Construction – Causation – Global Claims – Extensions of Time – Loss and Expense

Walter Lilly v Giles Patrick Mackay [2012] EWHC 1773 (TCC)

Mr Justice Akenhead gave important new guidance on causation and the correct approach to "global" claims. The case has already provoked extensive comment from an interlocutory judgment handed down on 12 March 2012 in which the Court granted the Claimant's application for disclosure, holding that legal advice privilege does not attach to documents generated by claims consultants even where the claims consultants concerned use legally qualified personnel[1]. **Sean Brannigan QC** led the team representing the successful Claimants.

The Claimant contractor had been engaged to construct a residential property under a JCT standard form of contract with bespoke amendments. The project fell into significant delay and the Claimant sought an extension of time and loss and expense.

In his final Judgment, Mr Justice Akenhead undertook a comprehensive review of the authorities and provided some guidance on the following important issues:

(a) The correct approach to calculating extensions of time, including the use which can be made of prospective or retrospective expert-driven delay analysis;
(b) The correct approach to ascertaining loss and expense under standard form contracts; and
(c) The extent to which loss and expense claims can be advanced on a "global" basis.

Extensions of Time

Mr Justice Akenhead refocused attention on the role the court generally plays when considering questions of extensions of time:

> "*It is first necessary to consider what the Contract between the parties requires in relation to the fixing of an appropriate extension of time. Whilst the Architect prior to the actual Practical Completion can grant a prospective extension of time, which is effectively a best assessment of what the likely future delay will be as a result of the Relevant Events in question, a court or arbitrator has the advantage when reviewing what extensions were due of knowing what actually happened. The Court or arbitrator must decide on a balance of probabilities what delay has actually been caused by such Relevant Events as have been found to exist…. How the court or arbitrator makes that decision must be based on the evidence, both actual and expert*[2]".

In undertaking that exercise the Court considered what the approach should be where a delay is caused by both the contractor and an employer default. Having considered the relevant authorities[3] he approved

[1] http://www.bailii.org/ew/cases/EWHC/TCC/2012/649.html
[2] Para 362 of the Judgment
[3] Balfour Beatty Building Ltd v Chestermount Properties Ltd (2003) 62 BLR 1, City Inn Ltd v Shepherd Construction Ltd [2010] BLR 473, Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR 32, De Beers v Atos Origin IT Services UK Ltd [2011] BLR 274, and Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 Comm.

the comments of Mr Justice Dyson in Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR 32, and expressly rejected the "apportionment" approach of City Inn Ltd v Shepherd Construction Ltd [2010] BLR 473. In doing so, he said:

> "*I am clearly of the view that, where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time. Part of the logic of this is that many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to construe [such clauses] on the basis that the Contractor should be denied a full extension of time in those circumstances. More importantly however, there is a straight contractual interpretation of [such clauses] which points very strongly in favour of the view that, provided that the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question. There is nothing in the wording of [such clauses] which expressly suggests that there is any sort of proviso to the effect that an extension should be reduced if the causation criterion is established. The fact that the Architect has to award a "fair and reasonable" extension does not imply that there should be some apportionment in the case of concurrent delays. The test is primarily a causation one. It therefore follows that, although of persuasive weight, the City Inn case is inapplicable within this jurisdiction*"[4] (emphasis added).

He also made a number of other interesting points concerning the assessment of extensions of time:

(a) First, that that the debate which often occurs between delay experts as to whether or not a "prospective" or "retrospective" delay analysis is the more appropriate is ultimately a sterile one because "*if each approach was done correctly, they should produce the same result*"[5].

(b) Secondly, snagging is an inevitable feature of most complex projects, such that time taken in snagging works per se is not delay caused by the contractor: such snagging could only be said to cause delay if it is excessive: "*Obviously, if there is an excessive amount of snagging and therefore more time than would otherwise have been reasonably necessary to perform the de-snagging exercise has to be expended, it can potentially be a cause of delay in itself*"[6]; and

(c) "[I]*n the delay assessment exercise the Court should be very cautious about giving significant weight to the supposedly contemporaneous views of persons who [do] not give evidence*"[7].

