



Technical

5 Cases That Affect Your Business - Part Two

Date: 24 Oct 2012

[Click here for 5 Cases That Affect Your Business - Part One](#)

Introduction

1. You will recall that in our first article '[5 Cases That Affect Your Business \(Part one\)](#)' we look at the issues of '*Agreement and Contract Formation – Battle of the Forms*' and '*Extension of Time*'. In part two we review '*Monetary Claims*', '*Settlement Agreements*' and '*Surviving Dispute Resolution*'.

Monetary Claims

2. When talking about monetary claims we usually mean claims for prolongation or disruption and such claims typically include such things as additional cost associated with remaining on the site for a longer period (extended preliminaries) claims for overheads, loss of output, interest charges and various other heads of claim.
3. Inevitably there will be arguments about whether the claim is global in nature. One of the cases most often cited is the Scots case of *Laing Management (Scotland) Limited -v- John Doyle Construction Limited [2004]*.

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4. Pursuing global claims is always risky and a claimant must not assume that a tribunal (adjudicator, arbitrator or judge) will help with a party's case if a global claim fails. However it was recognised in Laing that even if a global claim failed there may be sufficient evidence of a surviving claim for the tribunal to establish a causal connection between an individual loss and an individual event. This approach was followed in 2007 in the case of *London Underground Limited -v- Citylink Telecommunications Limited*.
5. Another issue which often raises its head in claims is the use of formulae for evaluating overheads. There have been a number of cases where the use of such formulae have been approved by the courts with the most common one being the Emden formula. This was used with approval in *Norwest Holst Construction Limited -v- CWS [1998]* and *McAlpine -v- Property and Land Contractors*.
6. In a recent case (July 2012) the principles involved in the valuation of claims have been authoritatively reviewed and whilst fundamentally there has been no new law it does restate and reinforce many of the principles which have been reviewed over the years. In our view this case *Walter Lilly & Co Limited and DMW Developments Limited [2012]* is the most important and useful case on claims in the construction industry for many years. The detail and potential impact of this case will be looked at in our seminar.

Settlement Agreements

7. More often than not it seems negotiations on final accounts are resolved by way of a settlement or compromise agreement. An agreement is drafted that compromises the account and this happened in the recent case of *Point West London Limited -v- Mivan Limited [2012]*. The parties entered into a settlement agreement but there was then a dispute as to whether the agreement released the contractor from liability for defects that were patent at the date of the agreement.
8. Point West was a developer and it appointed Mivan to build apartments on the top of an existing building. Practical completion was certified in June 2001 and a final account was agreed in July 2002. Some additional and remedial work was undertaken by Mivan after agreement of the final account. The balance of the final account was not paid because of problems with defective works and in October 2007 the parties entered into a settlement agreement although there were still unresolved defects at the time. The agreement included the words

“...regarding Mivan’s Final Account in respect of all Works carried out and any corresponding outstanding matters. The agreement comprises a further payment of £50,000.00 (including VAT), representing the final assessment of monies due or to become due thus achieving full and final settlement in respect of the above Works, together with any and all outstanding matters”.

9. Point West considered that the settlement agreement did not release Mivan from its liability in respect of either future defects or those which existed at the date of the settlement agreement. Point West was of the view that works that were undertaken after the agreement of the final account in 2002 were undertaken under a separate contract and that as the precise nature of defects were unknown they were in effect latent defects and not captured by the settlement agreement. Mivan obviously disagreed with that interpretation and said that it was not liable to pay damages or make good the defects.
10. The judge decided that Mivan was released from liability for defects which were patent at the date of the settlement agreement. He considered that the defects and remedial works were outstanding matters and therefore captured by the wording *“corresponding outstanding matters”* and *“together with any outstanding matter”*. He also considered that the agreed amount of payment in *“full and final settlement for all Works carried out and any corresponding matter”* resulted in a settlement of all financial liabilities again including patent defects and remedial works. The judge did not accept that as the precise nature of each defect was unknown then this meant that they became latent defects. Mivan was released from all liability for the patent defects and was not liable to pay damages or make good those defects.
11. In 2009 there was another construction case concerning issues arising out of final accounts and compromise agreements in which the judge dealt with some important principles and this will be reviewed in our seminar.

Surviving Dispute Resolution

12. Disputes arise in construction projects for a number of reasons. Some of these were highlighted in the Latham report in 1994 and it was because of this report that The Housing Grants, Construction and Regeneration Act 1996 was introduced in 1998. This has, of course,

been recently revised by The Local Democracy Economic Development Construction Act 2009 which amends the HGCR Act. Since 1998 adjudication has been the primary method of dispute resolution for contracts which fall under the Act. Some of the points which you should consider when deciding on which form of dispute resolution to use are as follows:

- **Adjudication** is backed by statute in which an adjudicator has 28 days to make his decision. The 28 day period can be extended. The decision is enforced by summary judgement in the High Court.
 - The courts have taken a robust approach in enforcing adjudicator's decisions and challenges to the enforcement of the award will rarely succeed.
 - An adjudicator's decision is, however, only temporarily binding. A party can have the dispute re-heard in arbitration or litigation.
 - **Arbitration** has been around for many years with the current arbitration procedures being governed by the Arbitration Act 1996. Generally speaking there needs to be an arbitration clause in the contract, or alternatively the parties might subsequently agree to have their disputes resolved by arbitration.
 - **Litigation** is often considered to be a more efficient and cost effective procedure than arbitration because you do not have to pay for a judge and a judge has greater powers than those of an arbitrator.
 - Before embarking on litigation the parties are often required to attempt some form of alternative dispute resolution such as mediation. This can be an effective method of resolving disputes.
 - You will be required to follow what is referred to as the Pre-Action Protocol.
 - **Dispute Boards** are sometimes used on large and complex projects.
13. Whatever the form of dispute resolution used in construction projects the results are often uncertain and the process costly and disruptive. We will be looking at a particular case on the 22 November which reinforces the fact that greater care should be taken before embarking on any form of formal dispute resolution.

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