord OSBORNE:

Background circumstances

1. The reclaimers and the respondents are respectively the employers and the contractors under a building contract, dated 15 October and 11 November 1998 for the construction of an 168-bed hotel at Temple Way, Bristol. The contract incorporated the conditions of the standard form of building contract (private with quantities) 1980 edition, together with a substantial number of additional provisions, including an abstract of conditions and a schedule of amendments, prepared for the purposes of the contract. The architects originally appointed under the contract were RMJM Scotland Ltd. The date of possession was specified in the abstract of conditions as 26 January 1998. The date of completion, also specified there, was to be 25 January 1999. In terms of clause 24 of the conditions of contract and the abstract of conditions, liquidate and ascertained damages were to be payable at the rate of £30,000 per week for the period between the contractual completion date and the date of practical completion.

2. On 2 December 1998, RMJM Scotland Ltd, "RMJM", were dismissed as architects. At that time Messrs Keppie Architects were appointed as architects under the contract. At the same time, Messrs Blyth and Blyth were appointed as structural engineers and mechanical and electrical engineers. On 27 April 1999 Keppie Architects issued a certificate of practical completion certifying that the practical completion of the works had been achieved on 29 March 1999, although, in reality, as at that date, certain work still required to be done. On 9 June 1999, the architects issued a certificate revising the contractual completion date to 22 February 1999. On the same date they issued a certificate of non-completion, certifying that the respondents had failed to complete the works by the completion date. The result of those certificates was that the respondents were awarded a four-week extension of time, but, in terms of clause 24 of the conditions of contract, the reclaimers were entitled to deduct liquidate and ascertained damages for the five-week period from 22 February 1999, the revised completion date, to 29 March 1999, the date of practical completion, at the weekly rate of £30,000. On that basis, the reclaimers deducted £150,000 from the monies due to the respondents.

3. Thereafter, certain disputes that had arisen between the parties were referred to adjudication. The adjudicator, Mr John D Spencely, determined that the respondents were entitled to a further five-week extension of time and directed the reclaimers to repay to them the sum of £150,000 previously referred to. That determination was binding upon the parties only until the disputed matters were finally determined by legal proceedings; the matters raised before the adjudicator and other matters subsequently became the subject of dispute in the present proceedings.

4. In 2000, the reclaimers raised the present action against the respondents, in which they sought the several remedies set forth in the 10 conclusions in the action. Thereafter, the respondents lodged a counterclaim against the reclaimers, in which they sought a number of remedies set forth in the five conclusions in the counterclaim.

5. In outline, the reclaimers contended that the respondents were not entitled to any extension of time beyond the contractual completion date of 25 January 1999 and that they were therefore not entitled to the four-week extension of time granted to them by the architects. This contention was advanced on two distinct bases: first, they relied on the terms of clause 13.8 of the conditions of contract, which was one of the special amendments added to the conditions by the parties. That clause, in summary, provided that, when an architect's instruction was liable to delay the completion date, the contractor was not to execute the instruction without following certain defined procedures. If the contractor failed to do so, he was not to be entitled to any extension of time. The reclaimers' position was that the respondents did not follow the procedures specified in clause 13.8 and accordingly, were

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not entitled to any extension of time. Secondly, the reclaimers contended that, as a matter of fact, none of the instructions issued by the architects caused any delay in completion. As a secondary argument, they contended that, if any delays had been caused by the architects' instructions, those delays had been concurrent with delays arising from matters that were the responsibility of the respondents. As a result, it was contended that the reclaimers were not entitled to any extension of time.

6. By contrast, the respondents contended that they were entitled to an extension of time of 11 weeks in total, with the result that the contractual completion date should be fixed at 14 April 1999. That period of 11 weeks was broken down in the following way. First, it was said that a delay of three-and-a-half weeks was caused by the late issue of an architect's instruction varying the form of the gas membrane to be incorporated into the sub-structure of the hotel. Secondly, it was said that a delay of five weeks beyond the contractual completion date had been caused by the late issue of an architect's instruction varying the roof cladding of the hotel from the built-up system on which the contract had been based to an alternative system, known as the Stramit Speedeck system; three-and-a-half weeks of that period was said to have been concurrent with the foregoing three-and-a-half-week delay. Thirdly, it was said that a six-week delay had been caused, following the dismissal of the original design team, RMJM, by the reclaimers in November 1998, by the late issue of a significant number of instructions for variations and additional work and late confirmation of details of the work. In relation to clause 13.8 of the conditions of contract, the respondents contended that it had application only to instructions that were liable to cause delay because of their content; it had no application to instructions that were liable to cause delays simply because they were issued too late for the contractors' programme. In the present case, it was said that the delays were, with one exception, caused by the lateness of the architects' instructions, not by their content. In addition, the respondents contended that, in the circumstances of the contract, the reclaimers, in part through the actings of the contract architects, had waived compliance with clause 13.8, or alternatively that the reclaimers were personally barred from relying on that clause.

7. The reclaimers disputed the respondents' construction of clause 13.8; they submitted that the distinction between the lateness and the content of instructions was not well founded. They further contended that no waiver or personal bar occurred in the circumstances of the case. In addition, they contended that the system of roof cladding specified in the contract was not the built-up system claimed by the respondents, but was rather the Stramit Speedeck system. The result was that the architects' instruction to use the Stramit Speedeck system was not a variation and it did not give rise to a claim for an extension of time.

8. It should be explained that, after a period of adjustment of the pleadings in the action, a debate took place before the Lord Ordinary (Lord Macfadyen), whose decision is reported at 2002 SLT 781. The debate ranged over a number of issues arising out the pleadings. In particular, the Lord Ordinary considered the construction of clause 13.8 of the conditions of contract. He concluded that the clause applied to late instructions which, because of their content, gave rise to a need to adjust the contract sum, or to grant an extension of time, but that it did not apply to late instructions which, merely because of their lateness, gave rise to a need to adjust the contract sum or grant an extension of time. A reclaiming motion was marked against that decision but was subsequently refused. The decision in the reclaiming motion is reported at 2003 SLT 885. The reclaiming motion did not cover the question of whether clause 13.8 extended to late instructions which, because of their lateness, gave rise to a need for an adjustment of the contract sum or an extension of time.

9. Following the determination of that reclaiming motion, a proof was held on a number of dates between March 2004 and February 2006, running over 29 days in all. On 30 November 2007, the Lord Ordinary pronounced an interlocutor in the following terms:

> "The Lord Ordinary, having considered the cause, grants the defenders' motion to amend their defences and allows them to add new fourth and fifth pleas-in-law, to deal with waiver and personal bar respectively; sustains the defenders' second, third and fourth pleas-in-law in the principal action, the fourth being restricted to the issue of the gas venting instruction; assoilzies the defenders from the conclusions of the principal action; sustains the defenders' first plea-in-law in the counterclaim; in respect of the first conclusion of the counterclaim, finds and declares that the defenders are entitled to an extension of time of nine weeks for the completion of the works under the contract between the parties, with the completion date thereunder accordingly being 29 March 1999; sustains the defenders' second and third pleas-in-law in the counterclaim; reduces the certificate of notification of revision to the completion date and certificate of non-completion issued by Keppie Architects on 9 June 1999 and decerns, all in terms of the second and third conclusions of the counterclaim; sustains the pursuers' second and sixth pleas-in-law in the counterclaim and assoilzies them from the fourth

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conclusion of the counterclaim; continues the cause in respect of all questions of expenses".

Against that interlocutor, the reclaimers have appealed to this court.

10. Between paragraphs 24 and 40 of his Opinion, the Lord Ordinary considered in detail the factual issues that he saw as arising in the case and gives his account of the evidence led before him. The respondents, who had been ordained to lead at the proof, led evidence from Mr Alan Whitaker, their own programming expert and evidence from two witnesses of fact, Mr Kevin Cornish, who was the respondents' senior site manager for most of the duration of the contract, and Mr David Dibben, who, at the time of the contract, was the respondents' regional manager for South West England and South Wales. The reclaimers relied solely on the evidence of their programming expert, a Mr Nigel Lowe. They did not lead any witnesses of fact. The Lord Ordinary found both Mr Cornish and Mr Dibben to be credible and generally reliable witnesses. The Lord Ordinary gave his assessment of the evidence of Mr Alan Whitaker between paragraphs 24 and 32 of his Opinion. His assessment of the evidence of Mr Nigel Lowe is to be found in paragraphs 33 to 39 of his Opinion. In paragraph 40, the Lord Ordinary expressed his overall conclusion concerning the evidence of the two expert witnesses. There he stated:

> "For the foregoing reasons I generally prefer the approach taken by Mr Whitaker. His views, as contained in his second report (No 7/8 of process) appeared to me to be based on the factual evidence. Moreover, his method of proceeding appeared to be based on sound practical experience and on common sense; I also found the logical connections that he drew in discussing programming to be entirely intelligible. So far as Mr Lowe is concerned, I do not think that it is possible to base any reliable conclusions upon his formal critical path analysis, for the reasons discussed above. Other parts of his evidence were of assistance, however, particularly in relation to concurrent causes of delay; I generally accept his evidence on the delaying effect of the lifts and the stair balustrading. . . . "

During the course of the hearing before us, no attempt was made by the reclaimers to disturb that evaluation of evidence by the Lord Ordinary.

The relevant contractual provisions

11. As I have already observed, the contract under consideration incorporated the conditions of the standard form of building contract (private with quantities) 1980 edition, subject to a substantial number of additional provisions and amendments.

12. It is appropriate to note the terms of certain of the standard form conditions. Clause 4 is concerned with architects instructions. Clause 4.1.1 provides:

> "The contractor shall forthwith comply with all instructions issued to him by the Architect in regard to any matter in respect of which the Architect is expressly empowered by the conditions to issue instructions; save that where such instruction is one requiring a Variation within the meaning of clause 13.1.2 the contractor need not comply to the extent that he makes reasonable objection in writing to the architect to such compliance".

It is also appropriate to notice the definition of the term "Variation" in use for the purposes of the contract. Clause 13.1 provides as follows:

> "13.1 The term 'Variation' as used in the conditions means:
>
> 13.1.1 the alteration or modification of the design, quality or quantity of the Works including
>
> 1.1 the addition, omission or substitution of any work,
>
> 1.1.2 the alteration of the kind or standard of any of the materials or goods to be used in the Works. . . .
>
> 13.2 The architect may, subject to the contractor's right of reasonable objection set out in clause 4.1.1, issue instructions requiring a Variation and he may sanction in writing any Variation made by the contractor otherwise than pursuant to an instruction of the architect. No Variation required by the architect or subsequently sanctioned by him shall vitiate this contract.
>
> 13.3 The architect shall issue instructions in regard to:
>
> 3.1 the expenditure of provisional sums included in the Contract Bills. . . . "

13. It is also necessary to notice the amendment made to clause 13 of the standard form conditions effected by the schedule of amendments adopted as part of the contract between the parties. In particular, an additional clause 13.8 "contractor's assessment of and agreement to variations" was inserted in the following terms:

> "13.8.1 Where, in the opinion of the contractor, any instruction, or other item which, in the opinion of the contractor, constitutes an instruction issued by the architect, will require an adjustment to the contract sum and/or delay the completion date, the contractor shall not execute such instruction (subject to clause 13.8.4) unless he shall have first submitted to the architect, in writing, within 10 working days (or within such other period as may be agreed between the contractor and the architect) of receipt of the

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instruction, details of: (here there follow references to initial estimates of the adjustment to the contract sum, of the additional resources required, initial estimate of the length of any extension of time to which the contractor considers he may be entitled and the new completion date, the initial estimate of the amount of any direct loss and expense to which he may be entitled and such other information as the architect may require).

