



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

**Lord Osborne
Lord Kingarth
Lord Carloway**

**[2010] CSIH 68
CA101/00**

OPINION OF LORD OSBORNE

in appeal

by

CITY INN LIMITED

Pursuers and Reclaimers:

against

SHEPHERD CONSTRUCTION LIMITED

Defenders and Respondents:

**Act: The Dean of Faculty, QC, Higgins; McGrigors LLP
Alt: McNeill, QC, Borland; Pinsent Masons**

22 July 2010

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 Edition 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 Limited. 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 Limited, "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 ten 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 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 eleven weeks in total, with the result that the contractual completion date should be fixed at 14 April 1999. That period of eleven 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 substructure 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 S.L.T. 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 S.L.T. 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 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 Edition 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 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 5 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 5 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:

...

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 (paras. 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 (e.g. para. 96 '.... in calculating the delay that was caused by any particular late instruction, the starting 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 (paras. 15 to 20 and 157 to 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 (paras. 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 9 weeks' loss and expense under Clause 26 of the Contract (paras. 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 (paras. 166 and 167);

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

8. in failing to properly construe Clause 13.8 of the Contract as being applicable to all instructions (paras. 140 to 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 (paras. 140-144);

10. in characterising Clause 13.8 as bestowing on the pursuers an immunity right capable of being waived (para. 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 (paras. 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 (para. 150);
13. in holding that the architect is to be deemed to know all the provisions of the Contract (para. 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 (para. 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 (paras. 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 (para. 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 (para.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 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 to 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 to 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 to 11 are concerned directly with the interpretation of clause 13.8, while grounds 12 to 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 to 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 L.T. 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 Company Limited v Norwich Union Fire Insurance Society Limited* [1918] A.C. 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 The 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 Limited & 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 (I.B.C.A.) 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 B.C.A. (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) Limited v McKinney Foundations Limited* [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 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 L.J. 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 Limited v Central Lancashire New Town Development Corporation* 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 The United States* [1982] USCAFED 64; 695F. 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 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] *S.M.K. Cabinets v Hili Modern Electrics Pty. Limited* [1984] V.R. 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 Limited v Chestermount Properties Limited* [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 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 Limited & 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 L.J. drew attention to the observations of Lord Wright in his speech in *Monarch Steamship Company Limited 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) Limited v Malmaison Hotel (Manchester) Limited* (1999) 70 Con LR 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 Limited v Chestermount Properties Limited* 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 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 e.g. 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) Limited v Malmaison Hotel (Manchester) Limited* was considered by Judge Richard Seymour QC in *Royal Brompton Hospital NHS Trust v Hammond & Others (No 7)* 2001 76 Con LR 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 and the recent decision of Dyson J. in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 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 ...'.

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 Con LR 32 at 37 (para. 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 (para. 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 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 common-sense 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 L.J. 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 Limited v Laing Management (Scotland) Limited* 2004 S.C. 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 to 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 *R. P. Wallace Inc v The 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 to 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 Limited v Secretary of State for Transport* [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 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 common-sense. 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 para. [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 common-sense. 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 Limited 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 Limited v The 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 para. [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. 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 to 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 made for the delays consequent on the lift installation and the construction of the stair balustrades resulted in a reduction of the period of eleven 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 (eleven 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 ten 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 S.L.T. 781. Lord Macfadyen considered this aspect of the case, following upon a procedure roll discussion, in paragraphs 30-32 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] A.C. 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

[67] The focus of the reclaimers' criticism in this regard was the Lord Ordinary's treatment of the circumstances in which a plea of waiver may operate, to be found in paragraph 145 of his Opinion. In

recognising that waiver involved the abandonment of a right, he expressed the view that the concept of a right, in this context, should be given a wide meaning. He considered that it should include, not only a right in the narrowest sense, consisting of a claim against another person, but should also extend to other forms of legal entitlement. These included entitlements that might more properly be described as privileges or immunities. Quoting W. N. Hohfeld in his work *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, (New Haven 1923), he said that a privilege was an entitlement to prevent another person from exercising a claim-right, and an immunity was an entitlement to prevent another person from exercising a power. He then expressed his conclusion that the reclaimers' right to invoke clause 13.8 could properly be characterised as an immunity. The respondents had a power to use the clause to claim an extension of time and the reclaimers had an immunity against that power if the respondents did not fulfil the requirements of the clause. The Lord Ordinary considered that an immunity could be the subject of waiver. It is therefore that analysis of the situation that requires to be examined.

