Apportionment and *City Inn*: Save it for the Scots

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Abstract

This paper assesses the validity of the findings of Lord Drummond Young in *City Inn v Shepherd Construction* firstly that in cases of concurrency of delaying causes it is legally possible and appropriate to determine the extension of time by apportioning the relative responsibility of the contractor and employer; and secondly that in cases of concurrency of delaying and or disrupting causes it is legally possible and appropriate to determine the amount of damages payable by apportioning the relative responsibility of the contractor and employer. The paper proceeds by considering the availability of apportionment at common law. The American decisions relied upon are then scrutinised, following which the law surrounding prevention is examined, and a conclusion on both issues is drawn.

Keywords: Apportionment; concurrent causes; delay; loss and expense; prevention; American authorities

Introduction

The construction of the City Inn on Temple Way in Bristol might be thought a somewhat ill-starred venture, having now provided occasion for three separate court judgments[1] in the quest to resolve the differences between the employer, City Inn Ltd, and contractor, Shepherd Construction Ltd. This paper focuses on part of the judgment in the third case, referred to in this paper as *City Inn.* Although this paper is written from an English law perspective, Scots decisions are, as Winter (2006) points out, deservedly given much respect by the English judiciary, and often mould the development of English authorities[2]. Consequently, it is important to scrutinise substantive Scots decisions to try and identify whether the approaches advocated are appropriate in advance of any attempt to translocate Scots law into England.

In *City Inn* the parties contracted on an amended Joint Contracts Tribunal Standard Form of Building Contract (Private Edition with Quantities) (1980 Edition). A dispute arose regarding the appropriate

[1] *City Inn Limited v Shepherd Construction Ltd* [2002] SLT 781, Outer House of Session; *City Inn Limited v Shepherd Construction Ltd* [2003] SLT 885, Inner House; *City Inn Limited v Shepherd Construction Ltd* [2008] BLR 269, Outer House

[2] For example *London Underground Limited v City Link Telecommunications Limited* [2007] BLR 391 applied *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* 2004 SC 713, IH

date for contractual completion. The employer argued that the appropriate date was 9 weeks prior to practical completion, meaning that £270,000 liquidated and ascertained damages ("LADs") would have been due from the contractor. The dispute was referred to court. Whilst the judgment deals with a number of issues, the aspect addressed here is the analysis and application of the law and practice surrounding the granting of extensions of time and the awarding of sums for loss and expense.

Relevant Facts

The contract contained provision for the contractual completion date to be extended if certain Relevant Events occurred The architect had to consider any notification of alleged Relevant Events received from the contractor, and then:

> *"If, in the opinion of the Architect… any of the events which are stated by the Contractor to be the cause of the delay is a Relevant Event and … the completion of the Works is likely to be delayed thereby beyond the Completion Date, the Architect shall […] give an extension of time by fixing such later date as the Completion Date as he then estimates to be fair and reasonable."* (extract from JCT 1980 Clause 25.3.1)

The contract also provided for the contractor to recover additional payment in respect of loss and/or expense caused by a number of specified causes. Upon receipt of an application from the contractor the architect has to "*ascertain ... the amount of such loss and/or expense which has been or is being incurred by the Contractor"* (extract from JCT 1980, Clause 26.1)

Following a painstaking review of the factual and expert evidence, Lord Drummond Young concluded that completion had been delayed by a total of 13 factors. Eleven of these constituted both Relevant Events and grounds for recovery of loss and/or expense whilst two were factors for which the contractor bore sole responsibility[3]. In many cases the factors were operating at the same time, hence prompting the problem of how such concurrent causes were to be dealt with. Lord Drummond Young shifts the operation of the extension of time clause in this case away from the general law of causation and sets it up as a contractually specific operation. Developing from the example of Dyson J in *Henry Boot v Malmaison*[4] that if a contractor was delayed both by exceptionally inclement weather (a Relevant Event) and by a labour shortage (a contractor's risk item) then the extension of time would be granted, Lord Drummond Young argues that:

[3] [2008] BLR 269, para 160
[4] *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32, at para 13

"On the approach to causation found in the general law of contract and delict [tort], it could not be said that the bad weather caused the delay because the delay would have occurred in any event. Under clause 25, however, the architect may take the bad weather into account to the extent that he considers it fair and reasonable to do so." [5]

