Claims

Ambit Claims and Damages for Delay by Contracor

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In *The Total Cost Claim* (1992) #26 Australian Construction Law Newsletter p.4 it was submitted that the decision of the Official Referee in *McAlpine Humberoak v McDermott International* did not accord with the law. On appeal, that was the finding of the Court of Appeal in England. The appeal is reported in (1992) 8 Const. L. J. 383.

The Court of Appeal found that the contract was not frustrated and that the Official Referee erred in making an award on the basis of an ambit claim and the evidence of a claims consultant. The Court held that the contractor had failed to prove the individual alleged extra costs resulting from each variation, instruction or delay. This decision will have material implications for future prolongation claims and the Hudson Formula.

The Court also had comments to make about the so called 'prevention principle', although the Court did not use that term. In *Variations Ordered after the Date for Practical Completion* (1991) #17 Australian Construction Law Newsletter p.53 it was submitted that the ordering of variations after the date for practical completion would not prevent the principal from recovering liquidated damages. In *McAlpine Humberoak*, the principal was not seeking liquidated damages but general damages for delay. The Court of Appeal held that the ordering of variations after the date for completion did not mean that the principal was unable to claim damages for delay occurring prior to the ordering of the variation and subsequent to the ordering of the variation.

The contract was for the construction of a deck structure for a North Sea oil rig for a price of £0.9m. The contractor claimed £3.5m. under the contract or alternatively, as damages for breach of contract. The costs actually incurred by the contractor including overheads came to £2.5m. The facts of the case are outlined in the article *The Total Cost Claim*. The Official referee obviously found the case difficult because the hearing lasted 92 working days and it took the Official Referee more than a year to deliver his decision.

In the appeal from the decision of the Official Referee, it was disclosed that neither party had ever pleaded or argued that the contract was frustrated. The Official Referee came to this conclusion of his own accord. The Court of Appeal found that because the contract provided for variations, the revised drawings did not cause the contract to be frustrated.

The contractor argued that by reason of the revised drawings, the contractor was prevented from completing the work within the time stated in the contract. The contractor claimed that based on contract rates, the contract price for the actual work and time should be £3.5m.

In the alternative, the contractor argued that there were implied terms which required the principal to provide drawings and materials within a time that would permit the contractor to complete the work by the date for completion stated in the contract.

The contract included provision for adjusting the lump sum price in the event of any change in the scope of work. In so far as the contractor was claiming under the contract, the contractor had to make good the claim under the variation clause. There was a dispute over whether the price for certain variations orders was agreed or whether there were indirect costs including overheads and disruption, which were outside the negotiations.

However, the contractor's witnesses could not give detailed evidence of the delay or disruption caused by individual drawing revisions. The could only speak in generalities. They could not say what alleged costs were caused by what variation. The plaintiff gave evidence of 'the vast amount of disruption', 'the utter confusion' and 'the impossible situation' in which the contractor was placed. The Court said "That was all. There were no particulars."

The Court then examined the evidence of an experienced engineer [the claims consultant] who had been called in by the contractor to prepare a claim for indirect costs allegedly caused by variation orders, revised drawings and late answers. The claims consultant had prepared the usual bar chart showing the cumulative effects of all causes of delay. This way he accounted for the whole period between the commencement of the contract and completion.

The Court said:

> "One cannot help admiring the way in which [the claims consultant] set about his task. It may be that there was no other way in which it could have been done. But it suffers from two major defects. So far as the first stage of the calculation is concerned, the [claims consultant's] approach assumed that if one man was working one day on a particular VO, the whole contract was held up for that day. ...

> The second, and even more serious defect relates to the second stage of the calculation. It assumes that the whole of the work force planned for a particular activity was engaged continuously on that activity from the day it started until the day it finished. This is hardly likely to be so, ...
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> By reason of these defects, we conclude that the plaintiffs did not prove, or indeed come near to proving, on the evidence which they called at the trial, that the delay in delivery of [the work] was due to the revised drawings, VOs and late response to TQs. Further they never came near to proving that the indirect costs resulting from these matters amounted to £2m. The very fact that the total entitlement claimed by the [contractor] on the basis of [the claims consultant's] evidence came to more than £1m. more than their actual costs should surely have put the judge and his assessors on enquiry. The truth is that [the claims consultant's] calculation provided no support for the judge's conclusion that the plaintiff's costs were fair and reasonable."

The argument usually put by contractors to justify the use of expert evidence as to the cost consequences of delay is the sheer volume of changes and the cumulative effect. The Court of Appeal dismissed that argument in the following terms:

> "The [Official Referee] dismissed the defendant's approach as being
> 'a retrospective and dissectional reconstruction by expert evidence of events almost day by day, drawing by drawing, TQ by TQ and weld procedure by weld procedure, designed to show that the spate of additional drawings which descended on [the contractor] virtually from the start of the work really had little retarding or disruptive effect on progress'.
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> In our view the defendant's' approach is just what the case required."

The Court of Appeal found that the lump sum price and unit rates for variations were not displaced. The direct costs of the variations had been agreed and could not be reopened. The claims consultant's calculation of indirect costs was flawed and the contractor had failed to prove or quantify any indirect costs. The contractor had failed to prove any breach of contract giving rise to indirect costs and to quantify such costs.

This decision of the Court of Appeal and the decision of the Privy Council in *Wharf Properties Ltd. v Eric Cumine Associates* noted in (1991) #21 Australian Construction Law Newsletter demonstrate that the superior courts in England have no sympathy for the ambit claim.

The Court of Appeal also rejected the contractor's claim for loss of profit on work taken out of the contract. The Court found that the omission of work was a variation and that since the contractor made an enormous loss on the remaining work, it was hardly likely that the contractor would have made a profit on the work omitted.

The principal was not claiming liquidated damages but was claiming as general damages for delay, the cost of paying site personnel between the contractual date for completion and the actual date of completion. The principal argued that the contractor was 10.5 weeks late [after allowing for extensions of time for variations]. This made the date for completion May 1. In fact there was no extension of time clause and time was stated to be of the essence.

The contractor argued that time was at large and since extra work was ordered on June 11, the date for completion could not be earlier than that date. The Court said:

> "We do not agree. Even if the [principal was] in a position to claim liquidated damages (which they are not) we doubt if the argument would prevail, at any rate so far as the period prior to June 11 is concerned: ... Here, as we have said, the defendants are claiming unliquidated damages. Obviously they cannot recover damages for any additional delay caused by the extra work. But this is taken care of by the three weeks allowed by [the principal], and the 10.5 weeks which we are allowing ourselves. If a contractor is already a year late through his culpable fault, it would be absurd that the employer should lose his claim for unliquidated damages just because, at the last moment, he orders an extra coat of paint. On the facts of this case and the conditions of this contract, the ordering of extra work on June 11 did not have that effect. The [principal is] not deprived of [the] right to damages.
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> To summarise; the [contractor is] entitled to a reasonable extension representing the overall impact of the extra work ordered under clause 35(c)(ii) of the contract. This period expired not later than April 30, 19982. Thereafter, the [contractor was] in breach of contract. The [principal is] accordingly entitled to recover damages in respect of their site personnel from May 1, 1982."

The result must have been quite a blow for the contractor. Instead of a judgment against the principal for approximately £2m., the contractor was held liable to the principal for damages for delay. In view of the length of the original hearing [92 days] and the appeal [3.5 weeks] the contractor's bill for legal costs must have been considerable. The case may serve as a warning to contractors who make ambit claims and also about the need for day by day detailed records to support claims. ❑