[68] During the course of the debate before us extensive reference was made to authority on this matter. It is a right therefore to seek guidance in that direction. In *Donnison v The Employers' Accident and Livestock Insurance Co Ltd* 1897 (24 R. 681), the court had to consider a policy of accident insurance that provided that it should be a condition precedent to recovery that notice should be given within 14 days of the accident, and, in the case of death, the representatives of the deceased should agree to a post mortem examination, if required by the insurers. The insured met with an accident and died about a month afterwards. Notice of the accident was not sent to the company until three days before his death. After the death, the insurers wrote to the widow: "In accordance with the conditions of our policy, we desire to have a post-mortem examination of the deceased." They said nothing concerning any reservation of the objection to want of timeous notice. The widow gave her consent to the post-mortem examination. It was held that the insurers, by demanding a post-mortem examination, had waived the defence of want of timeous notice. In the principal judgment, the Lord Justice Clerk observed that the requirement as to notice was a condition precedent to any claim under the policy. He concluded at page 686:

"On the whole matter, I am of opinion, with the Lord Ordinary, that in making the demand upon the widow for a *post-mortem* examination, without giving her any notice of their intention to put forward the want of timeous notice as a preliminary defence to her claim, the company must be held to have waived their right to state that defence."

Lord Young was of the same view, saying at page 686:

"But they made a demand for a *post-mortem*, and I think they must be taken to have done so on the footing of having waived any defence they had on the ground of notice. They were entitled to waive it. That is not doubtful".

While this decision is of some age, it appears to me important in the present context, since what was held to have been waived was the right to raise a defence to a claim made under the policy upon the basis of failure to fulfil the condition precedent of timeous notice. It appears to me that that condition precedent is comparable in legal status to the requirement of clause 13.8.1. Accordingly, the case appears to me to support the view that the concept of a right that can be waived is broad enough to cover the right to raise a contractual defence to a contractual claim, in the event of its being made. In the course of argument before us the reclaimers sought to avoid the implications of this decision by averring that the court had been much affected by the burden imposed by the insurers on the widow concerned to authorise a post-mortem examination on her deceased husband. I doubt whether that contention amounts to any more than saying that, in the context of the application of the principle of waiver, equitable considerations are to be taken into account. That is no more than would be expected in relation to the application of a principle that has its origin in considerations of equity.

[69] The general explanation of the concept of waiver is to be found in the speech of Lord Wright in *Ross T. Smyth & Co Ltd v Bailey, Son & Co* (1940) 164 L.T. 103 at page 106. There, speaking of the word "waiver" he said: "It is also used where a party expressly or impliedly gives up a right to enforce a condition or rely on a right to rescind a contract...". It appears to us that those observations would be apt to embrace a situation, such as is involved here, where clause 13.8.1, in association with clause 13.8.5, provides for a condition precedent to the making of a claim for an extension of time.

[70] In *Banning v Wright* [1972] 1 W.L.R. 972 the circumstances were far removed from those of the present case, involving a consideration of the concept of waiver in the context of section 22(4) of the Finance Act 1963. However, at page 980 Lord Hailsham of St Marylebone made certain observations which might be thought to be of wider application. At page 979D-E, he quoted with approval a passage from *Hallsbury's Laws of England* to this effect:

"A person who is entitled to the benefit of a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not

exist..."

Plainly, under clause 13.8, the employer enjoys the benefit of the provision, which is designed to protect him against adverse unforeseen consequences of a variation. On that view, it is a contractual provision which the employer may waive.

[71] Perhaps the most authoritative decision on waiver in a Scottish context in recent years is *Armia Ltd v Daejan Developments Ltd* 1979 S.C. (H.L.) 56. The issue in the case was whether a condition in missives that there was nothing in the titles of the subjects which would prevent demolition and redevelopment had been waived by the actings of the purchaser after discovering burdens affecting redevelopment. At page 69 Lord Fraser of Tullybelton explained the plea of waiver. He said:

"The word 'waiver' is a vague term - see *Gloag on Contract* (2nd Ed) 281... [His Lordship then proceeded to quote from the speeches of Lord Hailsham of St Marylebone and Lord Reid in *Banning v Wright*] ... In *W.J. Allan & Co Ltd v El Nasr Export & Import Co* [1972] 2 Q.B. 189, 213A, Lord Denning M.R. expressed the opinion that it was not necessary for the party relying on the waiver to have suffered prejudice by his reliance, but that it was enough if he had conducted his affairs on the basis of the waiver. In the present case the reason why the plea of waiver fails is not that the respondents suffered no prejudice (although in my opinion that is true) but that the appellants never abandoned their right to refuse the title offered, and the respondents never conducted their affairs on the basis that they had."

At page 72 Lord Keith of Kinkel said:

"The topic of waiver may arise in a number of guises in a variety of contexts. The truth is that it is a creature difficult to describe but easy to recognise when one sees it, subject to the proviso that it is on occasion difficult to distinguish it from variation of a contract. ... The word 'waiver' connotes the abandonment of a right. ... The abandonment may be express, or it may be inferred from the facts and circumstances of the case. ... I conclude from these cases that the question whether or not there has been a waiver of a right is a question of fact, to be determined objectively upon a consideration of all the relevant evidence."

While this case is of importance, containing, as it does, general explanations, by judges of high authority, of the concept of waiver, I do not find it of particular assistance in the present context, since it does not elaborate the nature of the right which may be waived, which is what is in issue here.