Loss and Expense – the correct approach under standard form contracts

In his judgment Mr Justice Akenhead considered the application of a typical standard form "loss and expense" clause. He concluded the following in relation to the particular loss and expense clause under consideration (Clause 26):

(a) "*Construing Clause 26.1.3 in its context, an entitlement to various heads of loss and expense will not be lost where for some of the loss details are not provided. Otherwise, one can have the absurd position that where £10 out of a £1 million claim is not adequately detailed but the rest of the claim is, the whole claim would fail to satisfy the condition precedent...*";

(b) "[*T]he condition precedent within Clause 26.1.3 only requires the Contractor to submit details which "are reasonably necessary" for the ascertainment of loss and expense. It does not say how the details are to be provided but there is no reason to believe that an offer to the Architect or*

[4] Para 370 of the Judgment.
[5] Para 380 of the Judgment.
[6] Para 379 of the Judgment.
[7] Para 382 of the Judgment.

Quantity Surveyor for them to inspect records at the Contractor's offices could not be construed as submission of details of loss and expense...";

(c) "[*W]hat is required is "details" of the loss and expense and that does not necessarily include all the backup accounting information which might support such detail...*"[8];

(d) "*There is no need to construe Clause 26.1.3 in a peculiarly strict way or in a way which is in some way penal as against the Contractor, particularly bearing in mind that all the Clause 26.2 grounds which give rise to the loss and expense entitlements are the fault and risk of the Employer.*"[9];

(e) "*It is legitimate to bear in mind that the Architect and the Quantity surveyor are not strangers to the project in considering what needs to be provided to them; this is consistent with the judgement of Mr Justice Vinelott in the Merton case...*"[10].

Crucially, this led to the following conclusion:

> "*Clause 26.1 talks of the exercise of ascertainment of loss and expense incurred or to be incurred. The word "ascertain" means to determine or discover definitely or, more archaically, with certainty. It is argued by DMW's Counsel that the Architect or the Quantity Surveyor can not ascertain unless a massive amount of detail and supporting documentation is provided. This is almost akin to saying that the Contractor must produce more conceivable material evidence such as is necessary to prove its claim beyond reasonable doubt. In my judgement, it is necessary to construe the words in a sensible and commercial way that would resonate with commercial parties in the real world. The Architect or the Quantity Surveyor must be put in the position in which they can be satisfied that all or some of the loss and expense claimed is likely to be or has been incurred. They do not have to be "certain". One has to bear in mind that the ultimate dispute resolution tribunal will decide any litigation or arbitration on a balance of probabilities and at that stage that tribunal will (only) have to be satisfied that the Contractor probably incurred loss or expense as a result of one or more of the events listed in Clause 26.2. Bearing in mind that one of the exercises which the Architect or Quantity Surveyor may do is allow loss and expense, which has not yet been incurred but which is merely "likely to be incurred"; in the absence of crystal ball gazing, they cannot be certain precisely what will happen in the future but they need only to be satisfied that the loss or expense will probably be incurred*"[11] (emphasis added).

Global Claims

The Defendant in **Walter Lilly** argued that the loss and expense claim was a "global" one and, as a result, was irrecoverable. That prompted Mr Justice Akenhead to embark on a careful consideration of the authorities surrounding "global" claims[12] and formed the following conclusions:

> "(a) *Ultimately, claims by contractors for delay or disruption related loss and expense must be proved as a matter of fact. Thus, the contractor has to demonstrate on a balance of probabilities that, first, events occurred which entitle it to loss and expense, secondly, that those events caused delay and/or disruption and thirdly that such delay or disruption caused it to incur loss and/or expense (or loss and damage as the case may be). I do not accept that, as a matter of principle, it has to be shown by a claimant contractor that it is impossible to plead and prove cause and effect in the normal way or that such*

[8] Paragraph 465 of the Judgment
[9] Paragraph 466 of the Judgment
[10] Paragraph 467 of the Judgment
[11] Paragraph 468 of the Judgment
[12] Crosby v Portland UDC (1967) 5 BLR 121, London Borough of Merton –v- Stanley Hugh Leach (1985) 32 BLR 68, Wharf Properties Ltd –v- Eric Cumine Associates (1991) 52 BLR 1, John Holland Construction & Engineering Pty Ltd –v- Kvaerner RJ Brown Pty Ltd (1996) 82 BLR 81, Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd 82 BLR 39, John Doyle Construction Ltd v Laing Management (Scotland) Ltd [20012] BLR 393 and Petromec Inc v. Petroleo Brasilerio SA Petrobras [2007] EWCA Civ 1371

impossibility is not the fault of the party seeking to advance the global claim. One needs to see of course what the contractual clause relied upon says to see if there are contractual restrictions on global cost or loss claims. Absent and subject to such restrictions, the claimant contractor simply has to prove its case on a balance of probabilities.

