Legal Update following Walter Lilly v Mckay

Presented by Anneliese Day QC

PROBYN · MIERS
CHARTERED ARCHITECTS . DISPUTE RESOLUTION

WALTER LILLY v MACKAY

[2012] EWHC 649; 141 Con LR 102

ANNELIESE DAY QC
4 NEW SQUARE

NEW SQUARE

The Project

- Walter Lilly win a £15.3 million tender in 2004 to build the Mackays and 2 other families luxury homes in Boltons Place, South Kensington on site of old BT exchange
- No 3 to be occupied by Mr Mackay and his family as their dream home. Estimated build cost of £5.2 million
- JCT Standard Form Building Contract 1998 Edition Private Without Quantities with a CDP supplement
- Design work only in elementary stages when Project let. Many works packages only briefly described and subject to provisional sums

NEW SQUARE

"a disaster waiting to happen"

- The Date for Completion was 23 January 2006.
- Liquidated Damages of £6,400 per day.
- Project was hopelessly under-designed
- Employer's design team issued 1,508 further drawing revisions, schedules and specifications and 146 formal Architect's instructions to the contractor
- Walter Lilly raised 121 confirmation Instructions and 249 Technical Queries.
- The design team was *"always on the back foot".*
- During the currency of the works Walter Lilly issued 234 notices of delay and requests for an extension of time
- Of these 196 EOT requests went unanswered.
- Completion was achieved on 7 July 2008.

NEW SQUARE

WHO FOOTS THE BILL?

- At first blush a routine dispute between parties over claims by contractor for further payment and EOTs and by the employer for defects

- 16 days in court and 32,000 pages of docs
- 9 factual witnesses and 8 experts
- 33 bundles for experts alone
- 660 paragraphs to the judgment, 191 pages
- EOT to date of practical completion awarded
- A bill for £2.3 million plus costs in relation to loss and expense claim
- Defects claim almost wholly unsuccessful
- Legal costs of £9 to £10 million claimed to have been incurred

Judge's view of Mr Mackay

He *"was and became increasingly frustrated as the project stumbled into substantial delay, rising costs and confusion as to who was responsible for what. I find it difficult to determine comprehensively whether it was the original architects, or other consultants, who were, so to speak, to blame or whether they gave appropriate advice at relevant stages to their client which was not followed.....Whatever the cause of his increasing frustration, his behaviour towards the architects, some Walter Lilly employees and other consultants was not simply coarse, (for which he apologised on a number of occasions when giving evidence); it was* ***combative, bullying and aggressive*** *and contributed very substantially to the problems on the project"*

NEW SQUARE

The contrast

- WLC's limited responses were *"polite and restrained"* while Mr Mackay appeared to be *"used to getting his own way".*

- Mackay set up a website to try and find and publicise complaints about Walter Lilly

NEW SQUARE

Importance of Disclosure

- At outset of trial judge broke new ground by ruling that legal advice privilege did not apply to documents prepared by claims consultants
- Gave rise to disclosure which show strategy adopted by Mackay behind scenes: deliberate decision not to comply with the contract
- Knowles brought on board two years after start of project
- Knowles did not hold itself out as offering services of qualified practising solicitors and barristers
- immaterial that the people providing the advice had trained at the Bar and that Mackay believed engaging Knowles to provide legal advice.

ISSUES COVERED BY THE JUDGMENT

- CONCURRENT DELAY EVENTS
- GLOBAL CLAIMS
- NOTIFICATION OF CLAIMS
- DESIGN LIABILITY
- CAUSATION
- HEAD OFFICE OVERHEAD CALCULATIONS
- SETTLEMENTS WITH SUBCONTRACTORS
- DUTY TO WARN

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".