[72] Although it was relied upon by the reclaimers, I do not find *Lousada & Co Ltd v J.E. Lesser (Properties) Ltd* 1990 S.C. 178 as of any assistance. The Second Division in that case held that the averments of the pursuers of waiver were insufficient to instruction of such a case. In *James Howden & Co Ltd v Taylor Woodrow Property Co Ltd* 1998 S.C. 853 an issue arose as to whether a right to resile from a construction contract had been waived. While the case contains general observations concerning the law of waiver, no particular assistance can be got from it, in my view, as regards the nature of the right which may be waived. Likewise, I can derive no assistance from *Minevco Ltd v Barratt (Southern) Ltd* (unreported; 16 March 2000), in which reference to waiver was peripheral.

[73] In *Evans v Argus Healthcare (Glenesk) Ltd* 2001 S.C.L.R. 117, the court decided that a pursuers' averments of waiver directed at the defenders' right to rely on the pursuers' failure to provide a deed of servitude were relevant for inquiry. Thus the averments of waiver related to the defenders' right to state a particular defence to the action for specific implement raised against them. That decision appears to me to show that the principle of waiver may apply to the stating of a particular defence to a claim. Reliance by the reclaimers on clause 13.8 of the Standard Form conditions I consider would be comparable to that. In his Opinion, Lord Macfadyen conducted a thorough review of the law of waiver. He stated his conclusions from that review in this way in paragraph 11 of his Opinion:

"It is, in my view, sufficient for the purposes of the present case to take from those authorities the propositions that (1) that waiver is constituted by the giving up or abandonment of a right; (2) that such abandonment may be express or may be a matter of inference from the actings of the party in whom the right in question was vested; (3) that determination of whether abandonment is to be inferred requires objective consideration of the facts and circumstances of the case; and (4) that circumstances which are also consistent with retention of the right in question will not support an inference that the right has been abandoned. It appears also to be necessary, for the purpose of relevantly supporting a plea of waiver, to aver that the party taking the plea has conducted his affairs on the basis that the right has been abandoned, but the issues between the parties in the present case does not turn on that aspect of the matter."

[74] It appears to us that further support for the position of the respondents on this ground of appeal is to be found in *Millar v Dickson* 2002 S.C. (P.C.) 30 in the Opinion of Lord Bingham of Cornhill. Although the case concerned was a criminal one, taken to the Privy Council on a devolution issue, relating to the status of

temporary sheriffs, his Lordship dealt with the law of waiver in paragraph 31 of his Opinion in this way:

"In most litigious situations the expression 'waiver' is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise."

For present purposes, it appears to me that that observation is of importance, having regard to the view expressed that the principle of waiver might operate in relation to the opportunity of a party to raise an objection. That seems to me to show that, for the purposes of deciding the nature of a right that may be waived, a wide view should be taken. That view directly supports the respondents' contention that the opportunity conferred upon the reclaimers by clause 13.8.5 of the Standard Form conditions to object to a claim for an extension of time may be the subject of a plea of waiver.

[74] In *E & J Glasgow Limited v UGC Estates Ltd* [2005] C.S.O.H. 63, Lord Eassie had to consider whether certain issues relating to waiver should be remitted to a proof. The case contains an observation which I consider to be cogent in the present context in paragraph 33 of his Opinion:

"However, while it is of course the case that in his speech in *Armia* Lord Keith described the doctrine of waiver as connoting the abandonment of a right, I am not persuaded by the principle proposition for the defenders that waiver cannot be deployed so as to cause something which does not come within the terms of a contractual provision to be treated as if it did. In a contractual context, waiver of a contractual term may necessarily imply that something which does not satisfy all the contractual provisions is yet to be treated as within those provisions because the party having an interest to insist on full satisfaction as either expressly, or by implication arising from the factual circumstances, waived his right to insist on one or more of the contractual conditions being duly fulfilled. In ordinary usage, waiving a contractual term is indeed to say that one is not insisting on one's right to require due observance of the term. ... [T]he authorities illustrate that a contractual term which is definitional of a contractual entitlement may be waived."

It was, of course, part of the reclaimers' argument that this passage was unsound. In the light of the authorities which I have reviewed, I disagree with that proposition. In my view, in the passage in question, Lord Eassie correctly stated the law. Reverting now to the position of the Lord Ordinary in the present case, in paragraph 145 of his Opinion, he categorised the reclaimers' right under clause 13.8 as an immunity which he concluded could be the subject of waiver. While I would not necessarily have chosen to use the terminology

employed by the Lord Ordinary in relation to the reclaimers' rights under clause 13.8, however one describes the reclaimers' entitlement, I am of the opinion that the contractual provisions in the clause, conceived in the interests of the employer, are contractual conditions capable of being waived. For these reasons I reject the contention which underlies Ground of Appeal 10. I should make clear that nothing said in *Hoult v Turpie* 2004 S.L.T. 308 seems to me inconsistent with the views that I have expressed. That case seems to me to turn on the particular terms of the agreement there under consideration.