(b) *Clause 26 in this case lays down conditions precedent which, if not complied with, will bar to that extent claims under that clause. If and to the extent that those conditions are satisfied, there is nothing in Clause 26 which states that the direct loss and/or expense cannot be ascertained by appropriate assessments.*

(c) *It is open to contractors to prove these three elements with whatever evidence will satisfy the tribunal and the requisite standard of proof. There is no set way for contractors to prove these three elements. For instance, such a claim may be supported or even established by admission evidence or by detailed factual evidence which precisely links reimbursable events with individual days or weeks of delay or with individual instances of disruption and which then demonstrates with precision to the nearest penny what that delay or disruption actually cost.*

(d) *There is nothing in principle "wrong" with a "total" or "global" cost claim. However, there are added evidential difficulties (in many but not necessarily all cases) which a claimant contractor has to overcome. It will generally have to establish (on a balance of probabilities) that the loss which it has incurred (namely the difference between what it has cost the contractor and what it has been paid) would not have been incurred in any event. Thus, it will need to demonstrate that its accepted tender was sufficiently well priced that it would have made some net return. It will need to demonstrate in effect that there are no other matters which actually occurred (other than those relied upon in its pleaded case and which it has proved are likely to have caused the loss). It is wrong, as Counsel suggested, that the burden of proof in some way transfers to the defending party. It is of course open to that defending party to raise issues or adduce evidence that suggest or even show that the accepted tender was so low that the loss would have always occurred irrespective of the events relied upon by the claimant contractor or that other events (which are not relied upon by the claimant as causing or contributing to the loss or which are the "fault" or "risk" of the claimant contractor) occurred may have caused or did cause all or part of the loss.*

(e) *The fact that one or a series of events or factors (unpleaded or which are the risk or fault of the claimant contractor) caused or contributed (or cannot be proved not to have caused or contributed) to the total or global loss does not necessarily mean that the claimant contractor can recover nothing. It depends on what the impact of those events or factors is. An example would be where, say, a contractor's global loss is £1 million and it can prove that but for one overlooked and unpriced £50,000 item in its accepted tender it would probably have made a net return; the global loss claim does not fail simply because the tender was underpriced by £50,000; the consequence would simply be that the global loss is reduced by £50,000 because the claimant contractor has not been able to prove that £50,000 of the global loss would not have been incurred in any event. Similarly, taking the same example but there being events during the course of the contract which are the fault or risk of the claimant contractor which caused or cannot be demonstrated not to cause some loss, the overall claim will not be rejected save to the extent that those events caused some loss. An example might be (as in this case) time spent by WLC's management in dealing with some of the lift problems (in particular the over-cladding); assuming that this time can be quantified either precisely or at least by way of assessment, that amount would be deducted from the global loss. This is not inconsistent with the judge's reasoning in the Merton case that "a rolled up award can only be made in the case where the loss or expense attributable to each head of claim cannot in reality be separated", because, where the tribunal can take out of the "rolled up award" or "total" or "global" loss elements for which the contractor cannot recover loss in*

the proceedings, it will generally be left with the loss attributable to the events which the contractor is entitled to recover loss.

(f) Obviously, there is no need for the Court to go down the global or total cost route if the actual cost attributable to individual loss causing events can be readily or practicably determined. I do not consider that Vinelott J was saying in the Merton case (at page 102 last paragraph) that a contractor should be debarred from pursuing what he called a "rolled up award" if it could otherwise seek to prove its loss in another way. It may be that the tribunal will be more sceptical about the global cost claim if the direct linkage approach is readily available but is not deployed. That does not mean that the global cost claim should be rejected out of hand.

(g) DMW's Counsels' argument that a global award should not be made where the contractor has himself created the impossibility of disentanglement (relying on Merton per Vinelott J at 102, penultimate paragraph and John Holland per Byrne J at page 85) is not on analysis supported by those authorities and is wrong. Vinelott J was referring to unreasonable delay by the contractor in making its loss and/or expense claim; that delay would have led to their being non-compliance with the condition precedent but all that he was saying otherwise was that if such delay created difficulty the claim may not be allowed. He certainly was not saying that a global cost claim would be barred necessarily or at all if there was such delay. Byrne J relied on Vinelott J's observations and he was not saying that a global cost claim would be barred but simply that such a claim "has been held to be permissible in the case where it is impractical to disentangle that part of the loss which is attributable to each head of claim, and this situation has not been brought about by delay or other conduct of the claimant". In principle, unless the contract dictates that a global cost claim is not permissible if certain hurdles are not overcome, such a claim may be permissible on the facts and subject to proof."[13]

That passage provides valuable guidance to clarify the principles courts and arbitrators should apply in considering "global" claims and also to assist parties considering making such claims.

