

# Recovery Of Loss, Expense & Global Claims COVID UPDATE

**Presented By**  
**Ryland Ash, Managing Partner**



**SILVER SHEMMINGS ASH**  
CONSTRUCTION & REAL ESTATE LAW

# Recovery Of Loss, Expense & Global Claims



**Presented By: Ryland Ash LLB(Hons), MCI Arb,  
Solicitor-Advocate, Managing Partner**

Ryland is dual qualified as a Barrister and Solicitor-Advocate (Higher Rights) and has over 15 years of legal experience in the construction industry

Apart from his work as legal adviser on projects around the world, the focus of his work is dispute resolution and he is an experienced advocate and lead representative in adjudication, arbitration and commercial litigation

Ryland regularly advises clients upon the myriad of issues that can impact upon a project through its lifecycle from pre-contract to post-completion, including strategic and dispute avoidance advice during the engineering, construction and development of projects. He has significant experience in the vetting, drafting and negotiation of a range of construction and engineering contracts (including the JCT and NEC suite of contracts) and in the drafting and reviewing of main contracts, sub-contracts, bonds, guarantees, collateral warranties and terms of business

**Tel: 0207 167 6602**

**Email: [rylandash@silverllp.com](mailto:rylandash@silverllp.com)**



**SILVER SHEMMINGS ASH**  
CONSTRUCTION & REAL ESTATE LAW

# Claims For Costs For Delay And Disruption

Entitlement can arise:

- i. Under the terms of the relevant Contract
- ii. At common law

Where there is entitlement under the terms of the Contract, one's common law rights are retained unless expressly excluded



# Claims For Costs For Delay And Disruption

Entitlement under the terms of the relevant Contract:

- i. Liquidated damages
- ii. General damages
- iii. A 'value' as opposed to a 'cost'



# Claims For Costs For Delay And Disruption

Liquidated damages clauses stipulate that a certain specified sum of money will be payable by one party to the other party, where there has been a particular breach of contract



**SILVER SHEMMINGS ASH**  
CONSTRUCTION & REAL ESTATE LAW

# Claims For Costs For Delay And Disruption

**Dunlop Pneumatic Tyre Co. Ltd. v New Garage & Motor Co. Ltd. (1915)** - in order for an LD cause to be enforceable (rather than being a penalty), the sum payable upon breach must be a genuine pre-estimate of the loss the innocent party would suffer in respect of that breach

If the intention of the LD is to threaten the guilty party into performance (rather than to compensate the innocent party), it is likely to be seen as a penalty



# Claims For Costs For Delay And Disruption

More recently, the courts have shown a reluctance to interfere with commercial contracts agreed by parties of broadly similar bargaining power and deem LD clauses unreliable penalty clauses under the rule in *Dunlop Pneumatic Tyre*, in particular where the parties to the contract have negotiated terms and have comparable bargaining powers



# Claims For Costs For Delay And Disruption

The Supreme Court decision in **Cavendish Square Holding BV -v- Talal El Makdessi (2015) UKSC 67** fundamentally changed the law in relation to LD clauses

It held that the test of whether an LD provision is a penalty is whether it imposes a detriment on the contract breaker out of all proportion to any legitimate business interest of the innocent party in the enforcement of the primary obligation (e.g. the Contractor's obligation to complete works on time) that the clause is in connection with





# Claims For Costs For Delay And Disruption

Although each case is decided on its facts, there are a number of guiding principles to be taken into account when drafting an LD clause, including:

- Avoid specifying sums payable upon breach which are so high that they cannot be seen as commercially justifiable or a genuine pre-estimate of loss
- Different types of breach should generally attract payment of different sums in order to be regarded in each case as a genuine pre-estimate of loss



# Claims For Costs For Delay And Disruption

- If the primary obligation is payment of a particular sum, then breach of this clause should not usually give rise to a 'penalty' payment of a much higher sum
- Keep your calculations to show you have tried to assess likely damage for a particular breach
- Include contractual wording to say that the parties agree that the sum is a genuine pre-estimate of loss and not a penalty (although not decisive, this kind of wording can at least be persuasive to the courts)



# Claims For Costs For Delay And Disruption

When deciding whether to bring a claim against another party, it is important to consider both causation and damages

- Causation is the process of proving that the other party caused your loss
- Damages are the losses suffered

In contractual disputes there must be a causal link between the breach of contract and the resulting damages

The party in breach must have caused the loss or contributed to it



# Claims For Costs For Delay And Disruption

The leading case on causation remains **Hadley -v- Baxendale (1854) 9 Ex 341**, which established two tests to determine causal link between the financial losses purportedly incurred and the Defendants breach of contract or if otherwise, losses are too remote from the breach



**SILVER SHEMMINGS ASH**  
CONSTRUCTION & REAL ESTATE LAW

# Claims For Costs For Delay And Disruption

Damages available for breach of contract include:

- Those that may fairly and reasonably be considered arising naturally from the breach of contract
- Such damages as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was made

If a loss could not be foreseen on formation of the contract then the general rule is that it cannot be claimed



# Claims For Costs For Delay And Disruption

## Damages

If a causal link can be found, the next process is to determine the level of damages

The much quoted dictum of **Parke B in Robinson -v- Harman (1848) 1 Exch 850** remains good law:

*“The general principle of contractual damages is to put the claimant in the position they would have enjoyed if the contract had been performed – consequently, the claimant should not be put in a better position than they would have enjoyed had the contract been performed”*



# Claims For Costs For Delay And Disruption

## What Is A “Global Claim”?

In some circumstances a Contractor may find it difficult to show that a particular breach by his Employer caused a particular loss to the Contractor

In such a situation, a Contractor may try to claim its loss and expense in a single rolled-up claim, this is known as a Global Claim

‘Global’ or ‘Total’ costs claims are terms used to describe a Contractor’s claim that identifies a number of causes of delay and/or disruption and can seek to link them to the Contractors total. From this figure the Employer’s net payment is deducted and a claim for the balance is made, without attributing actual costs to individual events



# Claims For Costs For Delay And Disruption

The major issue with Global Claims is that, normally, for a Contractor to succeed with a claim for loss and expense he must show a causal link between the sums claimed and each individual event that has caused this loss

In a Global Claim the Contractor does not, or cannot, demonstrate a direct link between the loss incurred and the individual events

In this way, Employers often argue that the burden of proof is reversed because it is them, and not the Contractor, who has to undertake a detailed analysis of the events and quantum to show why the global approach is not justified

Employers argue that this amounts to them doing the Contractor's job for it





# Claims For Costs For Delay And Disruption

**Walter Lilly & Co Ltd -v- Mr Mackay & DMW Developments Ltd [2012] EWHC 1773** - Mr Justice Akenhead (paragraph 485) set out his view that Walter Lilly's claim was not, on proper analysis, a Global or Total Cost Claim (despite the parties having initially assumed it would be regarded by the court as such)

His reasons were as follows:

- WLC's final pleadings did identify a comprehensible case in relation to delay
- WLC's case for extended preliminaries and profit and overhead was related solely to the periods of delay for which it asserted that it was entitled to extensions of time
- The sub-contractor claims were "largely" based on extension delay and to the sums actually paid, if not yet paid, due to the relevant sub-contractor



# Claims For Costs For Delay And Disruption

## Claims By Contractors For Delay Or Disruption Must Be Proved As A Matter Of Fact

What this means is that the Contractor has to demonstrate, on the balance of probabilities, that:

- Events occurred which entitled it to loss and expense
- Those events caused delay and/or disruption
- Such delay or disruption caused it to incur loss and/or expense



# Claims For Costs For Delay And Disruption

## **Any Contractual Restrictions Must Be Complied With**

Contractors should be aware of any contractual restrictions on Global Claims

If there are no such restrictions then the Contractor simply has to prove his case on a balance of probabilities

If your contract contains a contractual restriction then you must comply with all of the conditions otherwise claims under this clause will be barred



# Claims For Costs For Delay And Disruption

## Evidence Required

There is no set way for Contractors to prove the three elements of a loss and expense claim

It is open to a Contractor to prove its entitlement with whatever evidence will satisfy the tribunal on the balance of probabilities, this could include witness statements



# Claims For Costs For Delay And Disruption

## Evidential Difficulties

In Walter Lilly the Court confirmed that there is nothing, in principle, “wrong” with a Total or Global Cost Claim. However, it pointed out that Global Claims do present added evidential difficulties which must be overcome: namely that a Contractor will have to establish that the loss which it has incurred would not have been incurred in any event

This means that a Contractor will need to demonstrate that its accepted tender was sufficiently well priced that it would have made some net return and that there were no other matters which actually occurred which were likely to have caused the loss. In response the Employer is likely to attempt to raise issues or adduce evidence that suggest that the accepted tender was so low that the loss would have always occurred



# Claims For Costs For Delay And Disruption

## **Global Loss Caused By A Series Of Events Or Factors**

The fact that one or a series of events or factors (either unpleaded or which are the Contractor's risk) caused or contributed to the Global Loss does not necessarily mean that the Claimant Contractor can recover nothing

It depends on the impact of the events in question



# Claims For Costs For Delay And Disruption

## Actual Loss

There is no need for the court to go down the Global Cost route if the actual cost attributable to individual loss events can be readily or practicably determined

A Contractor who seeks to pursue a Global Claim where he could otherwise seek to prove his loss in another way will not be debarred from pursuing his claim but it may be that the tribunal is more sceptical about the Global Cost Claim if the Contractor could have instead proved the direct links but chose not to