Ground of Appeal 11

[76] In this ground of appeal, three distinct criticisms are made of the Lord Ordinary's decision. It is said that he erred in law in holding (i) that there was a relevant legal distinction between procedural provisions of the contract between the parties and other provisions; (ii) that the architect, who had no general power to waive compliance by the respondents' with the terms of the contract, had implied power to waive procedural provisions of it; and (iii) clause 13.8 was such a procedural provision. The Lord Ordinary's handling of these matters is to be found in paragraphs 148 and 149 of his Opinion. He concluded that, while an architect had no power to vary or waive the terms of a building contract on behalf of his client in relation to matters of substance, the position was different in relation to what might be called the procedural requirements of the contract. Thus he drew a distinction between those two types of provisions. In view of what occurred during the course of the submissions of junior counsel for the respondents, I do not find it necessary to decide whether the distinction perceived by the Lord Ordinary is valid. During his submissions on this part of the case, counsel for the respondents conceded, rightly in my view, that clause 13.8 was, on any view, more than a procedural provision. He accepted that it had, in certain circumstances, a substantive effect. In particular, clause 13.8.5 affected substantive rights under the contract, such as a right to obtain an extension of time. Furthermore, he stated that the reclaimers did not now seek to argue that the architect had any such implied authority as would enable a substantive provision of the contract to be waived upon the basis of his actings. In these circumstances, he accepted on behalf of the respondents that the Lord Ordinary had erred in law, if in no other respect, in holding that clause 13.8 was merely a procedural provision. In these circumstances, it is unnecessary to say more than that I agree that, to that extent, this ground of appeal is plainly well founded.

Ground of Appeal 12

[77] The formulation of this ground of appeal involves the contention that what is described as a power of waiver, presumably a reference to the possible application to the position of the architect of the common law principle of waiver, could not necessarily be implied in the express right of dispensation, which is a reference to the provisions of clause 13.8.4 of the Standard Form conditions which authorises the architect to dispense with the contractor's obligation under clause 13.8.1. In paragraph 150 of his Opinion, the Lord Ordinary appears to be considering the issue particularly of the possible co-existence of the express power of the architect contained in clause 13.8.4 with the possible application of the principle of waiver to the actings of the architect. Likewise, in the submissions made to us on behalf of the reclaimers, there was emphasis upon the alleged anomaly in the co-existence of that express power of dispensation with what is referred to as an implied right of waiver. It appears to me that, in the first place, there is confusion in the formulation of the reclaimers' argument in this respect. Furthermore, in view of the concession made by the respondents in relation to Ground of Appeal 11, the possibility of waiver being inferred against the reclaimers upon the basis of the actings of the architect has disappeared from consideration. Thus, we are no longer concerned with the possible co-existence in the architect of an express power to dispense with the provisions of clause 13.8.1 and what the reclaimers described in their submissions as an implied right of waiver, based presumably upon the actions of the architect. In short, it appears to me that the context in which the Lord Ordinary made his observations in paragraph 150 of his Opinion, against the background of which this ground of appeal was formulated, has disappeared in view of the respondents' concession to which we have referred.

[78] The context in which the issue of waiver now requires to be considered is one in which only the actings of the reclaimers can be considered. The express power of dispensation enshrined in clause 13.8.4, belongs not to the employers, but rather to their architect. In that situation, while I agree that in certain circumstances an express power to dispense with a provision might exclude the possibility of the waiver of that provision, that principle cannot operate where the power to dispense does not lie in the hands of the party, whose actings might give rise to a plea of waiver. In these circumstances, I conclude that this ground, so far as directed to possible waiver by the reclaimers themselves, is not well founded.

Ground of Appeal 13

[79] In this ground of appeal it is contended that the Lord Ordinary erred in law in holding that the architect was to be deemed to know all the provisions of the contract. This is, of course, a reference to what was said

by the Lord Ordinary in paragraph 153 of his Opinion. In that paragraph, he said this:

"Nevertheless, I do not think that it can be supposed that the architect was unaware of the terms of clause 13.8. It must generally be presumed that an architect is aware of the whole of the terms of the building contract under which he is acting; that seems fundamental to the architect's responsibilities."

