



## Walter Lilly and Company Limited v. GPC Mackay, and DMW Developments Limited

### Main points

(N.B. Based on JCT 1998)

by Dr Julian Critchlow

#### Concurrent delay

- where there is true concurrency of a Relevant Event and a contractor's culpable delay, both of which are effective causes of delay to the contract period, the contractor is entitled to an extension of time: *Henry Boot v. Malmaison* and *De Beers v. Atos* followed. *City Inn v. Shepherd Construction* not followed;
- however, in the above circumstances, it is probable that the contractor will not be entitled to loss and expense for prolongation for the period of concurrency;

#### Delay analysis

- where the contractor is in culpable delay after the original completion date and a Relevant Event (eg the giving of an Instruction) occurs, the contractor is not relieved of his delay. The "net" approach is adopted, ie the employer and contractor are each responsible for their own delay, *Balfour Beatty v. Chestermount Properties* followed;
- if used accurately, a time slice analysis is an acceptable methodology for establishing the causes of delay;
- both prospective and retrospective delay analysis can be effective if used correctly;
- the likely longest sequence of outstanding work can be a pointer as to the true cause of delay;
- it is not necessarily the last item of work which causes delay.

#### Global claims

- global claims are permissible. *London Borough of Merton v. Leach* and *Crosby v. Portland* followed;
- if one or more of the events causing loss and expense can be shown to be the fault of the contractor, that can undermine the contractor's entire global claim;
- nevertheless, it may be possible to assess the effect of the contractor default and allow the global claim to succeed;
- global claims must be sufficiently particularised so that the causal connection between the event and the loss is proved. *Wharf Properties v. Eric Cumine* followed;

- claims only have to be justified on the balance of probabilities. It is legitimate to use a global claim for this purpose even where it is practicable to produce a detailed, traditional analysis;
- a global claim may succeed even if the contractor's own behaviour has made a traditional analysis impracticable.

#### Proving loss and expense (under JCT 1998)

- where the contractor claims the works have been disrupted and the architect is also of that opinion, the architect must ascertain loss and/or expense (Clause 26);
- the contractor must provide "such details ... as are reasonably necessary for such assessment" (Clause 26);
- the architect need not be certain that the loss and expense applied for has been incurred: he merely needs to be "satisfied". He must take a sensible commercial view;
- the architect must take into account the information he has acquired through his administering the contract – the more he has then, arguably, the less the contractor has to give him;
- it may be appropriate for the contractor to invite the architect to inspect his books and records at his office.

#### Recovering monies where liability settled with a third party

- for C to be liable to A in respect of A's liability to B which was the subject of a settlement, it is not necessary for A to prove on the balance of probabilities that A was liable to B or that A was liable for the amount of settlement. *Biggin v. Permanite* followed;
- A must show that a liability, such as breach of contract by C, has arisen resulting in the need for a settlement with B;
- B's claim against A must have been of sufficient strength to justify the settlement;
- the test of whether the amount paid in settlement was reasonable is whether the settlement was, in all the circumstances, within the range of settlements which reasonable people in the position of the settling party might have made. Such circumstances will generally include:
  - (a) the strength of the claim;
  - (b) whether the settlement was the result of legal advice;
  - (c) the uncertainties and expenses of litigation;
  - (d) the benefits of settling the case rather than disputing it.