Walter Lilly & Company Ltd v. (1) MacKay and (2) DMW Developments Ltd – Clarification of the Law on Concurrent Delays in English Law Construction Contracts

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The judgment in *Walter Lilly & Company Ltd v. (1) MacKay and (2) DMW Developments Ltd* [2012] EWHC 1773 may prove to be the most significant decision to come out of the TCC (Technology and Construction Court) in recent years. In deciding what was a routine dispute between the parties over claims by the contractor for further payment and extensions of time and by the employer for defects and snagging, the TCC laid down important guidance in relation to concurrent delay, global claims and the use of formulae in overhead recovery claims.

Extensions of time

Over recent years, there has been considerable debate in the industry as to how the issue of concurrent delay should be dealt with. Although there is always dispute over whether the evidence demonstrates that a delay was truly concurrent, a concurrent delay can best be described as two competing causes of critical delay – one for which the employer is responsible and one for which the contractor is responsible. The usual example used to illustrate concurrent delay is where the employer has instructed a variation, but the contractor has no labour to carry out that work.

The debate over how to treat such delays has largely been distilled into two schools of thought. In Walter Lilly, Akenhead J described these as the English and Scottish schools. The first is the application of the apportionment approach, first set out by the Inner House in *City Inn Ltd v. Shepherd Construction Ltd* [2010] BLR 473. There the court decided that, in periods of concurrent delay, the contractor shall only be entitled to an extension of time for the reasonably apportioned period of the concurrent delay. This Scottish school of thought has been leapt upon by employers and contract administrators as a means of denying contractors extensions of time in periods of concurrent delay.

The English school of thought is the one that is most often cited by contractors and is, in experience, the one preferred by both the courts and adjudicators. The English school is set out in the court's decision in *Henry Boot Construction (UK) Ltd v. Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32. There the court decided that the contractor is entitled to a full extension of time for the delay caused by two or more events provided one is a relevant event that would entitle the contractor to such an extension.

The subsequent debate has been fuelled by the manner in which Dyson J (as he then was) set out this principle in Henry Boot. There was a suggestion from his words that he was simply repeating a principle that the parties themselves had agreed upon rather than reaching a considered decision on the point. The recent cases of *De Beers v. ATOS Origin IT Services UK Ltd* [2011] BLR 274 and *Adyard Abu Dhabi v. SD Marine Services* [2011] EWHC 848 have confirmed that the Henry Boot principle is good law and should be preferred.

Akenhead J has in Walter Lilly conclusively ended the debate by stating that " *…the City Inn case is inapplicable within this jurisdiction*".

It is common to see in most final account disputes involving claims for prolongation and thickening a "global" or "total

Global claims

cost" claim defence advanced by the employer. In assessing the previous authorities on the issue, Akenhead J stated in *Walter Lilly*:

"*One needs to be careful in using the expressions 'global' or 'total' cost claims. These are not terms of art or statutorily defined terms … What is commonly referred to as a global claim is a contractor's claim which identifies numerous potential or actual causes of delay and/or disruption, a total cost on the job, a net payment from the employer and a claim for the balance between costs and payment which is attributed without more and by inference to the causes of delay and disruption relied upon.*"

At paragraph 486 of his judgment, Akenhead J set out the principles to be applied in dealing with "global" or "total cost" claims. He stated:

1. Claims by contractors for delay and disruption related loss and expense are ultimately a question of fact. The contractor must prove 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 and disruption caused it to incur loss and expense (or loss and damage as the case may be)*".
2. A contractor does not have to show that it is impossible to plead and prove cause and effect in the normal way. The contractor simply needs to provide his case on the balance of probabilities.
3. It is open for contractors to prove the three limbs with whatever evidence will satisfy the tribunal and the required standard of proof. There is no set way for contractors to do so. It is open for contractors to rely on admissions or detailed factual evidence which links reimbursable events with periods of delay or individual instances of disruption and which then shows, with precision, what that delay or disruption cost.
4. There is nothing wrong in principle with a "global" or "total cost" claim. However, there are added evidential difficulties a contractor must overcome. It must show that the loss that occurred would not have occurred in any event. Therefore, it needs to show its tender was adequate and there were no other matters that could explain the loss.
5. The fact that one or a series of events cannot be shown to have caused or contributed to the total or global loss does not mean the contractor can recover nothing. This includes where the employer can show there is an event or factors for which the contractor is responsible. Akenhead J used the example where a contractor claims £1 million and the employer is able to show the tender was underpriced by £50,000 and, but for this, the contractor would have made a net return. In these circumstances, Akenhead J stated that this would not mean the total cost claim fails but rather it is reduced by £50,000 because this is the loss the contractor was unable to prove would not have been incurred in any event.
6. There is no support for the proposition that a global award should not be allowed where the contractor himself has created the impossibility of disentangling the loss from the event.

It is therefore clear that there is nothing offensive in itself through the pleading of a "global" or "total cost" claim. However, this will not diminish or detract from the burden of proof incumbent upon the contractor.

Formula claim

As part of its claim for recovery of lost overhead, Walter Lilly relied upon a formula calculation using the Emden formula. The recovery of lost overhead is not, in principle, a controversial head of claim. It represents a claim by the contractor for the loss of contribution to its head office overheads. Such contribution would ordinarily have been gained from projects that have had to be declined due to delays on the project in question.

In *Walter Lilly*, Akenhead J endorsed the use of the Emden formula. He found that, provided the contractor has proven (on a balance of probabilities) that, if the delay had not occurred, it would have secured work elsewhere, the

use of a formula such as Emden and Hudson is a "*legitimate and indeed helpful*" way of ascertaining the loss of contribution to head office overheads.

It remains to be seen what effect *Walter Lilly* will have on a day to day basis. The guidance provided by the court in relation to concurrency is helpful but the commentary on global claims and use of formulae may prove fertile ground for contractors.

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