In order to understand the significance, if any, of the Lord Ordinary's observations, it is necessary to recognise the context in which they were made. It is evident from the earlier part of paragraph 153 that the Lord Ordinary was dealing with a submission made by the reclaimers that the respondents had led no evidence to suggest that the architect was even aware of the terms of clause 13.8 when he issued decisions in relation to applications for extension of time. The argument was to the effect that the waiver of a right could not be inferred from circumstances that might be consistent with its retention; moreover, because waiver involved the abandonment of a right for all time, it could not be based on mere oversight. In that connection the reclaimers placed reliance on *Evans v Argus Healthcare (Glenesk) Ltd; Armia Ltd v Daejan Developments Ltd*; and *Oak Mall Greenock Ltd v McDonald's Restaurants Ltd* (unreported, 9 May 2003). The Lord Ordinary went on to say that he was in agreement with the propositions made. Likewise, I would agree with them. In this connection it is appropriate to note what was said by Lord Sutherland in *Porteous' Trustees v Porteous* 1991 S.L.T. 129, at page 132. There he said:

"I agree with counsel for the second defender that it will not suffice to show that a party had available to him information from which he could have ascertained that he had a right, unless the evidence goes to the extent of showing that he must have known that he had that right and cannot be heard to say that he was ignorant of it."

[80] It is quite clear from the terms of paragraph 153 of the Lord Ordinary's Opinion that he made the observations criticised in the context of an argument advanced by the reclaimers to the effect that the actings of the architect, in the context, could not give rise to a successful plea of waiver by the respondents. That being so, since the respondents have conceded that a plea of waiver could not be based upon the actings of the architect alone, the significance of the Lord Ordinary's observations, which are criticised, simply disappears. It is therefore strictly unnecessary to reach a conclusion on the contention advanced in this ground of appeal.

[81] Having said that, however, in my opinion, the contention is unsound. The position of the architect under a contract, such as that with which we are dealing, is that he administers the contract in several respects in

consequence of the status accorded to him by the terms of it. The architect is responsible for a wide range of decision making in connection with its administration. Not only is that true generally, but it is, in particular, the case in relation to the operation of clause 13.8, under which the architect has had placed upon him certain duties and responsibilities which are set forth in that clause. In these circumstances, I consider that an architect must generally be presumed to know the terms of a contract for the operation of which he was responsible, particularly a part of it the operation of which must necessarily involve him directly. In *Peter Raphael & Another v Wilcon Homes (Northern) Ltd* 1994 S.C.L.R. 940 Lord Johnston said at page 942:

"In particular, the defenders must be taken bound to know the terms of their own contract and to take any other view simply because of technicalities of pleading would be wholly artificial."

Just as a party to a contract therefore must generally be presumed to know the terms of the contract, so too, in my opinion, an architect must generally be presumed to know the terms of a contract which it is part of his responsibility to administer. To take any other view would be absurd and, in my opinion, undermine the operation of the whole law of contract. Accordingly, had it been necessary to do so, I would have rejected this ground of appeal.

Ground of Appeal 14

[82] The contention in this ground of appeal is that the Lord Ordinary erred in law in holding that the actings of the reclaimers' representatives at the site meeting of 8 April 1998 were sufficient to amount to waiver of the need to comply with clause 13.8 of the contractual conditions. I have some doubt as to whether that formulation properly reflects the issue that actually arises in relation to this part of the case. In paragraph 151 of the Lord Ordinary's Opinion he concluded, for the reasons there set out and having regard to the facts set forth in paragraphs 146 and 147 of the Opinion, that the immunity contained in clause 13.8 had been waived. There is one sense in which a decision that a right has been waived is a decision of fact. However, in the absence of a case of express waiver, a conclusion that a right has been waived must be based upon inference from primary facts proved. As I understand it, that is what the Lord Ordinary has done in this case. Thus the true question that arises is whether the Lord Ordinary's conclusion, derived by inference from the relevant primary facts, was one that he was entitled to reach. It is that issue that we now address.

[83] In approaching that question, I consider that the propositions enunciated by Lord Macfadyen in *Evans v Argus Healthcare (Glenesk) Ltd* in paragraph 11 of his Opinion are applicable. In particular, I consider that

propositions (3) and (4) express the correct approach here.

[84] There is one further general matter with which it is appropriate to deal at this stage. The only evidence that was led before the Lord Ordinary relating to the events of the site meeting of 8 April 1998 came from Mr David Dibben, the respondents' regional manager, who had been present at that meeting. In these circumstances, in examining the conclusion of the Lord Ordinary, it is right for us to bear in mind the principle enunciated by Lord Reid in *Ross v Associated Portland Cement Manufacturers Ltd* [1964] 1 W.L.R. 768 at page 775 and followed in *O'Donnell v Murdoch McKenzie & Co Ltd* 1967 S.C.(H.L.) 63 and *Davidson v Duncan* 1981 S.C. 83. Thus where a party has led no evidence upon a particular matter, the most favourable inferences may properly be drawn from evidence on that matter led by the other party.