Conclusion

In **Walter Lilly**, Mr Justice Akenhead has delivered a thorough judgment that brings welcome clarity to several of the most interesting and difficult practical issues that arise in both domestic and international construction disputes: How extensions of time are to be assessed; how loss and expense claims should be considered; and the correct approach to global claims. It seems likely that this decision will prove to be the main authority on these issues and an essential reference point for those making, or resisting, such claims.

Construction – Settlement Agreement – Patent Defects – Release of Liability

Point West London Ltd v Mivan Ltd [2012] EWHC 1223 (TCC)

This case illustrates the potential consequences and difficulties associate with construing the scope of a post-completion settlement agreement. **Sean Brannigan QC** represented the successful Defendant builder.

The Claimant (a property developer) engaged the Defendant (a builder) to carry out curtain walling and heating system works at a property. After the works were completed, the parties entered into a settlement agreement (by correspondence) to resolve final issues about payment. It was agreed that a further

[13] Para 486 of the Judgment

payment of £50,000 was to be made to the builder "*representing the final assessment of monies due or to become due*". This was said to be "*achieving full and final settlement in respect of the above works, together with any and all outstanding matters*".

A number of issues had by this time arisen between the purchaser of the property and the developer. These issues related to the works which had been undertaken by the builder. The fact, but not scope or extent, of these defects was known to both the builder and developer at the time of the settlement agreement. The purchaser obtained judgment in 2011 against the developer in respect of these defects, and the developer in turn sought a declaration that the settlement agreement did not cover the builder's liability for the defects in question. It submitted that the agreement simply effected the quantification of a final account and a release from any continuing obligation to carry out further works. It did not, it was argued, discharge the builder from any existing liabilities.

Mr Justice Ramsey held that no special principles apply to settlement agreements: words should be given their natural and ordinary meaning in light of business common sense; the court will consider the background knowledge reasonably available to both parties in the situation they were in at the time of contracting; and it is not the function of the court to remedy or improve a bad bargain. However, the court should be slow to infer that a party to a settlement agreement was intending to surrender rights and claims of which it was unaware and could not have been aware.

With these principles in mind, the Judge found that the words "*any and all outstanding matters*" did in fact take the settlement further than a financial settlement and was intended to refer to any and all outstanding defects. The developer could not therefore claim against the builder in respect of its liability to the purchaser.

The case provides a strong warning about the importance of parties investigating potential liabilities that may arise prior to concluding a full and final settlement, and ensuring that the terms of the settlement are very carefully drafted to avoid losing any potential rights.

Adjudication – Final Certificates – Breakdown of Contractual Machinery – Contractual Set-off – TeCSA Adjudication Rules

R and C Electrical Engineers Limited v Shaylor Construction Limited [2012] EWHC 1254 (TCC)

This is an important decision in relation to the right of set-off in adjudication enforcement. The Claimant was represented by **Allen Dyer**.

The claimant (a sub-sub-contractor) had been successful in a claim for payment in an adjudication brought against the sub-contractor. The adjudicator had ordered that payment be made after the issue of a Final Certificate under the main contract, pursuant to a term of the sub-contract. The claimant argued that the contractual mechanism in the main contract had subsequently broken down, as the Final Certificate was not issued on time. The contractual precondition to payment was consequently a nullity; and as a result the Claimant should be paid the sums ordered immediately. This was resisted by the Defendant, which additionally argued that it was entitled to set off other sums against the decision.

The claimant therefore sought to vary the adjudicator's decision by requesting an order that the sums awarded by the adjudicator be paid forthwith, rather than after issue of the Final Certificate.

Mr Justice Edwards-Stuart concluded that the claimant had failed to show that the certification procedure under the Main Contract had broken down and could not be revived, and declined to grant the relief sought. He found that that there was insufficient evidence before him of the Defendant's dispute with the main contractor concerning the true actual date of completion or the failure to issue a certificate, as a

result of which it could not be inferred that the contractual machinery of the main contract had broken down. A refusal by the main contractor to issue the certificate did not by itself mean that the contractual machinery had broken down. He distinguished between the case where there are "*circumstances which prevent the contractual machinery being operated*" and the case where there are "*circumstances in which one party refuses to operate it although in a position to do so*" because, in the latter situation, the problem is capable of being cured. On the facts, the problem had been cured, and the precondition therefore remained extant.