13.8.2 The contractor and the architect shall then, within five working days of receipt by the architect of the contractor's estimates, agree the contractor's estimates. Following such agreement, the contractor shall immediately thereafter comply with the instruction and the Architect shall grant an extension of time under clause 25.3 of the agreed length (if any) and the agreed adjustments (if any) and the agreed adjustments (if any) in relation to clauses 13.8.1.1 and 13.8.1.4 shall be made to the contract sum.

13.8.3 If agreement cannot be reached within five working days of receipt by the architect of the contractor's estimate on all or any of the matters set out therein; then;

1. the architect may nevertheless instruct the contractor to comply with the instruction; in which case the provisions of clauses 13.5, 25 and 26 shall apply; or

2. the architect may instruct the contractor not to comply with the instruction, in which case the contractor shall be reimbursed all reasonable costs associated with the abortive instructive (*sic*).

13.8.4 The architect may, by notice to the contractor before or after the issue of any instruction, dispense with the contractor's obligation under clause 13.8.1 in which case the contractor shall immediately comply with the instruction and the provisions of clauses 13.5, 25 and 26 shall apply.

13.8.5 If the contractor fails to comply with any one or more of the provisions of clause 13.8.1, where the architect has not dispensed with such compliance under clause 13.8.4, the contractor shall not be entitled to any extension of time under clause 25.3".

As already recorded, the standard form of building contract applicable to the contract in this case, in clause 24.1 states that, if the contractor fails to complete the works by the completion date, then the architect shall issue a certificate to that effect; clause 24.2.1 provides for the payment of liquidated and ascertained damages in the event that the contractor fails to complete the works by the completion date. These are payable for the period between the completion date and the date of practical completion. In this instance, the relevant amount was fixed at £30,000 per week. However, that is subject to the power of the architect to grant an extension of time under clause 25.

14. Clause 25.2.1.1 provides 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".

Clause 25.3.1 then provides:

"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

1.1 any of the events which are stated by the contractor to be the cause of the delay is a relevant event, and

1.2 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. The architect shall, in fixing such new completion date, state:

1.3 which of the relevant events he has taken into account and

1.4 the extent, if any, to which he has had regard to any instruction under clause 13.2 requiring as a Variation the omission of any work issued since the fixing of the previous completion date. . . . "

Clause 25.3.3. of the Standard Form conditions goes on to provide:

"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 either

3.1 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 . . . ".

"Relevant events" are defined in clause 25.4 of the standard form conditions. It provides, so far as material, as follows:

"25.4 The following are the relevant events referred to in clause 25:

. . .

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25.4.5 compliance with the architect's instructions

5.1 under clauses 2.3, 13.2, 13.3 (except compliance with an architect's instructions for the expenditure of a provisional sum for defined work), 23.2, 34, 35 or 36;

...

25.4.6 the contractor not having received in due time necessary instructions (including those for or in regard to the expenditure of provisional sums), drawings, details or levels from the architect for which he specifically applied in writing provided that such application was made on a date which having regard to the completion date was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive the same;"

15. Clause 26 makes provision for loss and expense caused to the contractor by matters materially affecting regular progress of the works. Clause 26.1 is in the following terms:

"26.1 If the contractor makes written application to the architect stating that he has incurred or is likely to incur direct loss and/or expense in the execution of this contract for which he would not be reimbursed by a payment under any other provision in this contract ... because the regular progress of the works or of any part thereof has been or is likely to be materially affected by any one or more of the matters referred to in clause 26.2; and if and as soon as the architect is of the opinion ... that the regular progress of the works or of any part thereof has been or is likely to be so materially affected as set out in the application of the contractor, then the architect from time to time thereafter shall ascertain, ... the amount of such loss and/or expense which has been or is being incurred by the contractor; provided always that:

26.1.1 the contractor's application shall be made as soon as it has become, or should reasonably have become, apparent to him that the regular progress of the works or of any part thereof has been or was likely to be affected as aforesaid and

26.1.2 the contractor shall in support of his application submit to the architect upon request such information as should reasonably enable the Architect to form an opinion as aforesaid, and

26.1.3 the contractor shall submit to the architect ... upon request such details of such loss and/or expenses as are reasonably necessary for such ascertainment as aforesaid".

Clause 26.2 of the standard form conditions provides as follows:

"26.2 The following are the matters referred to in clause 26.1:

26.2.1 the contractor not having received in due time necessary instructions (including those for or in regard to the expenditure of provisional sums), drawings, details or levels from the architect for which he specifically applied in writing provided that such application was made on a date which having regard to the completion date was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive the same; ...

26.2.7 Architect's instructions issued

under clause 13.2 requiring a Variation or

under clause 13.3. in regard to the expenditure of provisional sums (other than instructions to which clause 13.4.2 refers or an instruction for the expenditure of a provisional sum for defined work);"

Clause 26 goes on to provide:

"26.5 Any amount from time to time ascertained under clause 26 shall be added to the contract sum.

26.6 The provisions of clause 26 are without prejudice to any other rights and remedies which the contractor may possess".

The grounds of appeal for the pursuers and reclaimers

16. The reclaimers have tabled a number of grounds of appeal, in which they contend that the Lord Ordinary erred in law in holding that the defenders are entitled to (i) an award of extension of time of nine weeks, with the completion date for the works being 29 March 1999; and (ii) an award of loss and expense for the same period. In particular, it is said that the Lord Ordinary erred in law:

"1. in failing to properly interpret clause 25 of the contract between the parties ('the contract'), and in failing to apply the proper rules of causation in contract addressing the application of clause 25 of the contract (paragraphs 13, 15 and 167);

2. in failing to properly interpret clause 25 of the contract and, in particular, by applying his conclusion and approach as to the proper construction of 'relevant event' in terms of clause 25.4.6 (under reference to the completion date) to the separate and different issue of what effect any such relevant event has on 'the progress of the works' in terms of clause 25.2.1.1 (eg paragraph 96 '... in calculating the delay that was caused by any particular late instruction, the starting

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point had to be the original completion date. The reason . . . is that that was the date by which the defenders were contractually obliged to complete the works . . . ');

3. in the approach taken by him to assessing concurrent delaying events for the purposes of clause 25 of the contract, as regards (i) how a period of concurrent delay is to be defined, (ii) how any period of concurrent delay is to be assessed and (iii) how to treat periods of concurrent delay in the calculation of extensions of time (paragraphs 15–20 and 157–161). In particular, the Lord Ordinary erred in treating delays as concurrent, not on the basis that the actual consequences resulting from the relevant events overlapped during the performance of the works, but rather on the basis that the respective estimated extended dates for completion arising from the relevant events, overlapped;

4. in respect that his errors in (a) construing clause 25 and (b) his approach to matters of causation and concurrency, led him to find as a fact that the contractor delays relative to (i) the lifts and (ii) the stair balustrading (which works were not completed until 24 March and 12 April 1999 respectively), were not the dominant causes of delay to the progress of the works following the appointment of Keppie Architects in December 1999 (paragraphs 157 and 161). This is a finding that no judge acting reasonably could have made on the evidence.

5. in failing to provide any reasoning for his finding that the defenders were entitled to an award of nine weeks' loss and expense under clause 26 of the contract (paragraphs 166 and 167);

6. in failing to properly interpret clause 26 of the contract, and in failing to apply the proper rules of causation in contract in addressing the application of clause 26 of the Contract (paragraphs 166 and 167);

7. in failing to assess correctly the impact of periods of concurrent delay in the calculation of loss and expense (paragraphs 166 and 167);

8. in failing to properly construe clause 13.8 of the contract as being applicable to all instructions (paragraphs 140–144);

9. in construing clause 13.8 of the contract so that its application is limited to delay caused by the content of an instruction, but not delay caused by the timing of that instruction (paragraphs 140–144);

10. in characterising clause 13.8 as bestowing on the pursuers an immunity right capable of being waived (paragraph 145);

11. in holding that (i) there was a relevant legal distinction to be made between what he characterises as 'procedural' provisions of the contract and other provisions of the contract; (ii) the architect, who it was acknowledged had no general power to waive compliance by the defenders with the terms of the contract, had the implied power to waive 'procedural' provisions of the contract and (iii) clause 13.8 was such a 'procedural' provision of the contract (paragraphs 148 and 149);

12. in holding that a power of waiver was necessarily to be implied in the presence of an express right of dispensation (paragraph 150);

13. in holding that the architect is to be deemed to know all the provisions of the contract (paragraph 153);

14. in holding that the actings of the pursuers' representatives at the site meeting of 8 April 1998 were sufficient to amount to waiver of the need to comply with clause 13.8 (paragraph 151);

15. in finding as a fact that the defenders had acted in reliance on the purported actings of the pursuers, both at the meeting of 8 April 1998 and thereafter (paragraphs 152 and 156). This is a finding that no judge acting reasonably could have made on the evidence;

16. (i) in holding that a similar analysis to that applied by him to the issue of waiver of the requirement to comply with clause 13.8 in respect of the gas venting instruction could be applied to all other elements of the defenders' claim; and (ii) in failing to provide any reasoning for so holding (paragraph 156);

17. in finding as a fact that the defenders had acted to their prejudice in reliance on the actings of the pursuers such as to amount to a case of personal bar (paragraph 156). This is a finding that no judge acting reasonably could have made on the evidence".

The form of this opinion

17. At the outset of the thirteen-day hearing before us, we were invited to deal specifically with the issues raised by the reclaimers' grounds of appeal, indicating our view upon them, but not to pronounce an executive interlocutor giving effect to our conclusions. The practical justification for that course was said to be the complexity of the remedies sought in the conclusions of the summons and in the counterclaim. We were invited thereafter to put the case out in the By Order Roll following the issue of our Opinion, so that the form of the necessary interlocutor to be pronounced in conformity without our opinion could be discussed and settled. I was attracted by these suggestions and shall follow them. Accordingly, my conclusions in relation

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to the several grounds of appeal will be expressed specifically in relation to them.