NEW SQUARE

CONCURRENT DELAY

- Standard EOT clause requiring Architect to grant an EOT which was *"fair and reasonable"* having regard to any of the Relevant Events
- One of the causes of delay is the responsibility of the Employer and one is not
- Comprehensive review of authorities

NEW SQUARE

Prior to Walter Lilly two schools of thought

- English school of thought: *Henry Boot v Malmaison* (contractor entitled to a full extension of time for delay caused by two or more events provided one is Relevant Event)

- Scottish school of thought: *City Inn v Shepherd* (contractor only entitled to an extension of time for reasonably apportioned period of concurrent delay)

NEW SQUARE

Akenhead J: *"...the City Inn case is inapplicable within this jurisdiction"*

- Two or more effective causes, one entitles contractor to an extension of time as being a Relevant Event, contractor gets a full extension of time for that event.
- Based on principle that many of the Relevant Events which otherwise amount to acts of prevention and wrong to deny contractor an EOT in these circumstances.
- Also based on a "straight contractual interpretation" of Clause 25 of JCT standard form. Nothing in clause to suggest extension should be reduced if contractor partly to blame for delay.

Summary on concurrency

- "Apportionment" approach adopted in Scottish case of *City Inn* not part of English law
- "test is primarily a causation one"
- Good news for contractors
- Important to think about governing law for Scottish projects

- However, would still be open to parties to draft contract in a different way but on basis of standard forms no concurrency re EOT
- Still have to prove loss and expense

NEW SQUARE

Note on expert evidence and delay

- Court emphasised that evidence about delay should be based on evidence of factual witnesses and on the opinion of suitably qualified experts
- Experts should approach matters on an objective basis
- Retrospective or prospective approach to delay analysis should ultimately lead to same result: 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*
- Employer's expert criticised for being too subjective in his reports
- A reality check of what actually happened to affect the timing of the works should always be applied and mere theories about what might have happened were not to be used
- Favoured contractor's expert's approach of analysing on a month by month basis what had happened in reality

NEW SQUARE

Miscellaneous

- Snagging is an inevitable feature of most complex projects: 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 desnagging exercise has to be expended, it can potentially be a cause of delay in itself"*

- "[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".*

NEW SQUARE

Global Claims

- Common problem
- General guidance on approach to be taken
- Authorities again reviewed in detail
- Defined as:

❑ claims where causes of delay are identified and the total of the Contractor's cost is computed

❑ from this figure the Employer's net payment is deducted and a claim for balance made

❑ do not attribute individual costs to actual events

NEW SQUARE

"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"

Principles which apply (paragraph 486)

- Contractors must prove their claims as a matter of fact and on the balance of probabilities.
- Must show the occurrence of a Relevant Event and that it cause delay leading to loss and expense
- Do not have to show that impossible to plead and prove cause and effect in the normal way
- But must prove claim on balance of probabilities
- Any contractual restrictions on global claims may have an impact

NEW SQUARE

Potential Evidential Difficulties

- Nothing wrong with global claim in principle BUT may raise evidential difficulties
- Contractor must show that the loss incurred would not have been incurred in any event
- Need to show tender sufficiently well priced and that would have made some net return
- Global claim does not transfer burden of proof to party defending it
- Defending party may provide evidence to show that tender so low loss would have occurred in any event irrespective of events relied on by the contractor

NEW SQUARE

Global claim not all or nothing

- Even if an event which is not the fault of the Employer caused or contributed to the global loss, this does not mean contractor will recover nothing
- It all depends on the impact of such an event
- Claim may not be totally rejected but a deduction will be made for an individual event which is not the Employer's responsibility
- Judge gave example of contractor claiming £1 million which it can prove save for one underpriced item in tender of £50k. Simply reduce claim by £50: not all or nothing!

NEW SQUARE

Beware.....

- If it is practicable to attribute actual costs to individual events, the Court may be sceptical about a global claim
- However, a global claim may be made even if the Contractor himself made it impossible to disentangle the various causes
- The measure of the claim's success will depend on the facts and will be subject to proof
- No set way for contractors to prove such claims

NEW SQUARE

In summary, contractor must demonstrate on balance of probabilities that:

- Events happened which entitle it to loss and expense
- Those delays caused delay and/or disruption
- Such delay and/or disruption caused it to incur loss and/or expense
- Any condition precedent clauses re notification are complied with
- Contractor can prove its case using whatever evidence satisfies the tribunal, including witness statements
- Loss which has been incurred would not have been incurred in any event

NEW SQUARE

On the facts of Walter Lilly

- Court allowed for the fact that the contract was a “complete mess” on the administrative side with insufficient design detail at the outset, with hundreds of variations and “hopelessly late provision of instructions and information” to the contractor