He then develops this contract specific argument into his conclusion, which he subsequently supports by reference to American authority, that:

"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[6]*, 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.*[7]

… [The apportionment] exercise is broadly similar to the apportionment of liability on account of contributory negligence or contribution among joint wrongdoers. In my opinion two main elements are important: the degree of culpability involved in each of the causes of the delay and the significance of each of the factors in causing the delay. In practice culpability is likely to be the less important of these two factors".[8]

He then conducts an apportionment, taking into account the number of causative factors on each side, the extent of the works affected by the various factors and concludes that 9 weeks extension of time is due, which coincides with the date on which Practical Completion was certified, hence meaning that no LADs are payable.

Lord Drummond Young also decides that the apportionment approach, this time advocated in *John Doyle Construction Limited v Laing Management (Scotland)*[9] ("*Doyle*") is appropriate for determining loss and expense claims and makes an award for the same 9 week period under Clause 26.1 JCT (1980). He again stresses that this approach is one that is available specifically as a consequence of the wording of the relevant clause, and not "*based on a rigidly logical application of the principles of causation as they apply in the general law of contract and delict.*" [10]

[5] [2008] BLR 269, para 16
[6] Rejecting Judge Seymour's analysis in *Royal Brompton NHS Trust v Hammond (No 7)* (2001) 76 Con LR 148 (at para 31)
[7] [2008] BLR 269, para 19
[8] [2008] BLR 269, para 159
[9] *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* 2004 SC 713, IH
[10] [2008] BLR 269, para 168

Aims and Method

This paper aims to assess the validity of Lord Drummond Young's findings that:

1. In cases of concurrency of delaying causes it is legally possible and appropriate to determine the extension of time by apportioning the relative responsibility of the contractor and employer.

2. In cases of concurrency of delaying and or disrupting causes it is legally possible and appropriate to determine the amount of damages payable by apportioning the relative responsibility of the contractor and employer.

As indicated above, Lord Drummond Young makes these findings on the basis that, whatever might be the underlying common law, the specific contractual wording which obtained in *City Inn* permits apportionment to occur, and that such apportionment should be carried out in a manner akin to that adopted in relation to contribution or contributory negligence. In order to assess these assertions the method adopted in this paper is to examine:

a. The underlying position as to apportionment in English law;

b. The American authorities relied on to support the claims for apportionment;

c. The contractual wording;

d. Whether, in relation to extensions of time only, the prevention principle renders apportionment unavailable;

e. Whether, in light of the findings from the above examinations, in the specific case of *City Inn* Lord Drummond Young's assertions are well founded.

The Underlying Position

The scope of this paper does not permit coverage of common law causation, contributory negligence or contribution to any convincing depth. Lord Drummond Young's depiction of common law causation being essentially an "*all or nothing*" affair is borne out by most of the authorities[11], though

[11] See Brannigan and Phillipo (2007) for a consideration of this area.

there are some isolated[12], and arguably beleaguered[13], examples of apportionment being conducted at common law. Both the *Law Reform (Contributory Negligence) Act 1945*[14] (*"the 1945 Act")* and the *Civil Liability (Contribution) Act 1978*[15] *("the 1978 Act")* were enacted in order to overcome rigidities in the common law, both permit apportionment to occur on the basis of what the court considers *"just and equitable"*[16] and in relation to both such exercises the court is entitled to factor in not just causation, but also *"blameworthiness"* [17]. In that context the intellectual attraction of the flexibility of apportionment to solve the problems of concurrent causes is undeniable[18], the question is whether in *City Inn* that aim was properly achieved.

American Authorities

Aware that apportionment was not available at common law Lord Drummond Young argued for apportionment on a purely contractual basis. To justify the appropriateness of such an approach reliance was placed upon American authorities.

The practice of appealing to US authority is relatively common. Nash (2002) argues that this is because it was in the US that Critical Pathway analysis was pioneered, hence the issues and arguments are arguably more developed than in the UK, and certainly there are many more reported cases (Fenn et al 1998, p 800-801). The cases most often cited are decisions of Federal courts or administrative Contract Boards in relation to claims against the US Government. Drawing on US authority to support an argument does not appear to be an innately flawed approach, however, for the process to be valid, it is vital to ensure that one is comparing like with like.