18. In normal circumstances, this court could be expected to furnish in its Opinions a summary of the arguments deployed before it. However, in view of the duration of the hearing and the fact that very substantial written submissions and "skeleton" arguments have been lodged and exchanged by the parties, extending, in the case of the reclaimers, to 162 pages and, in the case of the respondents, to 74 pages, I have concluded that it would be quite impracticable to follow the normal course. The result of doing so would be an Opinion of quite inordinate length. In the circumstances I consider that there is no need to follow that course. Instead, in dealing with the grounds of appeal on which attention has been focused, I shall indicate only in the briefest way, where that it is necessary, the nature of the dispute between the parties.

The decision — preliminary observations

19. It will be seen that the grounds of appeal fall into two categories. First, grounds 1–7 are concerned with the operation of clauses 25 and 26 of the standard form conditions, as applied by the Lord Ordinary, in reaching his decision to award an extension of time of nine weeks with proportionate prolongation costs. Second, Grounds of Appeal 8–17 are concerned with issues relating to clause 13.8 of the Standard Form conditions, incorporated by the schedule of amendments to the JCT standard form. By way of elaboration, it will be seen that grounds 8–11 are concerned directly with the interpretation of clause 13.8, while grounds 12–16 are concerned with the issue of waiver, raised by the respondents in response to the reclaimers' reliance upon the provisions of that clause. Ground 17 is concerned with the matter of personal bar arising from paragraph 156 of the Lord Ordinary's Opinion. It is appropriate to record at this stage that, as regards that latter ground of appeal, it was made clear by counsel for the respondents that, there being no cross-appeal against the Lord Ordinary's rejection of the respondents' personal bar case, there was no live issue before the court relating to it. I proceed then to deal with the individual grounds of appeal.

Ground of Appeal 1

20. In this ground of appeal general criticism is made of the Lord Ordinary's approach to the interpretation of clause 25 of the Standard Form conditions and of his application of what are referred to as the proper rules of causation in contract in relation to the application of that clause to the circumstances of this case. It is to be noted that the Lord Ordinary turns his attention to these and other matters generally between paragraphs 10 and 22 of his Opinion. Having reached certain conclusions in relation to them there, in paragraphs 157–161, he applies his conclusions as regards the proper approach to be taken to the particular circumstances of this case. In evaluating ground of appeal 1, it appears to us to be necessary to consider particularly that earlier part of the Lord Ordinary's Opinion, with a view to ascertaining whether or not he has misdirected himself in law in the approach which he has formulated in relation to the interpretation of clause 25 of the Standard Form conditions. That exercise necessarily involves the need to consider such of the authorities cited to us as might properly be thought to bear upon the interpretation of clause 25.

21. Looking at these chronologically, I deal first with *Wells v Army & Navy Co-operative Society* (1902) 86 LT 764; (1902) 2 HBC 4th Edition 346. In that case, under a building contract, in the execution of which there had been substantial delay, and which involved a provision for liquidate damages, certain matters causing delay and other causes beyond the contractor's control were to be submitted to the board of directors of the owners of the building who were to "adjudicate thereon and make due allowance therefore if necessary, and their decision shall be final". The Court of Appeal rejected a proposition which they considered could be summarised thus:

> "Never mind how much delay there may be caused by the conduct of the building owner, the builder will not be relieved from penalties if he too has been guilty of delay in the execution of the works".

Because that case was decided under contractual conditions which are completely different from those involved in the present case, I consider that it is of limited value. However, it is of interest to note that the court was prepared to recognise the delay consequent upon the conduct of the building owner as a basis for the avoidance of an obligation to pay liquidate damages, despite the fact that the builder had been guilty of delay in the execution of the works, which delay might be seen as concurrent, in a sense, with the other.

22. *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 was a case involving issues of marine insurance. The ship concerned was insured against the perils of the sea by a policy containing a warranty against all consequences of hostilities. While on a voyage from South America to Le Havre, she was torpedoed by a German submarine 25 miles from that port. She began to settle down by the head, but with the aid of tugs reach Le Havre on the evening of the same day, when she was taken alongside a quay in the

outer harbour. A gale sprang up, causing her to bump against a quay whereupon the harbour authorities, fearing that she would sink and block the quay, ordered her to a berth inside the outer breakwater, where she was moored. She remained there for two days, taking the ground at each ebb tide, but floating with the flood. Finally her bulkheads gave way and she sank, becoming a total loss. In an action brought by the shipowners on the policy claiming to recover as for loss by perils of the sea, the House of Lords held that the grounding of the vessel was not a *novus casus interveniens* and that the torpedoing was the proximate cause of the loss and that consequently the underwriters were protected by the warranty against all consequences of hostilities. The case is notable for discussion of causation in the context concerned. The issue of causation was seen as a pure question of fact to be determined by common-sense principles, in the judgment of Lord Dunedin at page 362. He considered that the solution to an issue of causation would always lie in settling, as a question of fact, which of two causes might be seen as the dominant. While that approach has been echoed in very much more recent cases relating to causation, the context in which the observations were made is remote from the circumstances of the present case. For that reason I do not consider that it is of more than limited significance.

23. Turning next to *Robinson, Administrator of Robinson v United States* (1922) 261 US 486, the issue in the case arose out of stipulations in construction contracts obliging the contractor to pay liquidated damages for delay. A public building contract obliged the contractor to pay liquidated damages for each day's delay not caused by the Government. Delays were attributable to both parties. It was held that the Government were entitled to damages for the part of the delay specifically found by the Lower Court to have been due wholly to the fault of the contractor. Once again, having looked at the terms of the contract there involved, it appears to me that they are so far removed from the contractual provisions with which we have to be concerned that the decision is of little value.

24. *Heskell v Continental Express Ltd and another* [1950] 1 All ER 1033 was a case of carriage by sea. An issue as to the extent of damages exigible arose out of the negligent issue by the carrier of a Bill of Lading. I have been unable to identify anything in that case which is of assistance in the resolution of the matter currently before us.

25. Our attention was also drawn to *Chas I Cunningham Co* 1957 WL 139 (IBCA) 60, an American decision. The dispute arose out of a contract with the Fish and Wildlife Service for the construction of a concrete block residence at Colusa National Wildlife Refuge, Colusa, California. The contract involved contained a liquidate damages clause and provided the opportunity for the granting of an extension of time in respect of excusable reasons for delay. The provisions of the contract in question do not closely resemble those involved here. In the Opinion of the Adjudicator, Mr Slaughter, it was said that it was well settled that the failure of a contractor to prosecute the contract work with the efficiency and expedition requisite for its completion within the time specified by the contract did not, in itself, disentitle the contractor to extensions of time for such parts of the ultimate delay in completion as were attributable to events that were themselves excusable, as defined in the relevant clause. Where a contractor finished late partly because of a cause that was excusable under this provision and partly because of a cause that was not, it was 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. It appears to me that the passages in this case which were brought to our attention tend to support the approach followed by the Lord Ordinary here, as appears from paragraph 19 of his Opinion. In any event, they are not inconsistent with it. It was said on behalf of the reclaimers that that case fell to be considered as a case of "sequential delays". However, in my opinion, that does not emerge from the relevant passages. As the Lord Ordinary recognised, that approach was followed in *Sun Shipbuilding & Drydock Company* ASBCA 11300, 68-1 BCA (CCH) P 7054 (1968), a decision of the Armed Services Board of Contract Appeals. At page 12 of the Opinion delivered by Mr Kennedy it was said that, for purposes of assessing liquidated damages, if an excusable cause of delay in fact occurs, and if that event in fact delays the progress of the works as a whole, the contractor is entitled to an extension of time commensurate with the delay, notwithstanding that the progress of the work was concurrently slowed down by want of diligence, lack of proper planning or some other inexcusable omission on the part of the contractor.

26. *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111 was a case arising out of a contract between the plaintiffs and Liverpool Corporation for the construction of a block of flats. The contract was not one involving any standard form of building contract, but was concluded upon the basis of a form of contract devised by the Corporation. An issue of liquidated damages arose upon the basis of delay in the completion of the works. This case is discussed by the Lord Ordinary in paragraph 11 of his Opinion, as

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part of his general treatment of liquidated damages clauses. Attention was drawn, in particular to a passage in the judgment of the Court of Appeal, delivered by Salmon LJ at page 121. I do not consider that these observations are of particular assistance in the present case for the reasons that, first, the court was considering a form of contract different from that involved in the present case, and second, that the court was not considering the particular issues which have arisen here.

27. In *Henry Boot Construction Ltd v Central Lancashire New Town Development Corp* (1980) 15 BLR 1, Dyson J was considering issues arising out of a construction contract to which the Standard Form with Quantities for Local Authorities Building Works (1963 Edition) July 1975 Revision published by the Joint Contracts Tribunal, was a part. I am not persuaded that anything said by the judge in that case is of assistance to us here.

28. *Blinderman Construction Co Inc v United States* [1982] USCAFED 64; 695 F 2d 552, was a case concerning, *inter alia*, a claim for an extension of time for the completion of a construction contract. The basis of the claim was the failure of the employer to afford access to certain premises on which work had to be done. While the contract contained certain standard conditions for construction contracts, the report does not make clear the terms of those conditions. Having considered what was said in paragraph 46 of the decision of the United States Court of Appeals, Federal Circuit, I am are not persuaded that it is of direct assistance here. Since the case was to be remitted to the Board for reconsideration, what is said there is of a very tentative nature. Altogether, I do not find this case as of assistance.

29. *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391 is a decision by the Supreme Court of Victoria, concerned with a claim for liquidated damages under a building contract following upon delay by the contractor in which it was shown that delay was contributed to by the proprietor. The interest of this case, in the present context, lies in observations by Brooking J, delivering the principal opinion, at page 398, where he dealt with the defence of prevention to a claim for liquidated damages. Speaking of the decision of the arbiter under consideration, Brooking J said:

> "He evidently considered that where acts or omissions of a proprietor do in fact substantially delay completion, the proprietor nonetheless cannot be said to have prevented the contractor from completing by the relevant date unless the contractor would have been able to complete by that date had it not been for the supposed prevention. [Counsel] asks us to uphold that view. But it has been accepted for more than one hundred years that this is not the law. The cases are all one way".

While the Lord Ordinary quotes passages in the judgement of Brooking J, I do not consider that what he said in that case is of direct assistance to the issues before us. The case was very much concerned with the defence of prevention to a claim for liquidated damages which I would see as involving the application of general principles of the law of contract, rather than the interpretation of a condition such as clause 25 in the standard form conditions. I doubt whether what the Lord Ordinary concludes in paragraph 18 of his Opinion can be justified upon the basis of what was said by Brooking J.