[85] Turning now to the facts of the case, the background history relating to the radon gas venting scheme is set out in paragraphs 41 to 45 of the Lord Ordinary's Opinion. He comes to deal with the issue of waiver in relation to those facts particularly in paragraphs 146 and 147 of the Opinion. The form of membrane originally specified was the product Bituthene. On 23 March 1998, the architect issued an instruction to use an alternative form of membrane, known as Proofex (see Instruction No 9, dated 23 March 1998, 6/129 of process). By means of a letter to the architect, dated 31 March 1998 (No 7/13 of process) the respondents applied for an extension of time on the basis of delay said to be caused by the introduction of the particular gas venting scheme in question. That application made specific reference to clause 25 of the contract conditions. That matter, among others, was the subject of discussion at the project review meeting held on 8 April 1998, attended by representatives of the reclaimers and of the respondents. Mr J. A. M. Orr of the reclaimers expressed strong concern at the fact the respondents were asking for a three week extension at such an early stage. The Lord Ordinary has made findings concerning this meeting, in particular at paragraph 146 of his Opinion. Mr Dibben, in evidence which the Lord Ordinary accepted, stated that he did not think that, at that meeting, clause 13.8 of the contract conditions was ever mentioned. The minutes of the meeting are No 6/31 of process. It should be recorded that clause 13.8 was never mentioned by the architect, or in connection with the adjudication. The first time on which reference was made to it was on the last day of the first adjustment period in the present action, 20 September 2000. It was, of course, the case that a grant of an extension of time by the architect of four weeks was made. The respondents sought five further weeks, which became a matter of dispute that went before the adjudicator.

[86] Against this background, in paragraph 151 of his Opinion the Lord Ordinary concluded that the

reclaimers had waived the requirements of clause 13.8, both through their own actings at the meeting held on 8 April 1998 and through the actings of the architect in their approach to the claim intimated on 31 March 1998. In view of the respondents' concession, the issue is now whether the actings of the reclaimers' representatives at that meeting were such as to enable the conclusion properly to be drawn that the requirements of clause 13.8 had been waived. I have reached the conclusion that the Lord Ordinary was entitled to hold, on the material before him, that those requirements were waived by the reclaimers' representatives at the meeting in question. It is quite clear from the minutes of that meeting and from the evidence given by Mr Dibben of it that the issue of delay caused by the instruction relating to the gas venting scheme was the subject of discussion. However, that discussion proceeded, it appears, upon an examination of the merits or demerits of the claim. Plainly nothing was said about the invocation of clause 13.8. Clearly by 8 April 1998, the time limit provided for by clause 13.8.1 had expired. Accordingly, the provisions of clause 13.8.5 could have operated, had they been invoked. They were not. It was open to the Lord Ordinary to proceed on the basis of the general presumption that the reclaimers were aware of the terms of their own contract. It is clear from such cases as *Donnison v Employers' Accident and Livestock Insurance Co Ltd* and *Macdonald v Newall & Another* that silence in relation to a point that might be taken may give rise to the inference of waiver of that point. In my view, that equitable principle can and should operate in the circumstances of this case.

Ground of Appeal 15

[87] In this ground of appeal it is contended that the Lord Ordinary erred in law in finding as a fact that the defenders had acted in reliance on the purported actings of the reclaimers, both at the meeting on 8 April 1998 and thereafter. It is said that this is a finding that no judge, acting reasonably, could have made on the evidence. Particular criticism is focused upon what the Lord Ordinary has said in paragraphs 152 and 156.

[88] In paragraph 152, the Lord Ordinary states that one further requirement of waiver is that the person asserting the plea must have conducted his affairs in reliance on the waiver, although there is no need for him to have acted on it to his prejudice. As support for that approach, he cites *Armia Ltd v Daejan Developments Ltd*, particularly the observations of Lord Fraser of Tullybelton at page 69 and Lord Keith of Kinkel at page 72. It is appropriate once again to note what was said in that case. While Lord Keith makes no reference to the requirement that a person pleading waiver should have conducted his affairs on the basis of the waiver,

at page 69 Lord Fraser of Tullybelton quotes with apparent approval the observations of Lord Denning M.R. in *W. J. Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 Q.B. 189 at page 231A. He said that:

"... it was not necessary for the party relying on the waiver to have suffered prejudice by his reliance, but that it was enough if he had conducted his affairs on the basis of the waiver."

In paragraph 152 of his Opinion the Lord Ordinary proceeded upon the basis of that requirement and I see no reason to differ from him. I should say that I prefer to proceed upon that basis rather than to adopt the approach to a plea of acquiescence set out by Lord Nimmo Smith in paragraph 4 of his Opinion in *William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd* 2001 S.C.901. In view of the fact that *Lucas's Executors v Demarco* 1968 S.L.T. 89 was decided before the law of waiver was elaborated by the House of Lords in *Armia Ltd v Daejan Developments Ltd*, I do not find what was said there by Lord President Clyde at page 92 as of any particular assistance.