# Claims For Costs For Delay And Disruption

## Actual Loss

As warned in the 2<sup>nd</sup> Edition of SCL Delay Protocol, a Contractor making a Global Claim:

*“must be aware that there is a risk that a Global Claim will fail entirely if any material part of the Global Loss can be shown to have been caused by a factor or factors for which the employer bears no responsibility and it is not possible for the CA, Adjudicator, Judge or Arbitrator to assess the value of that non-recoverable portion on the available evidence”* (paragraph 17.5)





# Claims For Costs For Delay And Disruption

## **Disentanglement Caused By Contractor**

In Walter Lilly the Court confirmed that the argument that a Global Award should not be allowed where the Contractor has himself created the “impossibility of disentanglement” is wrong





# Claims For Costs For Delay And Disruption

## Four Principles For Recovery Of Overhead & Profits

Akenhead J concluded that:

- 1) A Contractor can recover overheads and loss of profits caused by delay if the delay in question was caused by factors that entitle it to claim loss and expense under the contract
- 2) The burden is on the Contractor to prove that if the delay had not occurred it would have secured other work that would have generated a return

# Claims For Costs For Delay And Disruption

## Four Principles For Recovery Of Overhead & Profits

- 3) Formulae such as Hudson or Emden are legitimate means for a Contractor to prove entitlement to loss of profits and overheads
- 4) A Contract Administrator does not have to be certain of the lost overhead and profits in order to ascertain them under the Contract



# Claims For Costs For Delay And Disruption

## Heads Of Claim

- **Prolongation Costs**
- **Thickening Costs**
- **Increased Costs**
- **Loss Of Overhead & Profit**



**SILVER SHEMMINGS ASH**  
CONSTRUCTION & REAL ESTATE LAW

# Claims For Costs For Delay And Disruption

## Hudson Formula:

$(\text{Head Office overheads} + \text{profit}) \div 100 \times \text{contract sum} \div \text{period in weeks} \times \text{delay in weeks}$

## Emden Formula:

FORMULA(1)  $EM1/EM2=EM3$ ;(2)  $EM3*EM4/EM5*EM6=EM7$

EM1: Total annual HO overhead cost & profit (from audited a/cs)

EM2: Total annual turnover of claimant (from audited a/cs)

EM3: HO overhead & profit as % of turnover

EM4: Original contract price

EM5: Original contract period (in days)

EM6: Period of delay (in days)

EM7: Recoverable of HO overhead & profit



# Delay Under Different Forms

**JCT - Relevant Events:** instructions, variations/changes/access,  
force majeure (not Relevant Matter)

Proving delay is retrospective

**NEC – Compensation Events:** changes, instructions, access, breach  
Proving delay is forecast

**Coronavirus: Clifford Gardner v Clydesdale Bank Limited [2013]  
EWHC 4356 (Ch)**

Obiter; a flu pandemic is "some form of force majeure"





**SILVER SHEMMINGS ASH**  
CONSTRUCTION & REAL ESTATE LAW

**CONCLUSION**



**SILVER SHEMMINGS ASH**  
CONSTRUCTION & REAL ESTATE LAW

**QUESTIONS?**

**[rylandash@silverlp.com](mailto:rylandash@silverlp.com)**



Looking for more information?

**Practical Completions: A Game Changing Case**

**Wednesday 2<sup>nd</sup> September, 8am**

**Hot Topics With Richard Silver: Letters Of Intent**

**Thursday 3<sup>rd</sup> September, 6pm**

**Exterminate! Contractual & Common Law Termination**

**Wednesday 9<sup>th</sup> September, 8am**

**Insolvency & Cash Flow**

**Wednesday 9<sup>th</sup> September, 6pm**

**To book a place / places please email Julie at  
[seminars@silverllp.com](mailto:seminars@silverllp.com)**



**SILVER SHEMMINGS ASH**  
CONSTRUCTION & REAL ESTATE LAW

# What The Property Team Does & What We Can Do To Help You!

- Development agreements – conditional contracts and pre-let agreements
- Financing for the purchase and building works and the re-financing including short term bridging finance
- Site acquisition and sale (from plan or as-built)
- Review of Section 106 Agreements and other planning documents
- Option agreements
- Joint ventures for finance and development
- Land promotion and other acquisition schemes
- Residential and mixed use development and plot sales/off plan purchases for high net worth clients
- Leases and the management work of commercial and residential portfolios
- Servicing the needs of commercial occupiers of offices, showrooms, warehouses and 'sheds'

Contact: Michael Shapiro on [michaelshapiro@silverllp.com](mailto:michaelshapiro@silverllp.com)

Tel: 0207 167 6602



**SILVER SHEMMINGS ASH**  
CONSTRUCTION & REAL ESTATE LAW



**SILVER SHEMMINGS ASH**  
CONSTRUCTION & REAL ESTATE LAW

**HELPLINE**  
**CALL US ON**  
**0207 167 6602**



**LinkedIn**