As in England, in the US multiple causes of delay pose particular problems for contractors seeking to avoid exposure to liquidated damages and/or to obtain compensation for delay and disruption. The issue was addressed in detail by the Court of Federal Claims in *R P Wallace v United States*[19] (*"Wallace"*). Works were completed late and liquidated damages were levied. The contractor alleged that some of the delays were the fault of the employer and sought thereby to avoid liquidated damages. Allegra, J confirmed that:

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[12] *Tennant Radiant Heat Ltd v Warrington Development Corpn* [1988] 1 EGLR 41 (CA); *W Lamb Limited v J Jarvis Plc* (1998) 60 Con L R 1

[13] *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1990] 1 QB 818 , per May LJ, at 904; and Law Commission 1993, para 3.13

[14] 8 & 9 Geo 6, c 28

[15] c 47

[16] s. 1(1) 1945 Act; s 2(1) 1978 Act

[17] Law Commission 1993 para 3.14, 4.18 ff *;* and *Re-Source America International Ltd v Platt Site Services* (2004) 95 Con LR 1.

[18] It appears that such pragmatic approaches are fairly readily available in civil jurisdictions (Paola and Spanu 2006; Tremblay 2003)

[19] (2004) 63 Fed Cl 402

"Thornier issues are posed by concurrent or sequential delays - the first occurring where both parties are responsible for the same period of delay, the second, where one party and then the other cause different delays seriatim or intermittently.[20]*"*

American law treats these two circumstances differently. In the case of concurrent delay[21], a contractor will generally receive what in the UK would be summarised as "time, but no money"[22]. The more complex issue arose in relation to sequential delays (i.e. "*where one party and then the other cause different delays seriatim or intermittently"*). The contractor had tried to rely on the "*rule against apportionment*" which is derived from *United States v United Engineering and Constructing Co*[23] and is to the effect that "*where delays are caused by both parties to the contract the court will not attempt to apportion them, but will simply hold that the provisions of the contract with reference to liquidated damages will be annulled*."[24] However, Allegra J's careful consideration of the authorities establishes that despite these *dicta*, apportionment of liquidated damages in a *sequential* delay situation *is* sanctioned, and by the Supreme Court, in *Robinson v United States*[25].

Wallace has since been approved on at least two occasions by the Court of Federal Claims[26]. More recently, that court again considered this aspect of the law in *Cumberland Cas & Sur Co v US*[27], underlining the importance of evidence being needed to establish a clear apportionment of delay and expense attributable to each party, and also confirming that in the case of concurrent delay "*apportionment of liability may be impossible*".

Although none of these cases were referred to in *City Inn*, the case that was, *Appeal of Chas I Cunningham*[28] ("*Cunningham*") specifically relied on the Supreme Court case of *Robinson*. Consequently though the court did hold that a contracting officer should make "*if at all feasible, a fair apportionment*" when "*ascertaining"* the appropriate extension of time, this reference relates to *sequential* and not concurrent delays and refers to the exercise, perhaps inappropriately termed "*apportionment*", of picking out from a series of successive delay periods those which are wholly attributable to one or other party. In short, Lord Drummond Young can take no support for his apportionment approach from the American case he cited.

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[20] Ibid
[21] Note that in the US no distinction is drawn between what the SCL Protocol terms "true concurrent delay" and the "concurrent effect of sequential delay events" (1.4.4). As already indicated, *City Inn* takes this approach too, rejecting the *Royal Brompton* analysis.
[22] The Henry Boot v Malmaison approach; 70 Con LR 32
[23] 234 U.S. 236, 242, 49 Ct.Cl. 689, 34 S.Ct. 843, 58 L.Ed. 1294 (1914)
[24] (2004) 63 Fed Cl 402, at 410, per Allegra J
[25] 261 US 486, 43 S Ct. 420, 67 L.Ed 760 (1923)
[26] (2005) *George Sollitt Construction v United State* 64 Fed Cl 229; and (2005) *Sunshine Construction & Engineering v United States* 64 Fed Cl 346
[27] Fed Cl – 2008 WL 2628433
[28] 57-2 BCA P, 164 Interior Dec 449, IBCA 60, 1957 WL 139 (IBCA)