30. *Balfour Beatty Building Ltd v Chestermount Properties Ltd* (1993) 32 Con LR 139, (1993) 62 BLR 1 is the first of the cases in this chronological review which was directly concerned with the operation of clause 25 of the JCT standard form 1980, private edition with approximate quantities. As the Lord Ordinary observes in paragraph 12 of his Opinion, the general approach to the interpretation of clause 25 was the subject of detailed discussion by Coleman J. Like the Lord Ordinary, I find the consideration of Coleman J at pages 28 to 30 of his judgment illuminating, particularly his preference for the net as opposed to the gross basis of the assessment of delay caused by a variation. However, the points considered in relation to the interpretation of clause 25.3.1 and 25.3.3, it seems to me, do not bear directly upon the issue of causation that lies at the centre of the dispute in this case. However, at page 34, Coleman J comments upon the issue of causation, saying:

> "Before leaving this issue it is right to add that the application of the 'net' method to relevant events occurring within the period of a culpable delay may give rise to particular problems of causation. These were discussed at some length in the course of the argument. In each case it is for the architect exercising his powers under clause 25.3.3 to decide whether an adjustment of the completion date is fair and reasonable having regard to the incidence of relevant events".

However, the application of the criterion of what is fair and reasonable, he makes clear, operates only within certain limits. He goes on:

> "Fundamental to this exercise is an assessment of whether the relevant event occurring during a period of culpable delay has caused delay to the completion of the works and, if so, how much delay. There may well be circumstances where a relevant event has an impact on the progress of the works during a period of culpable delay but where that event would have been wholly avoided had the contractor completed the works

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by the previously-fixed completion date. For example, a storm which floods the site during a period of culpable delay and interrupts the progress of the works would have been avoided altogether if the contractor had not overrun the completion date. In such a case it is hard to see that it would be fair and reasonable to postpone the completion date to extend the contractors' time. Indeed, where the relevant event would not be an act of prevention, it is hard to envisage any extension of time being fair and reasonable unless the contractor was able to establish that, even if he had not been in breach of overshooting the completion date, the particular relevant event would still have delayed the progress of the works at an earlier date".

Thus, Coleman J envisages, but does not wholly resolve, the problems of causation to which the application of clause 25.3 may give rise. In particular, he does not address the problem created by concurrent delays having their origin in "relevant events" as defined in clause 25.4, and other events.

31. Some reliance was placed by the reclaimers on *County Ltd and another v Girozentrale Securities* [1996] 3 All ER 834, a case involving breach of contract, in which an issue of causation arose. Its circumstances were far removed from those of the present case and, in particular, it did not involve consideration of clause 25.3 of the standard form conditions. For that reason I do not find this case of material assistance in the present context; however, at page 847, Beldam LJ drew attention to the observations of Lord Wright in his speech in *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (AB)* [1949] AC 196, at page 228:

> "Causation is a mental concept, generally based on inference or induction from uniformity of sequence as between two events that there is a causal connection between them. ... The common law, however, is not concerned with philosophic speculation, but is only concerned with ordinary everyday life and thoughts and expressions ... ".

32. Issues of causation in the context of the operation of clause 25 of the Standard Form conditions were the subject of consideration in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 ConLR 32, a decision by Dyson J. The matter which brought the case from an arbiter to the Technology and Construction Court was one relating to the arbiter's jurisdiction; in particular, whether the matters pleaded in paragraph 37 of the Statement of Defence could be raised in the arbitration. Those amounted to a long list of criticisms of the claimants' performance at various times in the contract, which were alleged to have been the true cause of the delay in the completion of the works. That issue came to be one concerning the proper interpretation of clause 25 of the standard conditions. As narrated in paragraph 12 of the judgment there was agreement that the analysis of Colman J in *Balfour Beatty Building Ltd v Chestermount Properties Ltd* should be applied as a valuable interpretation of clause 25. It is appropriate to note that it was also a matter of agreement between the parties, and, it would appear, accepted by the court in paragraph 13 of the judgment, 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".

What was in controversy between the parties is described by Dyson J in paragraph 14. There he said this:

> "As I understand his submission [counsel for the claimant] argues that, in determining whether a relevant event is likely to cause delay to the works beyond the completion, the architect is not permitted by cl. 25 to consider the effect of other events. [Counsel for the respondents] on the other hand contends that the architect is not precluded by cl. 25 from considering the effect of other events when determining whether a relevant event is likely to cause delay to the works beyond completion".

Dyson J resolved this issue in paragraph 15 of his judgment, saying:

> "I accept the submissions of [counsel for the respondents]. It seems to me that it is a question of fact in any given case whether a relevant event has caused or is likely to cause delay to the works beyond the completion date in the sense described by Colman J in the *Balfour Beatty* case. In the present case, the respondent has what [she] calls both a negative and a positive defence to the EOT/I claim. The negative defence amounts to saying that the variations and late information etc relied on by the claimant did not

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cause any delay because the activities were not on the critical path, and on that account did not cause delay. The positive defence is that the true cause of the delay was other matters, which were not relevant events, and for which the contractor was responsible. In my view, the respondent is entitled to advance these other matters by way of defence to the EOT/I claim. It is entitled to say (a) the alleged relevant event was not likely to or did not cause delay eg because the items of work affected were not on the critical path, and (b) the true cause of the admitted delay in respect of which the claim for an extension of time is advanced was something else. The positive case in (b) supports and fortifies the denial in (a). The respondent could limit its defence to the claim by relying on (a), but in my view there is nothing in cl. 25 which obliges it to do so. Likewise, when considering the matter under the contract, the architect may feel that he can decide the issue on a limited basis, or he may feel that he needs to go further, and consider whether a provisional view reached on that basis of one set of facts is supported by findings on other issues. It is impossible to lay down hard and fast rules. 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".

33. As pointed out by the Lord Ordinary in paragraph 16 of his Opinion, the opinion of Dyson J in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* was considered by Judge Richard Seymour QC in *Royal Brompton Hospital NHS Trust v Hammond and others (No 7)* 2001 76 ConLR 148. That litigation was concerned with one part of one section of complex litigation arising out of the construction of the new Brompton Hospital in Sydney Street, Chelsea between 1987 and 1990. The issue raised was whether the architects were negligent and in breach of their professional duty of skill and care by reason of extensions of time for completion of the contract works which they allowed by various certificates and at different dates to the contractors, Taylor Woodrow. The works commenced in 1987 and the contractual date for completion was 23 July 1989. The works were not completed in fact until 22 May 1990, on the face of it, 43 weeks late. However, the architects issued certificates having the cumulative effect of extending the date for completion until the date of practical completion, so that the claimants were unable to claim damages for the late completion in the arbitration proceedings which followed between them and Taylor Woodrow. In the case which is the subject of the report, the claimants contended that the certificates were negligently issued and that the architects were accordingly liable to them in damages. The measure of damages claimed was compensation for the claimants' weakened bargaining position *vis-à-vis* the contractors, in negotiations to settle the arbitration proceedings. The matter was the subject of a decision at first instance by Judge Richard Seymour QC, sitting in the Technology and Construction Court. His decision was to the effect that, in relation to a part of the extensions of time granted, the architects had not directed their mind to the right question and were negligent. Otherwise the allegations of negligence were rejected for a variety of reasons.

34. In the present context, his decision is of interest for what he said, particularly in paragraphs 31 and 32 of his judgment. In these paragraphs he was concerned with the question of the circumstances in which it was proper to grant an extension of time under clause 25 of the Standard Form conditions. He said:

> "The answer, in my judgment, depends upon the proper construction of that clause. Leaving aside for a moment the authorities to which my attention has been drawn . . . , as a matter of impression it would seem that there are two conditions which need to be satisfied before an extension of time can be granted namely: (i) that a relevant event has occurred; and (ii) that that relevant event is likely to cause the completion of the works as a whole to be delayed beyond the completion date then fixed under the contract, whether as a result of the original agreement between the contracting parties or as a result of the grant of a previous extension of time".

One may comment that those observations are plainly apt in relation to an extension to be granted under clause 25.3.1 of the clause; however, they require to be qualified if what is in issue is the granting of an extension under clause 25.3.3. In such a situation as that, likelihood disappears as a factor, since that situation exists following upon the completion date. Judge Seymour continued by emphasising the second element of the two mentioned by him, in view of the submissions that had been made to him. Speaking of those submissions he said of counsel:

> "He cited, helpfully, the decision of Colman J in *Balfour Beatty Building Ltd v Chestermount Properties Ltd* (1993) 32 Con LR 139, (1993) 62 BLR 1 and the recent decision of Dyson J in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 ConLR 32 in support of the submission that those decisions 'confirm . . . the approach taken by WGI [Architects] in this case, where relevant and non-relevant events operate concurrently . . . '.

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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 the existing of the 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. It was circumstances such as these that Dyson J was concerned with in the passage from his judgment in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 ConLR 32 at 37 (paragraph 13) which Mr Taverner drew to my notice. Dyson J adopted the same approach as that which seems to me to be appropriate to the first type of factual situation which I have postulated when he said (at 38 (paragraph 15)): 'It seems to me that it is a question of fact in any case whether a relevant event has caused or is likely to cause delay to the works beyond the completion date in the sense described by Colman J in the *Balfour Beatty* case.'"

35. Judge Seymour went on, in paragraph 32, to consider the evidence in the case before him, although he also made certain observations of a general nature in relation to the assessment of the significance of delay. I consider that it is appropriate to draw attention to those. In that paragraph he said:

"... it was plain ... that there are a number of established ways in which a person who wishes to assess whether a particular event has or has not affected the progress of construction work can seek to do that. Because the construction of a modern building, other than one of the most basic type, involves the carrying out of a series of operations, some of which, possibly, can be undertaken at the same time as some of the others, but many of which can only be carried out in a sequence, it may well not be immediately obvious which operations impact upon which other operations. In order to make an assessment of whether a particular occurrence has affected the ultimate completion of the work, rather than just a particular operation, it is desirable to consider what operations, at the time the event with which one is concerned happens, are critical to the forward progress of the work as a whole".

Speaking of the matter of a critical path, Judge Seymour went on to say:

"... the establishment of the critical path of a particular construction project can itself be a difficult task if one does not know how the contractor planned the job. Not only that, but the critical path may well change during the course of the works, and almost certainly will do if the progress of the works is affected by some unforeseen event. Mr Gibson [a witness in the case] frankly accepted that the various different methods of making an assessment of the impact of unforeseen occurrences upon the progress of construction works are likely to produce different results, perhaps dramatically different results".

36. In paragraph 16 of his Opinion, the Lord Ordinary, commenting on the case in question, observed that Judge Seymour, in the passage which I have quoted, gave a further explanation of what was meant by events which operate concurrently. The Lord Ordinary states:

"He drew a distinction between on one hand a case where work has been delayed through a shortage of labour and a relevant event then occurs and on the other hand a case where works are proceeding regularly when both a relevant event and a shortage of labour occur, more or less simultaneously. Judge Seymour considered that Dyson J had only been concerned with the latter situation, and not with the former; in the former situation the relevant event had no effect upon the completion date. 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 pre-date 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 the 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 by granting such extension as the architect considers fair and reasonable".