As to whether the Defendant was entitled to set-off various sums, the Adjudicator's Decision had stated that "*Any sum to which R&C are entitled to be paid [should be paid] in accordance with clause 21.8(b)*". Clause 21.8(b) included provisions as to the timing of payments and of the notice proposing to withhold or deduct. The Claimant argued that "*in accordance with clause 21.8(b)*" referred only to the time periods set out rather than actively permitting set-off, and the Decision did not allow for set-off. However, it was held that, when combined with the reference to "*Any sum*", the Decision also had in mind the withholding provisions and set-off would therefore be permissible.

The Adjudication was subject to the TeCSA Adjudication Rules, rule 33 of which provides that: *"No party shall be entitled to raise any right of set-off, counterclaim or abatement in connection with any enforcement proceedings."* The Claimant argued that this precluded the Defendant's attempted set-off. Mr Justice Edwards-Stuart held that the Defendant was not in fact seeking to exercise a right of set-off or to deploy a counterclaim in the present enforcement action, but was instead seeking simply to exercise a contractual right that had been expressly preserved by the Adjudicator's Decision itself, as outlined above.

The decision demonstrates that an Adjudicator's Decision requiring payment in accordance with time limits which permit a withholding notice will be open to set-off under such a notice. Significantly, Rule 33 of the TeCSA Adjudication Rules does not prohibit set-off where the purported set-off is contractual and preserved by the Adjudicator's Decision.

Contract – Agreement on Terms – Price – Arbitration – Stay of Proceedings – Incorporation of Arbitration Clause

Merit Process Engineering Ltd v Balfour Beatty Engineering Services (HY) Ltd [2012] EWHC 1376 (TCC)

This decision of Mr Justice Edwards-Stuart demonstrates the importance of agreeing terms as to price, or a method for fixing the price, if a contract is to be found to have been concluded. The Claimant in this case was represented by **James Bowling.**

The Defendant sought a stay of court proceedings under CPR Part 62.3(2) and section 9 of the Arbitration Act 1996, arguing that all three pipe installation package contracts in issue incorporated an arbitration clause. The Claimant resisted the application on the basis that, in respect of two of the packages, no contract had been concluded and there was therefore no applicable arbitration clause. As to the third package, the Claimant accepted that the arbitration clause had been incorporated.

In relation to the first package, the Claimant had commenced work under a letter of intent, which was expressed as subject to contract and provided that in the absence of conclusion of a contract the Claimant would be entitled to reimbursement of its actual costs. Subsequent correspondence seeking to confirm terms between the parties indicated a £37,500 price differential between them on a £1.6m contract, the difference essentially representing the application of the main contractor's discount. No method was fixed for finally determining the contract price. The Defendant later sent a written contract (which included the arbitration clause). The Claimant replied disputing the price on the documents. It never signed or returned the documents but work continued in the meantime.

In respect of the second package, the Claimant received a signed contract for countersignature; there was no dispute about price. It failed to sign and return the contract; there was no further discussion about the contents of the documents, but the Claimant proceeded to carry out the work.

Stressing the importance of agreeing a fixed price or a method by which the price should be fixed, Mr Justice Edwards-Stuart held that the parties had not concluded a binding agreement in relation to the first package: the price is an important term in such a contract; the disputed main contractor's discount was an element of that price; and £37,500 could not be regarded as *de minimis*. The work was therefore still being carried out under the terms of the letter of intent, which contained no arbitration clause.

In respect of the second package, he held that the Claimant had accepted the offer contained in the Defendant's letter by its conduct in proceeding to carry out the work after receipt of the contract documents. It was therefore bound by the arbitration clause contained therein.

This decision demonstrates the importance of ensuring that fundamental terms (particularly relating to price) have been agreed before assuming that a contract has been concluded. Where price cannot be fixed prior to commencement of works, a method to fix price should be agreed in order to avoid the conclusion that no agreement has been reached. This also has the evident benefit of giving the parties certainty as to the content of their obligations.

Editor: Lynne McCafferty

Lmccafferty@4pumpcourt.com