American Authorities and *Doyle*

In *Doyle* apportionment appeared in the context of failed global claims. A global claim is one where a claimant cannot establish causal links between each alleged causative factor and each loss, but *can* establish that *all* causative factors are the defendant's responsibility and therefore contends that all losses are recoverable[29]. The issue was whether the claimant could recover anything if they failed to establish that *all* causative factors were the defendant's responsibility. In ostensible reliance on a number of American decisions, Lord MacFadyen held:

"…it may be possible to apportion the loss between the causes for which the employer is responsible and other causes. […] Such a procedure may be appropriate in a case where the causes of the loss are truly concurrent, in the sense that both operate together at the same time to produce a single consequence." [30]

Three US cases were relied on to justify this approach: *Boyajian v United States*[31], *Lichter v Mellon-Stuart* [32] and *Phillips Construction Co Inc v United States*[33]. References in *Boyajian* to the Court saving part of a failed global claim are cursory[34], and the entire claim failed because the claimant had not tried to strip out the effects of factors for which the defendant was not responsible. The paragraph quoted by Lord Macfadyen, suggesting that in appropriate cases a "*jury verdict*" award might be made[35] refers specifically to the *Phillips* case. The summary of *Phillips* provided in *Doyle*[36] apparently supports the pure apportionment approach, however, a closer look at the case tells a different story.

In *Phillips*, the contractor bore the risk of rainfall delaying progress. Rain did delay progress, but its effect was exacerbated by the unexpectedly poor drainage system, which the contractor argued was a "*previously unknown physical condition*"[37] for which the employer was contractually responsible. The contractor advanced a global claim adducing expert evidence that over 50% of the site had been affected by flooding and seeking costs calculated by reference to that area. The employer argued that the relevant issue was the amount of the site regularly affected by standing water, since only standing water was indicative of poor drainage. The employer adduced evidence that 10.2% of the site was so

[29] See: *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51; *Wharf Properties Ltd v Eric Cumine Associates* (1991) 52 BLR 8; *John Holland Construction & Engineering Pty Ltd v KvaernerR J Brown Ltd* (1996) 82 BLR 81;
[30] 2004 SC 713, IH, at para 16
[31] *Boyajian v United States* (1970) 191 Ct Cl 233, 423 F. 2d 1231
[32] *Lichter v Mellon-Stuart* (1962) 305 F 2d 216, Federal Court of Appeals
[33] *Phillips Construction Co Inc v United States* (1968) 184 Ct.Cl. 249, 394 F.2d 834 .
[34] 423 F. 2d 1231, at 1244 per Commissioner Gamer
[35] 2004 SC 713, IH, at para 14
[36] 2004 SC 713, IH, at para 19
[37] 394 F.2d 834 , at 837.

affected. The contractor, whilst denying the argument, accepted the 10.2% figure for areas affected by standing water. The tribunal rejected the global claim because the contractor had not stripped out the effect of the rain for which the contractor bore contractual responsibility, but then made an award for the contractor which, though not fully explained (and hence akin to a "*jury verdict*" award) was based on the 10.2% agreed figure. These facts do demonstrate a tribunal stepping in to partially save an otherwise failed global claim, but doing so in a very restricted, evidence based manner, which bears no relationship with the broad brush apportionment approach suggested at points in *Doyle*.

The *Lichter* case is similar. Here the main contractor pursued a global claim against a sub-contractor arising from poor workmanship. It became apparent that part of the loss sought was caused by factors, including inclement weather, for which the sub-contractor was not contractually responsible. The tribunal again saved part of the claim and made an award to the main contractor, because there was adequate evidence to assess how much of the global claim related to poor workmanship alone.

None of these cases appear to support Lord MacFadyen's suggestion that a court may conduct an apportionment in cases of concurrent causes. Rather they show how a tribunal can be flexible and use available evidence to make an award in respect of part of a claim, on standard causation principles. Whilst Ramsey J cited *Doyle* with approval in *London Underground Limited v City Link Telecommunications Limited*[38] his focus is, it is submitted, on this more limited basis. Accordingly, none of the American cases referred to, directly or indirectly, in *City Inn* provide any support for concurrent cause apportionment. Lord Drummond Young's argument for concurrent cause apportionment therefore appears to rest solely on the precise words used in the contract.