With those observations of the Lord Ordinary, I would agree. When one examines Judge Seymour's comments in paragraph 31 on what he considered

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was meant by Dyson J, and when one examines what in fact was said by Dyson J, it appears to me that there is no evident reason to consider that his observations were so limited. Furthermore, I have difficulty in understanding the basis on which Judge Seymour drew the distinction which he did. In any event, his observations seem to involve the contemplation of a situation in which two events productive of delay, one a relevant event and the other not, occur simultaneously with chronologically coincident starting points, as the only one in which the effect of the relevant event can be assessed under clause 25, where a non-relevant event is also present. I consider that approach to its interpretation unnecessarily restrictive and one which would militate against the achievement of its obvious purpose of enabling the architect, or other tribunal, to make a judgment on the basis of fairness and a commonsense view of causation.

37. While Sir Anthony Evans, in the Court of Appeal, in refusing leave to appeal against the decision of Judge Seymour, described his judgment as "exemplary" he does not enter upon a consideration of the proper approach as regards causation required by clause 25 of the standard conditions, other than to say in paragraph 11 of his decision:

> "The architects' task of estimating the likely date for final completion, and of delay caused to it by a relevant event, becomes particularly complex when there are concurrent or overlapping causes of delay, as the architects considered here that there were. No criticism is made of the judge's approach, indeed both parties accept that his analysis of the legal position was entirely correct".

38. I am unable to read those observations as necessarily approving the distinction in Judge Seymour's judgment, to which we have referred, as a valid one. Indeed, Sir Anthony Evans' reference to "overlapping causes of delay" might perhaps be thought to sit uneasily with it.

39. Continuing my review of the authorities which may bear upon the issue under consideration, I deal next with *Holladay v East Kent Hospitals NHS Trust* [2003] EWCA Civ 1696. This was an action of damages for alleged psychiatric injury and loss flowing from the humiliation and degradation caused by the circumstances of the claimant's arrest and what followed. An issue of causation arose and is discussed in paragraph 32 of the judgment of Scott Baker LJ in which the other judges of the court concurred. In my view, the circumstances of that case are far removed from those of present one and what is said there is of no real assistance in elucidating the issues with which we are faced.

40. *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* 2004 SC 713 was concerned with the consequences of delay in the completion of a construction contract in relation to a global claim for loss and expense in terms of clause 26 of the Standard Form conditions. The matter came before the Inner House of this court, following upon a decision on relevancy by the Lord Ordinary. No proof had been held. The issue concerned the relevance of a global claim for loss and expense, where there might be an issue relating to the causative effect of one or more of the factors founded upon. Lord Drummond Young, who delivered the Opinion of the Court, in paragraphs 15–20 dealt with the issue of causation. In paragraphs 16 and 17, his Lordship deals with situations in which there may legitimately be apportionment of loss between different causes in an appropriate case. While those observations were made in the context of the consideration of the relevancy of a claim under clause 26 of the standard conditions the wording of which is materially different from that of clause 25, nevertheless, it appears to me that the possibility of apportionment as between different causative factors, contemplated as legitimate in that case tend to support the approach taken by the Lord Ordinary in the present one.

40. In *RP Wallace Inc v United States* (2004) 63 Fed Cl 402, the issue was of extension of time in a construction contract under contractual provisions plainly different from those involved in this case. For that reason, the case has limited value in the present context. However, it is of interest to note that the familiar problem of causation arose. That was dealt with by the United States Court of Federal Claims at pages 409–411. For the present purposes, in my opinion, it is sufficient to note that the court regarded concurrent delay as between an excusable cause and a non-excusable cause as not fatal to a contractor's claim for additional time. Finally, *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291, [2005] 1 WLR 2339, was cited to us in connection with the concept of fairness, which of course, because of the use of the words "fair and reasonable", is relevant to the application of clause 25.3.1.2 of the standard form conditions. Having considered the terms of that case I find nothing of particular assistance in the present context, which is far removed from that existing in the decision in question.

42. I consider that, in the light of my examination of the foregoing authorities, it is possible to formulate certain propositions as regards the proper approach to be taken to the application of clause 25.3 of the standard form conditions. In the first place, before any claim for an extension of time can succeed, it must plainly be shown that a relevant event is a cause of delay and that the completion of the works is likely to be delayed thereby or has in fact been delayed thereby. In the second place, the

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decision as to whether the relevant event possesses such causative effect is an issue of fact which is to be resolved, not by the application of philosophical principles of causation, but rather by the application of principles of commonsense. In the third place, the decision-maker is at liberty to decide an issue of causation on the basis of any factual evidence acceptable to him. In that connection, while a critical path analysis, if shown to be soundly based, may be of assistance, the absence of such an analysis does not mean that a claim for extension of time must necessarily fail. In the fourth place, if a dominant cause can be identified as the cause of some particular delay in the completion of the works, effect will be given to that by leaving out of account any cause or causes which are not material. Depending on whether or not the dominant cause is a relevant event, the claim for extension of time will or will not succeed. In the fifth place, where a situation exists in which two causes are operative, one being a relevant event and the other some event for which the contractor is to be taken to be responsible, and neither of which could be described as the dominant cause, the claim for extension of time will not necessarily fail. In such a situation, which could, as a matter of language, be described as one of concurrent causes, in a broad sense (see paragraph [48] infra), it will be open to the decision-maker, whether the architect, or other tribunal, approaching the issue in a fair and reasonable way, to apportion the delay in the completion of the works occasioned thereby as between the relevant event and the other event. In that connection, it must be recognised that the background to the decision making, in particular, the possibility of a claim for liquidated damages, as opposed to one for extension of time, must be borne in mind and approached in a fair and reasonable manner.

43. While I have endeavoured to formulate principles which I consider should apply in the application of clause 25.3 in my own words, looking at the approach adopted by the Lord Ordinary between paragraphs 15 and 22 of his Opinion, I cannot conclude that he has failed properly to interpret clause 25, or that he has failed to apply proper rules of causation in considering the application of that clause. Accordingly, I reject ground of appeal 1.

Ground of Appeal 2

44. The criticism advanced in this ground of appeal appears to be that the Lord Ordinary erred in relation to the proper interpretation of and approach to the application of clause 25 of the standard form conditions by conflating the issues arising in connection with the application of clause 25.4.6 with the different issue of what effect such relevant event might have on the progress of the works in terms of clause 25.2.1.1. In evaluating this criticism, it is necessary to examine the approach which the Lord Ordinary has taken to these matters in the light of any authority which may be available as guidance. In connection with this ground of appeal the reclaimers focus attention upon what the Lord Ordinary has said in paragraph 96 of his Opinion.

45. The first point that I must make is that what is said in paragraph 96 is part of the Lord Ordinary's response to a series of criticisms of Mr Whitaker's evidence advanced by the reclaimers, which begins at paragraph 93. There the Lord Ordinary observes that he is dealing with certain general criticisms made by the reclaimers of the respondents' arguments relating to instructions given following the replacement of RMJM by Keppie Architects. In particular, the criticisms related to the delay analysis set out by Mr Whitaker in his second report (No 7/8 of process). At paragraph 96, the Lord Ordinary is dealing with the reclaimers' fifth criticism of Mr Whitaker's analysis in his expert evidence, which the Lord Ordinary, in the result, decided to accept. As the Lord Ordinary points out at paragraph 40 of his Opinion, for the reasons which he had previously stated, he generally preferred the evidential approach taken by Mr Whitaker. He states there that he found that that witness's method of proceeding appeared to be based on sound practical experience and on commonsense. He states also that he found the logical connections that he drew in discussing programming to be entirely intelligible. By contrast, the Lord Ordinary observes that, so far as Mr Lowe, the reclaimers' expert, was concerned, he did not think that it was possible to base any reliable conclusions upon his formal critical path analysis, for the reasons which he had already given. Thus, to the extent that the Lord Ordinary has preferred the expert evidence of Mr Whitaker in these matters, I consider that that is a course which he was entitled to take, subject to this qualification. If it could be shown that the Lord Ordinary's preference for the evidence of Mr Whitaker necessarily involved the commission of some error of law, then plainly this court might be required to review the Lord Ordinary's decision in this regard. Bearing that in mind, I now turn to consider the provisions of clause 25 of the Standard Form conditions and, in particular, that part of the clause dealing with "relevant events".

46. In this connection, clause 25.4.6 must be examined. I have already noted its terms. It refers to the contractor not having received "in due time" necessary instructions for which he had specifically applied "provided that such application was made on a date which having regard to the completion date was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive the same." In *Percy*

Bilton Ltd v Greater London Council [1982] 1 WLR 794 the House of Lords was considering the terms of clause 23 of the 1963 Edition of the standard form conditions, which is similar to clause 25.4 of the standard form conditions applicable in this case. At page 801, Lord Fraser of Tullybelton said this of the clause being considered by him:

> "Clause 23(f) applies to delay caused by the contractor not having received instructions 'in due time', ... In my opinion, the words mean 'in a reasonable time' ... ."

What was a reasonable time was considered by Diplock J, as he then was, in a similar context in *Neodox Ltd v Borough of Swinton and Pendlebury* [1958] 5 BLR 38. That case involved the question of whether the engineer acting for the defendant corporation had failed to issue instructions to the contractors within a reasonable time. At page 42 Lord Diplock explained what was meant by that expression in this way:

> "In determining what is a reasonable time as respects any particular details and instructions, factors which must obviously be borne in mind are such matters as the order in which the engineer has determined the works shall be carried out ... whether requests for particular details or instructions have been made by the contractors, whether the instructions relate to a variation of the contract which the engineer is entitled to make from time to time during the execution of the contract, or whether they relate to part of the original works, and also the time, including any extension of time, within which the contractors are contractually bound to complete the works".

In the present context, it is appropriate to emphasise these latter words.

47. In my opinion, the adoption of any other approach would be quite unworkable having regard to the contractual obligations undertaken by the respondents in this case. One of those obligations was, of course, to complete the works in accordance with the contractual conditions, an obligation reflected in clause 5.4 of the standard form conditions. More particularly, however, under clause 23.1.1 of those conditions it is provided that:

> "On the Date of Possession possession of the site shall be given to the contractor who shall thereupon begin the works, regularly and diligently proceed with the same and shall, complete the same on or before the completion date".

Apart from that, it is to be observed that clause 25.4.6 itself makes reference to the completion date in connection with the date by which the contractor must have specifically applied in writing for necessary instructions.

48. These matters were all the subject of consideration by the Lord Ordinary in paragraph 23 of his Opinion. Faced with conflicting submissions regarding the timing of the issue of instructions he preferred the submissions of the respondents to the effect that the contractual completion date, allowing for any extension, must always set the criterion against which the timing of instructions should be judged. The Lord Ordinary preferred the submissions of the respondents for the reasons which he gives. In my opinion, the conclusion which he expressed there was correct. Thus it is apparent that the Lord Ordinary has proceeded on a proper interpretation of clause 25.4.6. Furthermore, in deciding to prefer the expert evidence of Mr Whitaker, I consider that the Lord Ordinary has taken a course which he was quite entitled to take. Indeed, it was not argued otherwise. For these various reasons, I am not persuaded that Ground of Appeal 2 possesses force. I reject it.