- Also allowed for lack of unity between the employer and his designers and a general lack of certainty for the works to give the contractor some justification to present at least parts of the claim in a “global manner”

NEW SQUARE

Notification of Claims

- Clause 26 of JCT requires the Contractor to give notice of loss and expense *"as soon as it has become, or should have reasonably become, apparent to him that the regular progress has been or is likely to be affected … [and] to submit to the Quantity Surveyor such details of loss and/or expense as are reasonably necessary…"*

- Pre-condition to making a claim that contractor had to make timely application for additional losses and expenses, along with supporting information and details

- However timing of claim could turn on when the contractor had actually incurred the relevant loss and expense (could be prospective or retrospective)

NEW SQUARE

Practical Approach

- Extent of information already available to the Architect (for example through Site meetings) must be taken into account in considering the Contractor's obligations for provision of information
- The contractual obligation was to submit details which are *"reasonably necessary"* for ascertainment of loss and expense.
- This could be met by an offer to the Architect to inspect records at the Contractor's office (as actually occurred in this case)
- As soon as reasonably sufficient material is received, the architect or contract administrator should proceed to make his ascertainment.

Look at wording of clause in question

- The architect must be satisfied that the loss and expense claimed is likely to be or has been incurred
- Does not have to be “certain”
- Only needs to review all the detail that is reasonably required by the wording of the clause
- Contractor has to provide reasonable details in support of claim but not every conceivable detail
- Have to prove claim on “balance of probabilities” and not “beyond reasonable doubt”
- moving towards a more common sense approach based on the architect’s knowledge and understanding of the project as opposed to having to delve in to every receipt, time sheet and proof of expense.

NEW SQUARE

DESIGN LIABILITY

- Contract was entered into on the JCT Standard Form of Building Contract 1998 with Contractor's designed portion supplement

- Envisages that the parties will enter details of the works where the contractor will complete the design. The contractor will generally put forward proposals to indicate how the design will be carried out, which will be embodied in the contract.

- However, here the position was more fluid. Certain aspects of the design (such as windows) were specified in the tender documents, but the intended arrangement was that the employer would notify the contractor if and when he wanted the contractor to carry out design.

- This arrangement is difficult to operate in practice. Extremely difficult for contractor to properly price and plan on this basis.

failure to delineate the areas of design responsibility in the contract at the outset was a recipe for problems later on

- The contract proceeded and the employer gave no such design notifications to the contractor.
- Did the architect do so?
- It was held that the wording of the contract must be strictly interpreted and that, unless the employer himself (or the architect with his specific authority to do so) gave notice, the design liability remained with the employer.
- On facts all design liability remained with the employer

Calculation of Lost Overhead

- WLC relied upon a formula calculation in Emden
- This approach endorsed by the Judge
- He held 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.

NEW SQUARE

Settlements with sub-contractors

- Prior settlement with sub-contractors
- Employer's Expert claimed that the files provided in support of the claim did not demonstrate or prove in an absolute sense all the claims put forward.
- Lengthy review of authorities
- Held that Walter Lilly was put in a position in which it faced a substantial and broadly meritorious claim which it was reasonable to settle. The need to settle with the sub-contractor was caused by delay and disruption caused by the Employer and the settlement fell well within the *"reasonable range of settlement".*
- Recognised that there is or may be a residual uncertainty as to whether there was an exact or 100% correlation in terms of all the factors attributable to DMW which delayed and disrupted Walter Lilly and its sub-contractor and other factors which delayed and disrupted the sub-contractor. So slightly reduced amount claimed

Duty to Warn?

- American black walnut was specified by the architect
- Mr and Mrs Mackay decided to have it finished in Danish oil rather than French polish.
- Once installed and exposed to daylight the timber discoloured and was left in a “orange coloured state”.
- Mr and Mrs Mackay felt that WLC should have warned them that this would have happened.
- However the judge held that the contractor was “*engaged simply to provide materials and services in accordance with the drawing and specifications; he did not have a duty to warn the Employer about design issues*”.

NEW SQUARE

The end of the story

One house for sale: yours for £60 million

NEW SQUARE