Contractual Wording

General principles, such as those outlined thus far, may be open to contractual manipulation by appropriate words[39]. At the outset of the judgment much is made of the significance of the "*fair and reasonable*" discretion afforded by clause 25, and its effect is equated with the "*just and equitable*" discretion available under the 1945 and 1978 Acts. Moreover a distinction is drawn between the "*fair and reasonable*" discretion and the clause 26 discretion, which requires the architect simply to "*ascertain*" the losses. Despite these matters, when it comes to making a decision, Lord Drummond Young indicates that he is "*unable to discover any reason for treating the two exercises under clause 25 and clause 26 on a different basis*."

[38] [2007] BLR 391, at para 145
[39] Cf *dicta* of Wilcox J cited from *Great Eastern* supra.

It does, however, appear that a distinction can be made. "*Ascertain*" commonly means "*To find out or learn for a certainty by experiment, examination, or investigation; to make sure of, get to know*" (OED 1989). There is no specific suggestion of conducting an apportionment and it is submitted that the clause requires an architect only to draw conclusions, based on standard causation principles, in light of the evidence available. The lack of sufficiently clear contractual wording coupled with the unsupportive *Doyle* authorities and the probable unavailability of apportionment at common law mean, it is submitted, that the *City Inn* approach to apportioning loss and expense was incorrect.

"*Fair and reasonable*" by contrast does arguably connote a more flexible approach to assessment and consideration must now be given to whether there are legal principles which would prohibit such an approach.

Prevention and Malmaison

A specific principle of causation exists which appears to apply only to the granting of extensions of time in circumstances where there are two (or more) causes of delay operating concurrently, one (or some) of which would entitle the contractor to an extension of time, and others where the contractor is in culpable delay. Prior to *City Inn* it appeared reasonably settled that such a circumstance would be determined according Dyson, J's *dicta* in *Henry Boot v Malmaison*[40]*: "…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"*.

It is to be regretted that this approach was not argued out by Dyson J, he simply adopted an agreement to that effect of the two parties. The rationale suggested by Marrin (2002) is that the approach reflects the outcome of commercial risk sharing between the parties such that if one operative reason for delay affords the contractor grounds for relief, then the contractor should have his relief.[41] This is a pragmatic solution which permits a straightforward operation of extension of time clauses, albeit the reasoning is somehow legally unsatisfying. An alternative justification for the approach is cited by the Society of Construction Law as justification for effectively adopting the *Malmaison* approach in the Protocol (SCL, 2004, §1.4.12, p 17) and explored by Tobin (2007), which is that unless the *Malmaison* approach is adopted, operation of the contract is likely to offend the prevention principle:

[40] *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32, at para 13

[41] Marrin attributes this approach to dicta of Judge Edgar Fay in *Henry Boot Construction v Central Lancashire New Town Development Corporation* [1981] 15 BLR 1, though the Author has not located the relevant words in that case report.

"That is, in a situation of true concurrency an event for which the owner is liable and an event for which the contractor is liable may both be considered 100% responsible for the delay. To attempt to reduce this 100% owner responsibility (by apportioning some liability to the contractor) the contractor will be prevented from completing by the contractual date for completion." (Tobin 2007)

This reasoning reflects the approach to the issue taken by Brooking J in *SMK v Hili*[42] and would provide a neat legal justification for *Malmaison* were it not that *Malmaison* applies to all Relevant Events, irrespective of whether they would otherwise amount to employer prevention. Hence, if a complete explanation is sought we must look to that delineated by Marrin. Be that as it may, *City Inn* discards such approaches by advocating pure apportionment in relation to extension of time clauses[43] To assess the extent to which such a radical approach may be legally effective, the law of prevention must be considered in more detail

The Law of Prevention

Holme v Guppy[44] is the earliest source usually cited, where an employer was denied any liquidated damages from a contractor who completed well after the contractual completion date, because part of the delay was caused by the employer failing to give possession of the site on time. Parke B noted that "*there are clear authorities, that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default*" consequently the employer was "*left at large*"[45]. Employer's acts can amount to prevention even if contractually permitted[46], and the solution is to include a provision to extend time to cater for prevention.[47]

There has been some discussion regarding whether the prevention principle is to be considered a rule of law or a rule of contractual construction[48]. Moreover, some of the discussion indicates that even if prevention is considered a rule of law, it is one which can be modified by express contractual consent[49].