Ground of Appeal 3

49. It is proper for a moment to focus upon the criticism which, it appears, is made in this ground of appeal. It is said that the Lord Ordinary has erred in the approach taken by him to assessing what are referred to as concurrent delaying events for the purposes of clause 25 of the standard form conditions, in respect first of all of how a period of concurrent delay is to be defined, secondly how a period of concurrent delay is to be assessed, and thirdly how periods of concurrent delay in the calculation of extensions of time are to be treated. There then follows the somewhat enigmatic observation that the Lord Ordinary

> "erred in treating delays as concurrent, not on the basis that the actual consequences resulting from the relevant events overlapped during performance of the works, but rather on the basis that the respective estimated extended dates for completion arising from the relevant events overlapped".

I have some difficulty, it must be said, in understanding exactly what point is being made here. My difficulty is, at least in part, the result of the language used and, in particular, the references to concurrent delays, or delaying events. One of the problems in using such expressions as "concurrent delay" or "concurrent delaying events" is that they may refer to a number of different situations. Confining attention for a moment to concurrent delaying events, which may be taken to mean relevant events and other events, or causes of delay, which are not relevant events, there would seem to be several possibilities. Such events may be described as being concurrent if they occur in time in a way in which they have common features. One might describe events as concurrent on a strict approach only if they were contemporaneous or co-extensive, in the sense that they shared a starting point and an

end point in time. Alternatively, events might be said to be concurrent only in the sense that for some part of their duration they overlapped in time. Yet again, events might be said to be concurrent if they possessed a common starting point or a common end point. It might also be possible to describe events as concurrent in the broad sense that they both possessed a causative influence upon some subsequent event, such as the completion of works, even though they did not overlap in time. In other words, they might also be said to be contributory to or co-operative in bringing about some subsequent event. It is in this sense that the use of the term concurrent is perhaps most likely to be of relevance in the application of clause 25.3 of the standard form conditions; see paragraph [41] above. It appears to me that one of the problems in the present case is that language such as that under consideration here has been used in different senses at different times. It therefore becomes important in the interests of clarity, to try to disentangle this confusion.

50. The Lord Ordinary, in paragraph 18 of his opinion observes:

> "While delay for which the contractor is responsible will not preclude an extension of time based on a relevant event, the critical question will frequently, perhaps usually, be how long an extension is justified by the relevant event. In practice the various causes of delay are likely to interact in a complex manner; shortages of labour will rarely be total; some work may be possible despite inclement weather; and the degree to which work is affected by each of these causes may vary from day-to-day. Other more complex situations can be imagined. What is required by clause 25 is that the architect should exercise his judgment to determine the extent to which completion has been delayed by relevant events. The architect must make a determination on a fair and reasonable basis".

With those observations I find myself in complete agreement. However, the Lord Ordinary continues:

> "Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable".

What the Lord Ordinary appears to be saying in this passage is that what he calls true concurrency has a particular significance, in that it may give rise, in terms of clause 25, to a need to apportion responsibility for the delay between the two causes. What he means by true concurrency, in this context appears to be a situation in which a relevant event and a contractor default event both existed simultaneously. However, in saying that, he seems to intend to refer to what might be called overlapping events, since he does not consider that coincidence of starting points, or, presumably, end points, is of importance. What he does not say, however, is that in circumstances where concurrent causes, in the broad sense, act together, ie where two causes, neither of which is dominant, operate to cause delay beyond the completion date, an apportionment exercise might not equally be appropriate.

51. Clause 25.3.1 deals with a situation in which the architect has received a notice, particulars and estimates under clauses 25.2.1.1 and 25.2.2. In that event, the architect is required to form an opinion as to whether any of the events which are stated by the contractor to be the cause of the delay is a relevant event and also whether the completion of the works is likely to be delayed thereby beyond the completion date. In the event of his forming a positive opinion in that regard, he is to grant an extension of time by fixing such later date as the completion date as he estimates to be fair and reasonable. However, if such questions arise after the contractual completion date, if that occurs before the date of practical completion, the architect is then to consider whether it would be fair and reasonable to fix a completion date later than that previously fixed having regard to any of the relevant events, whether upon reviewing a previous decision or otherwise. Whether the process is undertaken under clause 25.3.1.1 and .2 or under 25.3.3.1, the focus for consideration by the architect, or other decision-maker, requires to be the cause for the delay in the completion of the works, upon a fair and reasonable view. Thus, it may not be of importance to identify whether some delaying event or events was or was not concurrent with another, in any of the possible narrow senses described, but rather to consider the effect upon the completion date of relevant events and events not relevant events. For that reason, discussion of whether or not there is true concurrency, in my opinion, does not assist in the essential process to be followed under clause 25. Having said that, however, I would endorse the view of the Lord Ordinary that where two causes, neither of which is dominant, are under consideration, a relevant event and a non-relevant event, it may be appropriate for the architect or decision-maker to apportion responsibility for the delay between the two causes. As he himself observes, the various causes of delay are likely to interact in a complex manner and what is required by clause 25 is that the architect should exercise his judgment to determine the extent to which completion is likely to be or has been delayed by relevant events.

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Upon this approach to the matter, I consider that what is said in Ground of Appeal 3 amounts to criticism founded upon a misconceived basis.

52. In paragraph 157 of his Opinion, the Lord Ordinary concludes that the delay in the completion of the works was the result of concurrent causes. He makes several references to such causes, also referring to the present case as one where there is true concurrency between relevant events and other events. In this situation, he considers that apportionment enables the architect or decision-maker to reach a fair assessment of the extent to which completion has been delayed by relevant events. It respectfully appears to me that, in this paragraph, the Lord Ordinary is using the expressions "concurrent events" and "true concurrency" to refer to a situation in which relevant and non-relevant events, neither of which can be said to be dominant, are contributory towards, or co-operative in producing, delay in the completion of the works. Plainly in paragraph 159 of his Opinion, in referring to the installation of the lifts and the construction of the stair balustrades as concurrent causes, with the eleven matters listed that amount to relevant events, the Lord Ordinary is using his reference to concurrent causes in the broad sense just mentioned. In other words, the focus of attention has moved, rightly in my opinion, from the events themselves and their points and durations in time to their consequences upon the completion of the works. In all of these circumstances, I reject Ground of Appeal 3.

Ground of Appeal 4

53. This ground of appeal proceeds upon the premise that the Lord Ordinary erred (a) in construing clause 25 of the standard form conditions and, (b) in his approach to matters of causation and concurrency. It is said that these errors led the Lord Ordinary to find as a fact that the contractor delays relative to (i) the lifts and (ii) the stair balustrading, which works were not completed until 24 March and 12 April 1999 respectively, were not the dominant causes of delay in the progress of the works following the appointment Keppie Architects in December 1998. At the outset, I would observe that, in my opinion, already set forth, the Lord Ordinary did not err in the respects alleged in this ground of appeal. I would endorse his general approach to these matters, although, in relation to certain matters of terminology, I find certain of his observations difficult to follow. Accepting, as I have done, that a dominant cause of delay, in the present context, would possess a particular significance in relation to the application of clause 25, I consider that whether a particular factor is or is not a dominant cause of delay is essentially an issue of fact, albeit one which, for its resolution, may require inferences to be drawn from primary facts.

54. The Lord Ordinary deals with the matters of (i) the delaying effect in relation to the lifts and (ii) stair balustrading at a number of parts of his Opinion. In paragraph 40, having evaluated the evidence that he had he preferred, that of Mr Whittaker, to the evidence of Mr Lowe, he was able to accept the evidence of the latter on those matters. He went on to deal with delay in relation to the matter of lifts in paragraphs 132 to 135 of his Opinion. After giving details of the history of arrangements for the installation of lifts, the Lord Ordinary, in paragraph 134, records that Mr Whittaker had conceded that the lifts had been installed late and that that was a problem for which the respondents had been responsible. He had accepted that it had involved a delay that was concurrent with other delays until 23 March 1999. In paragraph 135 the Lord Ordinary concludes that the delay in the completion of the lift installation was a concurrent source of delay in completion along with the other sources that he had considered. Lift installation was completed on 24 March 1999.

55. As regards stair balustrades, the Lord Ordinary deals with that matter in paragraphs 136–138 of his Opinion. Having recorded the history of the installation of that particular element in the works, and the problems that occurred, he concludes, in paragraph 138, that completion was delayed by the work on the stair balustrades. He states that that work was a concurrent source of the delay in completion, which lasted until 12 April 1999, which was agreed to be the date when work on the balustrades ended. The Lord Ordinary summarises his conclusions relating to the delays in paragraph 157 of his Opinion. Delay in completion was the result of what he calls concurrent causes, the majority of which were the result of late instructions or variations issued by the architect and were relevant events for the purposes of clause 25. However, the delays caused by the work on the lifts and the stair balustrading were the responsibility of the respondents, or their sub-contractors. He then says:

> "In my opinion, none of the causes of delay can be regarded as a 'dominant' cause; each of them had a significant effect on the failure to complete timeously. The pursuers advanced an argument based on the proposition that the items involving contractor default, the lifts and the stair balustrades, were the 'dominant' cause of the delay, but I am of opinion that this contention must be rejected".

In paragraph 160, the Lord Ordinary goes on to carry on the exercise of judgment required by clause 25 and makes clear that the allowance he

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made for the delays consequent on the lift installation and the construction of the stair balustrades resulted in a reduction of the period of 11 weeks' extension of time claimed by the respondents to one of nine weeks. The fact that that decision entails the making of an extension of time that runs to the date of the certificate of practical completion is merely a reflection of the artificiality of that date which occurred before all of the works were, in fact, complete.

56. In my view, these parts of the Lord Ordinary's Opinion involve the making by him of decisions of fact as regards the significance of the delays caused by the lift installation and the installation of stair balustrades. I have not been persuaded that, in reaching his conclusions on these matters, the Lord Ordinary has fallen into any error of law. Nor do I consider that his conclusions can be said to be perverse, in the sense that they are conclusions that no judge acting reasonably could have made on the basis of the evidence before him. In these circumstances, in my opinion there is no basis upon which this court could interfere with those conclusions. Much of the reclaimers' submissions on this aspect of the case amounted to assertions that the Lord Ordinary ought to have regarded the particular sources of delay under consideration as dominant causes; however, his conclusions were reached in the light of the benefit which he enjoyed of hearing all the evidence in the case. I see no reason to interfere with his decision in these respects. Accordingly Ground of Appeal 4 is rejected.

Ground of Appeal 5

57. This ground of appeal alleges a complete lack of reasoning to justify the Lord Ordinary's finding that the respondents were entitled to an award of nine weeks' loss and expense in their claim under clause 26 of the standard form conditions. It is therefore necessary to examine what the Lord Ordinary has said in relation to the respondents' claim for direct loss and expense. His treatment of these matters commences at paragraph 162 and runs to paragraph 167 of his Opinion. In paragraph 162, the Lord Ordinary points out that the claim under clause 26 was one based on the prolongation of the contract works. A Joint Minute had been concluded between the parties in which the pecuniary consequences of that prolongation were agreed as follows:

> "The defenders incurred loss and/or expense arising from the prolongation of the works from 25 January 1999 to 14 April 1999 (11 weeks and two days) in the sum of £11,518.80 plus VAT per week".