[89] The criticism of the Lord Ordinary made in this ground of appeal, characterised as an error of law, is in effect that no judge acting reasonably could have made the finding concerned in paragraph 152 of his Opinion upon the basis of the available evidence. In these circumstances, it is necessary to examine what evidence was in fact available to support his conclusion. In relation to the Lord Ordinary's finding relative to the meeting of 8 April 1998, there was available to him the evidence from Mr Dibben, already referred to. He attended that meeting and was the only person to do so who actually gave evidence. He was asked what effect there would have been on the respondents' conduct after that meeting, if clause 13.8 of the contractual conditions had been relied upon by the reclaimers, or their architect on their behalf, in relation to the respondents' first notice relating to delay regarding the gas venting issue. Mr Dibben stated that: "We would [have complied] with clause 13.8 for all potential claims for extension in time." (see Mr Dibben's re-examination on 8 June 2004 at pages 135-136). As he put it, had clause 13.8 been relied upon by the reclaimers, he would have instructed his staff accordingly, that is to say to comply with it. (See Mr Dibben's evidence-in-chief of 8 June 2004 at page 84). It was open to the Lord Ordinary to proceed on the basis of the general presumption that the respondents were aware of the terms of their contract. Evidence on this aspect of the case was also given on behalf of the respondents by Mr Kevin Cornish, their site manager. He stated that, had the reclaimers or their architects acted differently and had they indicated that they would be relying upon clause 13.8, the respondents would have followed the contractual terms to the letter. (See the agreed version of his evidence, absent a transcript, given in chief on 13 April 2004). He explained that the

respondents would have "developed protocols to ensure 13.8 was followed from thereon in. We would have been mad not to have done that." (See Mr Cornish's evidence-in-chief on 13 April 2004).

[90] It should also be recognised that, following upon the meeting of 8 April 1998, the respondents continued for many months to pursue their extension of time claim, based on the gas venting instruction, despite the fact that, had clause 13.8 been operated, such a claim would have been barred from the outset. When the architect did eventually reject that application in October 1998, that was done under reference to clause 25 of the Standard Conditions, having consulted with the reclaimers themselves as to the ground of rejection to be advanced. In addition to that, following upon the meeting of 8 April 1998, the respondents proceeded to make a number of applications for extensions of time on several grounds, proceeding in each case on the basis of clause 25 of the contract conditions. These were dealt with by the architect under reference to clause 25 only. In the event, the architect eventually awarded the respondents an extension of time of four weeks, an award which the reclaimers subsequently sought to have upheld before the adjudicator.

[91] In all these circumstances, in my view, the Lord Ordinary was wholly justified in concluding that the respondents had clearly conducted their affairs upon the basis of the waiver by the reclaimers of their right to invoke the provisions of clause 13.8, in particular clause 13.8.5. Accordingly, I would reject this ground of appeal.

Ground of Appeal 16

[92] In this ground of appeal it is contended that the Lord Ordinary erred in law 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 respondents' claim; and also in failing to provide any reasoning for so holding. The criticism advanced by the reclaimers is focused upon paragraph 156 of the Lord Ordinary's Opinion, in particular.

[92] In paragraph 156, the Lord Ordinary observes that, because of the view that he had taken on the construction of clause 13.8, it was unnecessary for him to consider how either waiver or personal bar would apply to elements of the respondents' claim other than the gas venting instruction. It is unnecessary to comment on that particular observation, since I have dealt with the issue of the construction of clause 13.8 elsewhere in this Opinion. Thereafter, the Lord Ordinary continues by saying that, in these cases, a broadly similar analysis would apply, subject to one exception. That exception relates to the issue of personal bar, as

opposed to waiver. However, the Lord Ordinary makes clear in this paragraph that because of the view which he has taken as to the construction of clause 13.8, it was not necessary for him to consider how the principles of waiver or personal bar might apply to elements of the respondents' claim other than that based on the gas venting instruction. It will be seen that the Lord Ordinary has sustained the respondents' plea-in-law 4, which relates to waiver only in relation to the gas venting instruction. It will be observed that he has neither sustained nor repelled the respondents' plea-in-law 5, which relates to personal bar. However, in relation to that latter issue, he has expressed the opinion that he considered that it could be said that there was the necessary ingredient of prejudice, in respect that the respondents did not make use of the clause 13.8 procedures on the assumption that their claims were being dealt with under clause 25. Thus the Lord Ordinary has made no decision in relation to how the principle of waiver might apply to the elements of the respondents' claim other than the gas venting instruction. Nevertheless, this ground of appeal focuses upon the Lord Ordinary's *obiter* observations in relation to that matter. Given that I see no reason to question the Lord Ordinary's approach to the construction of clause 13.8, it is unnecessary for us to deal specifically with these observations.