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[42] *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391, per Brooking J at 394ff

[43] *City Inn* also advocates dominant cause analysis in the extension of time context, but this is obiter and will not be considered.

[44] (1838) 3 M & W 389

[45] ibid

[46] *Dodd v Churton* [1897] 1 QB 562, per Esher, MR at 566 and 567

[47] Employer prevention factors are the only ones which require accounting for to keep the liquidated damages clause working, but typically such clauses will also make allowance for other factors – inclement weather etc – which would otherwise be contractor risks.

[48] *E.g.Trollope & Colls Ltd v Northwest Metropolitan Regional Hospital Board* [1973] 1 WLR 601, HL per Lord Pearson at 607

[49] *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391, per Brooking J at 394ff

In *Jones v St John's College*[50] ("*Jones*") the contractor signed up to a contract under which he specifically agreed not only to complete the works by the due date, but also any variations which the employer ordered "*to all intents and purposes as if such alterations and additions had been originally comprised within the words of the contract*"[51]. Inevitably the variations impeded progress, and the contractor then sought to avoid the levy of liquidated damages. The Court of Appeal decided that the contractor, though unwise to have signed up to a contract in those terms, was bound by it. Furst and Ramsey (2006, §9-019, p.321) identify a further two, albeit fairly venerable, cases which have been decided along similar lines[52] If *Jones* remains good law it is authority that the prevention principle, so far as it relates to contractually legitimate acts by an employer in circumstances similar to those which obtained in *Jones*, is one that can be overridden by clear express contractual language. The next question is whether prevention caused by an employer's breach of contract or default can be accomodated by contract, such that with an appropriately worded clause a contractor can be held liable to pay liquidated damages for a period of delay caused by employer default.

In *Alghussein Establishment v Eton College*[53] Lord Jauncey, who gave the only substantive judgment, established that there is undoubtedly at least a well established rule of contractual construction that it would take very clear words indeed for one party to be entitled to obtain a contractual benefit (e.g. liquidated damages) as result of their own contractual defaults. Since that threshold was not reached on the facts in *Alghussein* it was not necessary for Lord Jauncey to consider the ancillary question of whether there was an inalienable and absolute rule of law that no person shall *ever* be entitled to take advantage of their own wrong, regardless of the wording of the contract. If *Alghussein* is currently the best available authority on this point, it appears legally possible for a valid contract to be drafted which would permit an employer to benefit by receipt of liquidated damages from a delay which the employer had themselves caused by a contractual default, albeit any such formulation would be vulnerable to careful scrutiny by the court.

More recently the decision in an Australian case, *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [54] ("*Gaymark*"), has prompted further consideration of this issue. Typically extension of time clauses include a notice procedure requiring the contractor to notify the contract administrator of delay as it occurs. In *Gaymark* the contract administrator was not contractually entitled to grant an extension of time unless the contractor complied with strict notice procedures. The contractor was delayed by the employer but, having failed to comply with the notice provisions, no extension of time

[50](1870-71) LR 6 QB 115
[51](1870-71) LR 6 QB 115, at 125
[52]*Tew v Newbold-on-Avon United District School Board (1884)* 1 Cab & El 260; *Sattin v Poole* (1901) Hudson Building Contracts (4th Edn) Vol 2, p 306
[53] [1988] 1 WLR 587
[54] [1999] NTSC 143, Supreme Court of the Northern Territories.

was granted and liquidated damages were levied. The court decided that this was contrary to the prevention principle and disapplied the liquidated damages clause.

Currently the ascendant analysis of *Gaymark* is that it was wrongly decided. In *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Limited (No 2)* [55] ("*Multiplex*") Jackson J approved the reasoning of Wallace (2002) and took support from obiter dicta of Cole J from an earlier Australian decision; "*If the Builder having a right to claim an extension of time fails to do so it cannot claim that the act of prevention which would have entitled it to an extension of time for Practical Completion resulted in its inability to complete by that time"*[56]. Jackson J expands on this, asserting that "*If Gaymark is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option he could set time at large*" [57]. Though *Multiplex* is only a first instance decision, and moreover the comments of Jackson J on this point are *obiter dicta*, if this is the correct analysis it seems to follow that the prevention principle is not an absolute rule of law even in relation to employer defaults but rather is a general principle susceptible to express contractual amendment.