58. At paragraph 164 of his Opinion, the Lord Ordinary notes that the respondents' claim for direct loss and expense was based on the provisions of clause 26.2.1 of the standard form conditions, which refers to "the contractor not having received in due time necessary instructions (including those for or in regard to the expenditure of provisional sums), drawings, details or levels from the architect . . . ". It may be observed that the terms of clause 26.2.1, operative in the context of a claim for direct loss and expenses, are the equivalent of those of clause 25.4.6, in the context of a claim for extension of time under clause 25. Clause 25.4.6 relates, of course, to what may be called late instructions. It is to be noted that of the events identified by the Lord Ordinary at paragraph 159 of his Opinion, he concluded that the 10 events numbered there as 2 to 11 were all relevant events for the purposes of clause 25, on the basis that the relevant circumstances in each case fell within clause 25.4.6. Against that background, in paragraph 164 the Lord Ordinary observes:

> "The reasoning applicable to an extension of time seems to me to be equally applicable to a claim for direct loss and expense based on clause 26.2.1. It was clear in my opinion that the regular progress of the works was 'materially affected' (clause 26.1) by the instructions that were not received in due time; that appeared from the evidence that is summarised above in relation to an extension of time. Mr Cornish was asked (day 4, 3.48) how satisfied he was that late instructions were critical to the defenders' completion of the works. Mr Cornish replied that the late instructions were 'completely critical'. He went on to say that he was satisfied that they affected the regular progress of the works 'in a very profound way'. I thought that these views were justified by the evidence as a whole. I accordingly concluded that the requirements of clause 26 are satisfied".

59. In paragraph 165 of this Opinion the Lord Ordinary deals with the reclaimers' submission that the respondents' claim for prolongation costs should be refused for the same reasons as were advanced in opposition to their claim for an extension of time. Understandably he observed that, having granted an extension of time, for the reasons underlying that decision, he rejected this part of their argument. The Lord Ordinary then went on to deal with the reclaimers' submission that, even if the respondents were entitled to an extension of time to resist liability for liquidated and ascertained damages, they were not automatically entitled to prolongation costs for an identical period. The Lord Ordinary agreed with that submission in principle in paragraph 166 of his Opinion. However, having recognised the different considerations which might

apply in each of clauses 25 and 26, he held that, in the present case, the claim for prolongation costs should nonetheless follow the extension of time claim.

60. The Lord Ordinary was also faced with a submission that, if a contractor incurred additional costs that were caused both by what might be called an employer delay and by a concurrent contractor delay, the contractor should only be entitled to recover direct loss and expense to the extent that it was able to identify the additional costs caused by the employer delay, as opposed to the contractor delay. If the contractor would have incurred the additional costs in any event, as a result of contractor delay, he would not be entitled to recover those additional costs. In connection with that submission, in paragraph 166 of his Opinion, the Lord Ordinary relies on the decision in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd*. He observes that, in that case, it was recognised at paragraphs 16–18 that, in an appropriate case, where direct loss and expense is caused both by events from which the employer is responsible and events for which the contractor is responsible, it is possible to apportion the loss between the two causes. He expressed the view that that was what ought to be done in the present case. Thus he observes that this case was one where delay had been caused by a number of different causes, most of which were the responsibility of the employer, through the architect, but two of which were the responsibility of the contractor. It was accordingly necessary to apportion the respondents' prolongation costs between these two categories of causes. He considered that the same general considerations, the causative significance of each of the sources of delay and the degree of culpability in respect of each of those sources, had to be balanced. On this basis, he was of the opinion that the result of the exercise should be the same in this regard. He was unable to discover any reason for treating the two exercises under clause 25 and clause 26 on a different basis. He therefore concluded that the respondents were entitled to the prolongation costs for nine weeks.

[61] Having regard to the reasoning of the Lord Ordinary in relation to the claim of the respondents under clause 26 of the Standard Form conditions, which I have summarised, I conclude that it simply cannot be said that he failed to provide any reasoning for his finding that they were entitled to an award of nine weeks direct loss and expense. I therefore regard Ground of Appeal 5 as without any merit.

Ground of Appeal 6

62. In this ground of appeal, it is claimed that the Lord Ordinary erred in law in failing properly to interpret clause 26 of the Standard Form conditions and in failing to apply the proper rules of causation in contract in addressing the application of clause 26 to the circumstances of the case. I have already made reference to the Lord Ordinary's approach and reasoning in relation to the respondents' claim under that clause. In my opinion, there is no justification for a suggestion that he failed properly to interpret that clause. Nor do I consider that he failed to apply appropriate rules in relation to causation in connection with the claim under clause 26. I have already referred to his reliance on *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* in connection with Ground of Appeal 5. The Lord Ordinary's reliance on what was said in that case, in my opinion, justifies the approach which he took to the causation of direct loss and expense in connection with the clause 26 claim. Of course, had there been a dominant cause of delay, the position would have been quite different, but, as I have already narrated, the Lord Ordinary rejected such a contention, in my view with justification. For these reasons, I consider that Ground of Appeal 6 also is without merit.

Ground of Appeal 7

63. This ground of appeal, it appears to me raises in different language the same point as was raised in Ground of Appeal 6. For the reasons which I have given in relation to that ground of appeal, I would conclude that it cannot properly be said that the Lord Ordinary failed to assess correctly the impact of periods of concurrent delay in connection with the clause 26 claim. As regards the factual conclusions which the Lord Ordinary reached in connection with his application of the principle of apportionment, I consider that that was essentially a matter for him to decide in the light of the evidence available to him. I have not been persuaded that he acted perversely, or without evidential justification, in that regard. Accordingly I would reject this ground of appeal as being without merit.

Grounds of Appeal 8 and 9

64. It is appropriate, as was recognised by both parties to this reclaiming motion, that these two grounds of appeal ought to be considered together. Ground 9 is, in effect, an elaboration of the point made in Ground 8, to the effect that the Lord Ordinary had failed properly to construe clause 13.8 of the standard form conditions as applicable to all instructions. The Lord Ordinary has dealt with these matters at paragraphs 140–144 of his Opinion. He reaches his conclusion, in principle, in paragraph 143, where he adopts the approach set out by Lord Macfadyen in *City Inn Ltd v Shepherd Construction Ltd* (2002) SLT 781. Lord Macfadyen

considered this aspect of the case, following upon a procedure roll discussion, in paragraphs 30 to 32 of his Opinion, parts of which are quoted by the Lord Ordinary. The view which he expresses at the outset in paragraph 30 seems to me to be consistent with what was said by Lord Mustill in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313. There, in relation to contractual interpretation, he said at page 384:

> "I believe that most expressions do have a natural meaning, in the sense of their primary meaning in ordinary speech. Certainly, there are occasions where direct recourse to such a meaning is inappropriate".

Elaborating that point later he said:

> "This is, however, an occasion when a first impression and a simple answer no longer seem the best, for I recognise now that the focus of the argument is too narrow. The words must be set in the landscape of the instrument as a whole".

I would certainly agree that, as observed by Lord Macfadyen in paragraph 30 of his Opinion, the language of clause 13.8 is *prima facie* applicable to all architects' instructions, including those in respect of the expenditure of provisional sums. However, in paragraphs 31 and 32 of his Opinion, Lord Macfadyen points out the absurdities which would result if clause 13.8 were held to apply to a situation where, for example, delay was occasioned by the lateness of the instruction rather than the content of the instruction. In paragraph 32, Lord Macfadyen says:

> "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 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. It is in my view difficult to formulate the distinction more precisely in the abstract. It would, in my view, be wrong to say simply that cl. 13.8 has no application to late instructions. On the other hand, a failure to comply with cl. 13.8 will not, in my view, exclude a claim for extension of time in so far as the extension is made necessary by the lateness of the instruction as distinct from its content".

I find myself in agreement with that view.

65. Turning again to the Opinion of the Lord Ordinary, in paragraph 143 he concludes that Lord Macfadyen's construction of clause 13.8 is clearly correct. I also find myself in agreement with that. In the latter part of that paragraph the Lord Ordinary goes on to give his own reasons for his agreement with the Opinion of Lord Macfadyen. It seems to me that the validity of this approach to clause 13.8 of the Standard Form conditions is consistent with what is to be found in the definition of "Relevant Events" in clause 25.4 of those conditions. It will be recalled that, under clause 25.4.6, there is a relevant event where the contractor has not "received in due time necessary instructions". That clause contemplates the possible allowance of an extension of time in that event. Furthermore, clause 26 of the Standard Form conditions, providing for the recovery of certain loss and expense, contemplates its operation where such a situation has come into being. In my view it would indeed be absurd if the clause 13.8 procedure were to operate in such situations. I consider that it cannot have been in contemplation of the parties that that would be so. For these reasons, I would reject the propositions in Grounds of Appeal 8 and 9.

66. In paragraph 144 of his Opinion the Lord Ordinary deals with the application of clause 13.8 of the standard form conditions, as construed by him, to the instructions founded upon by the respondents for the purposes of justifying their claim for extension of time. The Lord Ordinary concluded that in relation to all of the instructions except that in relation to the gas venting scheme, for the reasons which he had discussed in detail between paragraphs 41 and 131, it was the lateness of instructions rather than their content that caused delay to the completion of the works. He therefore concludes that, in none of those cases did clause 13.8 of the standard form conditions preclude the making of a claim for an extension of time under clause 25. As regards the gas venting scheme, the Lord Ordinary accepted that it had been the content rather than the timing of the instruction that had caused delay. For that reason clause 13.8 was potentially applicable to that instruction. The clause 13.8 procedure had, of course, not been operated by the respondents in relation to that matter. Having considered the Lord Ordinary's detailed examination of the various instructions concerned, I have not been persuaded that any of his conclusions as to the nature and effect of the instructions were unsound.

Ground of Appeal 10

[Editors' Note: Paragraphs 67–97 have been removed from this law report, please see www.bailii.org/scot/cases/ScotCS/2010/2010CSIH68.html for the full judgment]

Lord KINGARTH

98. I agree with the Opinion of your Lordship in the chair.

Lord CARLOWAY

99. I adopt the narrative of the background circumstances, the relevant contractual provisions and the grounds of appeal set out by Your Lordship in the chair. I agree also with Your Lordship's categorisation of these grounds.

100. The reclaimers' contention under grounds of appeal 8 and 9 was that the respondents were not entitled to any extension of time because they had not followed the procedures set out in clause 13.8. These procedures, the reclaimers argued, applied to all instructions. I am unable to accept that submission. However, I do not accept either the reasoning of the Lord Ordinary (at paragraphs 140–144) where he adopts that of Lord MacFadyen in *City Inn v Shepherd Construction* (2002) SLT 781 (at paragraphs 30–32) to the effect that there is a distinction to be made 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 an adjustment or grant such an extension". Such a distinction is not merited on a plain reading of the clause.