[94] However, it would be right to say that I can readily understand what the Lord Ordinary was intending to convey. The position in relation to those other elements was that instructions were issued from time to time, the works instructed were carried out by the respondents over a period of time, without the respondents seeking to operate the provisions of clause 13.8 and, thereafter, an extension of time application was made by them upon the basis of the provisions of clause 25 of the Standard Form conditions. Those sequences of events are plainly inconsistent with the invocation of the provisions of clause 13.8. At no point in this sequence of events did the pursuers, or the architect, take a stand upon the basis that clause 13.8 had not been complied with and that therefore the provisions of clause 13.8.5 eliminated the possibility of any extension of time. Furthermore, clause 13.8 was not invoked, or even referred to, in any contemporaneous correspondence relating to the project involving the reclaimers, or the architect. Subsequently the architect dealt with the other instructions only on the basis of clause 25, in the end, granting an extension of time of four weeks duration. That course of action was wholly inconsistent with any insistence upon the operation of clause 13.8. Indeed, as has already been observed, the reclaimers sought to defend the award of a four week extension of time made by the architect. In my view these circumstances clearly demonstrate that the pursuers had altogether departed from and abandoned their contractual right to insist upon the observance of

clause 13.8. While the Lord Ordinary has not spelled these matters out as I have just done, it is obvious to me that that is what he was saying in paragraph 156 of his Opinion. Accordingly I would reject this ground of appeal.

Ground of Appeal 17

[95] In this ground of appeal it is contended that the Lord Ordinary erred in law in finding as a fact that the respondents had acted to their prejudice in reliance on the actings of the reclaimers, such as to amount to a case of personal bar. It is said that this is a finding that no judge acting reasonably could have made on the evidence. At an early stage in the hearing before us, senior counsel for the respondents emphasised that there was no cross appeal at the instance of the respondents against the Lord Ordinary's decision. The Lord Ordinary had declined to sustain the respondents' plea of personal bar. Although he had not repelled their plea-in-law 5, neither had he sustained it. That remained the position. Accordingly, no submissions relating to this ground of appeal were made to us on behalf of the respondents. It is therefore unnecessary to express any view upon it. What the Lord Ordinary said relating to prejudice in paragraph 156 of his Opinion is plainly an *obiter* observation, which, in the absence of a cross-appeal, possesses no significance. Accordingly I shall say no more about this ground of appeal.

Further Observations

[96] An argument was addressed to the court by the Dean of Faculty, on behalf of the reclaimers, which was based upon the acknowledged fact that that the contract between the parties to this case was not signed by them until November 1998, many months after the works had commenced. The context of this argument was a critique of the Lord Ordinary's decision in relation to the respondents' plea of waiver. It was submitted that the fact that both parties had expressly signed a contract containing clause 13.8 of the conditions in November 1998 was fatal to the respondents' contention that the reclaimers had unequivocally abandoned their right to rely upon clause 13.8 by April 1998 and that the respondents thereafter had acted in reliance on this waiver.

[97] I would reject this argument. It may well be that the contract was formally executed in November 1998, but, until the Dean of Faculty raised the point in oral submissions, no significance had been attached by either party to that circumstance. The point was not raised in the pleadings in this case, nor was it addressed to the

Lord Ordinary. Whatever explanation there may be for this strange irregularity, I am of the opinion that this case must be approached upon the basis that the contractual provisions to which I have referred in detail were applicable to the relationship between the parties from the outset of the works. I have little doubt that that was recognised by the parties, who plainly attached little importance to the formality of formal execution of the contract documents. In these circumstances, I consider that it is proper to proceed, as did the Lord Ordinary, upon the basis that the relevant contractual provisions were applicable to the relationship between the parties from the outset of the works.



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

**Lord Osborne
Lord Kingarth
Lord Carloway**

**[2010] CSIH 68
CA101/00**

OPINION OF LORD KINGARTH

in Appeal

by

CITY INN LIMITED

Pursuers and Reclaimers:

against

SHEPHERD CONSTRUCTION LIMITED

Defenders and Respondents:

**Act: The Dean of Faculty, QC, Higgins; McGrigors LLP
Alt: McNeill, QC, Borland; Pinsent Masons**

22 July 2010

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

**EXTRA DIVISION, INNER HOUSE, COURT OF SESSION**

Lord Osborne
Lord Kingarth
Lord Carloway

[2010] CSIH 68
CA101/00

OPINION OF LORD CARLOWAY

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CITY INN LIMITEDPursuers and Reclaimers;

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SHEPHERD CONSTRUCTION LIMITED

Defenders and Respondents:

-
Act : The Dean of Faculty, Higgins; McGrigors LLP
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-
22 July 2010
-

[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 paras [140] to [144]) where he adopts that of Lord MacFadyen in *City Inn v Shepherd Construction* 2002 SLT 781 (at paras [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 (i.e. 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 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 ed) 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) v McKinney Foundations* [1970] 1 BLR 111 (Salmon LJ at 121) and *SMK Cabinets v Hili Modern Electrics Pty* [1984] VR 391 (Brooking J at 398) are essentially to the same effect.

[108] In *Balfour Beatty Building v Chestermount Properties* [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)* (1999) 70 Con LR 32. Dyson J states (para 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 (para [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 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 Con LR 148 (at para 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 (para [16]), if a Relevant Event would have caused a six week delay in the Completion Date, and a shortage of labour caused by a contractor's 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 (para [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.