The dismissal of the *Gaymark* analysis has not received universal approbation. *Gaymark* would enable contractors to set time at large at will only if notification is made a condition precedent to obtaining an extension of time. Whilst there is no doubt[58] that there are definite administrative advantages in contractors keeping employers informed of delays as they arise, Rae (2006) argues that making notification a condition precedent shifts the risk of employer delays over to the contractor in contravention to the prevention principle, particularly if the notice provisions are onerous in terms of information to be provided and deadlines to be met. In that context Rae argues, relying on *dicta* from an earlier iteration of *City Inn*[59] that courts should have the power to strike down condition precedent clauses – and thereby invoke the prevention principle - to the extent that they impose an excessive burden on the contractor (Rae 2006). Furst and Ramsey are similarly doubtful that a contractual term, the effect of which is, under certain conditions, to leave the contractor responsible for employer default can ever be justified, or at least not without express words explaining clearly that that is the case (Furst and Ramsey 2006, §9-025 p 324).

Apart from the apparently very limited purview of *Jones v St John's College*, there appears no judicial or academic support for a contractor to be immediately bound by contract to take responsibility for an employer's act of prevention, and indeed there is considerable weight of authority in the opposite

[55] [2007] BLR 195, [2007] EWHC 447
[56] *Turner Corporation Limited (Receiver and Manager Appointed) v Austotel Pty Ltd* 1997 BCL 378, at 12
[57] [2007] BLR 195, [2007] EWHC 447 at para 103
[58] [2007] BLR 195, [2007] EWHC 447 at para 103
[59] [2003] BLR 468

direction. At the same time, there is some support for permitting contractual formulations which could result in the contractor becoming responsible for the employer's default, although only after having a contractual opportunity to avoid that effect and only if very clearly worded.

Returning to *City Inn*, it is apparent that adopting a pure apportionment approach to dealing with concurrent causes of delay when determining an extension of time, as advocated by Lord Drummond Young, could result in a contractor being charged with liquidated damages for a period during which an employer's act of prevention was operative. For example, if completion of works was delayed by three weeks owing concurrently to the contractor rectifying defective work, the employer requiring a variation and the employer delaying the confirmation of an instruction, a pure apportionment might award 2 weeks extension of time, and levy 1 week's liquidated damages, on the basis that the three delaying factors were of equal effect. Such an approach appears to make significantly greater inroads into the prevention principle than the condition precedent mechanism, which is already disputed in some quarters. Even if the prevention principle *is* one which can be ousted by appropriately clear wording, it must be seriously doubted that merely including a clause which provides a contract administrator with power to make a "*fair and reasonable*" assessment of the extension of time is sufficiently clear.

Conclusion

This paper set out to assess the validity of Lord Drummond Young's findings that, given the contract terms which obtained in *City Inn* :

1. In cases of concurrency of delaying causes it is legally possible and appropriate to determine the extension of time by apportioning the relative responsibility of the contractor and employer.

2. In cases of concurrency of delaying and or disrupting causes it is legally possible and appropriate to determine the amount of damages payable by apportioning the relative responsibility of the contractor and employer.

A review of the common law relating to causation confirmed that for the most part it operates in an all or nothing way, even in the context of concurrent causes. Lord Drummond Young sought to justify his apportionment approach by calling on a number of American authorities. Closer examination of these authorities indicates that they are not examples of broad brush concurrent cause apportionment, but rather they support on the one hand the saving of fragments of a global claim on the basis of available evidence assessed on an orthodox basis, and on the other the adding together of a series of

discrete sequential delays in order to come to an aggregate figure for overall delay in relation to one party. As for whether the specific wording of the contract supports either contention, the clause relating to loss and/or expense, based, as it is, around the word "*ascertain*" does not seem to draw in apportionment on a contractual basis. Whilst the extension of time wording, "*fair and reasonable"*, seems more promising, extension of time clauses operate in the shadow of the prevention principle and it seems very doubtful that the words are sufficiently clear to oust that principle, even if this is possible, which is not certain.

In conclusion, for the reasons given, this paper argues that both of the findings under consideration are incorrect and neither should be imported into English law.

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