101. The provisions in clause 13.8, in relation to delaying the execution of instructed works unless the contractor has submitted details of the extra cost/delay, do not make sense (commercially or simply on reading the clause in context) where all that is under consideration is an instruction not involving a variation of the works. A late instruction is a "relevant event" under clause 25.4 and there is no reason why the rigmarole under clause 13.8.1 should apply to it. Clause 13.8.1 must be read in the context of the contract as a whole. Clause 13, as its heading states, is concerned with "Variations and provisional sums". Thus, clause 13.8.1 is not concerned with instructions which are purely late (eg in relation to items contained in provisional sums). Such late instructions would not, without more, cause an adjustment to the contract sum or delay the completion date (as distinct from a particular aspect of the work). Rather, this clause is directed towards instructions which constitute a variation. In these circumstances, although not entirely agreeing with the Lord Ordinary's reasoning, I reach the same conclusion that there was no requirement for the respondents to invoke clause 13.8 other than in connection with the gas venting scheme. I agree also that the result is that the contentions in grounds of appeal 8 and 9 must fail.

102. On the issue of waiver, and in particular grounds of appeal 10 to 16, a Hohfeldian analysis might perhaps be regarded as over elaborate. However, I agree with the detailed consideration of the cases cited by Your Lordship in the chair and that the contentions in these grounds of appeal must fail for the reasons given.

103. Turning to grounds 1 to 7, it is important to note that the contract is not expressed in a manner whereby the contractor is entitled to an extension of time in the event of a relevant event occurring. Were that to be the case, all the esoteric nuances of a lawyer's approach to causation, including issues such as "dominant" or "operative" causes etc, might have a more prominent part to play. Rather clause 25.3.1 provides that it is in the power of the architect to form an opinion on whether a matter complained of is a "relevant event" and whether "the completion of the works is likely to be delayed thereby beyond the completion date". If he does so determine, then he will fix a later date "as he then estimates to be fair and reasonable". On one view, the matter ought to be approached as an architect would assess the situation at the time and not by a judge using his perception of legal causation. But that view is scarcely tenable in this case now, given the approach of both parties before the Lord Ordinary and the absence of evidence from any architect at the proof.

104. The initial exercise to be carried out by the architect occurs upon the application of the contractor, who will have requested an extension of time by intimating, under clause 25.2, that the progress of the works "is being or is likely to be delayed". He will claim that a relevant event has been the, or at least a, cause of the delay. The architect then has to decide whether he considers that the completion of the Works is likely to be delayed by a relevant event beyond the completion date (clauses 25.3.1.1 and 2). This provision is designed to allow the contractor sufficient time to complete the works, having regard to matters which are not his fault (ie relevant events). This does not, at least strictly, involve any analysis of competing causes of delay or an assessment of how far other events have, or might have, caused delay beyond the completion date. It proceeds, to a large extent, upon a hypothetical assumption that the contract has proceeded, and will proceed, without contractor default. It involves an assessment, on that assumption, of the delay which would have been caused to the completion date purely as a result of the relevant event.

105. In the oft quoted context of bad weather (clause 25.4.2), if such weather occurs and would have been likely to, or did, delay the Works beyond the completion date, the contractor would expect an extension to the date by which the architect estimated the works ought to have been completed, given the occurrence of the adverse weather. It is of no moment that there was a contractor default

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before, during or after the weather conditions. What the architect is tasked to do is to look at what the contract required within the time frame permitted and to allow the contractor such additional time as is fair and reasonable, taking into account the occurrence of any relevant event. It is partly because of this type of analysis that, whereas clauses 25.3.2 and 3 permit the architect to review the situation after the contractual completion date and to fix a later date, having regard to the actual effect of any relevant events looked at in retrospect, he cannot fix an earlier date unless work has been omitted from the contract. Thus, for example, if the architect has allowed the contractor an extension because of a late instruction or a variation, he cannot change the date to an earlier one on a review simply because a supervening contractor default would have caused the same delay.

106 In reaching these conclusions on the proper interpretation of clause 25, I accept much of the detailed analysis of Your Lordship in the chair regarding the many cases cited, especially where the cases are not concerned with building contracts. But the important general principle was well enunciated by Vaughan Williams LJ in *Wells v Army & Navy Co-operative Society* (1902) 2 Hudson's Building Cases (4th Edition) 346, where he states (p 354):

> "... where you have a time clause and a penalty clause, it is always implied in such clauses that the penalties are only to apply if the builder has, so far as the building owner is concerned and his conduct is concerned, that time accorded to him for the execution of the works which the contract contemplates he should have".

The proposition that delay caused by the contractor must also to be taken into account was rejected (p 355), and rightly so. It is irrelevant so far as the contractual exercise is concerned. That exercise does not involve an analysis of competing causes. It involves a prediction of a completion date, taking into account that originally stated in the contract and adding the extra time which a relevant event would have instructed, all other things being equal.

107. The general principle is consistent with what was said by Mr Kennedy of the United States of America's Armed Services Board of Contract Appeals (*Sun Shipbuilding & Drydock Co* (1968) ASBCA LEXIS 54 under the heading "D Remission of Liquidated Damages"), following *Chas I Cunningham Co* 1957 WL 139 (IBCA) 60). These cases both demonstrate that, where there is an excusable cause of delay, an extension must be given for that delay notwithstanding other non-excusable causes. *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111 (Salmon LJ at 121) and *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391 (Brooking J at 398) are essentially to the same effect.

108. In *Balfour Beatty Building Ltd v Chestermount Properties Ltd* (1993) 32 Con LR 139, (1993) 62 BLR 1, Coleman J expressed the view that (p 34):

> "In each case it is for the architect exercising his powers under clause 25.3.3 to decide whether an adjustment of the completion date is fair and reasonable having regard to the incidence of relevant events".

But that is not what the clause says. The exercise for the architect is not to fix a fair and reasonable completion date having regard to that incidence. It is, first, to determine whether there is likely to be, or was, delay in the completion date caused by a relevant event and, secondly, to fix such later date as he considers to be "fair and reasonable". In the example given of a storm flooding the site and causing delay during a contractual overrun caused by a contractor default, the correct approach is to ignore that storm, since it could not have affected the completion date on the hypothesis outlined above that the contract had proceeded without contractor default.

109. The analysis of the issue started well in *Henry Boot Construction (UK) v Malmaison Hotel (Manchester) Ltd* (1999) 70 ConLR 32. Dyson J states (paragraph 13):

> "... 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".

But Dyson J goes on to reject a submission that, in determining whether a relevant event is likely to cause delay beyond the completion date, the architect is not permitted to consider the effect of other events. He accepts that the effect of other events can be considered when determining whether a relevant event is likely to cause delay beyond the completion date. In reaching this view, he states (paragraph 15) that:

> "... it is a question of fact in any given case whether a relevant event has caused or is likely to cause delay to the works beyond the completion date in the sense described by Colman J in the *Balfour Beatty* case".

No doubt that is correct as stated, since it is always a question of fact whether the relevant event is likely to cause, or has caused, delay. In that context, although a formal Critical Path Analysis is not essential, it is that type of exercise that has to be carried out to see what effect a relevant event will have on the completion date as originally provided

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for in the contract, or as subsequently altered by earlier relevant events.

110. But the exercise remains one of looking at the relevant event and the effect it would have had on the original (or already altered) completion date. If a relevant event occurs (no matter when), the fact that the works would have been delayed, in any event, because of a contractor default remains irrelevant. In that respect, the view of HHJ Seymour QC in *Royal Brompton Hospital NHS Trust v Hammond & Others (No 7)* [2001] 76 ConLR 148 (at paragraph 31), that a relevant event falls to be disregarded if a pre-existing contractor default would nonetheless have caused the delay, appears to be in error. That may reflect how the law might regard causation operating in a situation of competing causes, but it is not what the contract envisages.

111. At paragraph [18] of his Opinion, the Lord Ordinary expresses the view that:

> "While delay for which the contractor is responsible will not preclude an extension of time based on a relevant event, the critical question will frequently, perhaps usually, be how long an extension is justified by the relevant event".

At the risk of repetition, that is not the question. It is whether a relevant event is likely to cause delay beyond the completion date and, if so, and as a separate exercise, what a fair and reasonable new date should be.

112. Having said that causes of delay can interact in a complex manner, which is no doubt correct, the Lord Ordinary states:

> "What is required by clause 25 is that the architect should exercise his judgment to determine the extent to which completion has been delayed by relevant events".

That is also, no doubt, correct. He goes on:

> "The architect must make a determination on a fair and reasonable basis. Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable".

That is not an exercise warranted by any term of the contract. In this context, the Lord Ordinary considers that where, for example, a relevant event and a contractor fault operate "concurrently to delay the completion of the works", clause 25.3.1 envisages that the architect will grant such extension as he considers fair and reasonable. But that too is not the exercise envisaged by clause 25. What the architect must do is concentrate solely on the effect of the relevant event in the absence of any competing default. If he decides that it was likely to, or did, cause a delay beyond the completion date, he must fix a "fair and reasonable" new completion date having regard to what he estimates to be the delay caused by the relevant event, all other things being equal.

113. In the example given by the Lord Ordinary (paragraph 16), if a relevant event would have caused a six-week delay in the completion date, and a shortage of labour caused by a contractors default would also have caused a six-week delay in completion, the architect should fix a completion date six weeks beyond the existing one. If the Relevant Event would have caused only a two- or a four-week delay, looked at in isolation, a two- or a four-week extension would be appropriate. It is not, in short, an apportionment exercise. It is one involving a professional judgment on the part of the architect to determine, as a matter of fact and no doubt using his and not a lawyer's common sense, whether the relevant event would have, or did, cause delay beyond the completion date and then to estimate a fair and reasonable new completion date.

114. Where there are potentially two operative causes of delay, the architect does not engage in an apportionment exercise. Where the contractor can show that an operative cause of delay was a relevant event, he is entitled to an extension to such new date as would have allowed him to complete the works in terms of the contract. The words "fair and reasonable" in the clause are not related to the determination of whether a relevant event has caused the delay in the completion date, but to the exercise of fixing a new date once causation is already determined.

115. To the foregoing extent only, I disagree with your Lordship in the chair's approval of the Lord Ordinary's approach. I do consider that he has misconstrued the exercise required by clause 25. That having been said, as presently advised, the effect would appear to favour the respondents in respect of grounds of appeal 1, 3 and 4. If, as the Lord Ordinary has found in fact, the relevant event delays operated concurrently with contractor defaults in a significant manner to delay the completion date (paragraph 157), there does not seem any basis upon which to disturb the Lord Ordinary's ultimate finding that the respondents were entitled to an extension of at least the time given.

116. In respect of grounds 2, 5, 6 and 7, subject to the qualifications already stated, I agree that the contentions in these grounds fall to be rejected for the reasons given by Your Lordship in the chair.

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