Confusion from above

Melville Dundas Ltd v George Wimpey UK Ltd [2007]

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It was a revolution. In May 1998 the government finally enacted the Housing Grants, Construction and Regeneration Act 1996. Construction lawyers take very little interest in about 90% of the Act, but towards the end there are provisions relating to construction contracts (in particular, how contractors are to be paid and how disputes are to be settled by adjudication).

For nine years, no case has come before the House of Lords in relation to any of those provisions. That has now changed. If it did nothing else, *Melville Dundas* would be noteworthy for that alone. However, their Lordships have taken the opportunity of setting the cat among the pigeons. The facts of the case are quite specific, but the principles and problems that it highlights are more widely applicable.

There were five judges in the Lords and their verdicts were not unanimous. This gives some indication of the difficulty that the House had in producing a clear and unequivocal decision.

In essence, the most important matter to come out of the case is the possibility of modifying, via one's contractual terms, what would otherwise be the default position under the Act.

In brief, the Act gives the building contractor a right to periodic payments and sets a procedure that the employer must follow if it wishes to make deductions from those payments. The most important aspect is that if the employer wishes to make a deduction, it must issue, before the 'final date for payment', a notice (the withholding notice) indicating how much (and why) it will be deducting from the amount that is then due to the contractor.

The facts relate to a contractor going into receivership and having its contract terminated under the terms of the contract at a time when a sum had become due to it under the interim payments provisions. The employer had not served any withholding notice (under s111 of the Act). After the receivership was instituted, however, it sought to rely on a contractual provision (clause 27.6.5.1), allowing it to make no further payment to the contractor under any of the payment provisions.

On the one hand, therefore, pursuant to the Act, as at the date of the interim payment becoming due, the contractor had an absolute right to the money, and on the other hand there was a contractual provision that allowed the employer not to pay. By a three to two majority the House allowed the contractual provision to have effect.

Perhaps the House was influenced by the contractor's concession in the courts below that the interim payment was no longer payable (a concession that was withdrawn before the House). It could also be said that the House was influenced by the fact that the interim payment was not going into the contractor's coffers but, due to the administration, was winging its way to its creditors. However, one expects that the highest court in the land will lay down strong guiding principles that can be followed by the lower courts. This case does anything but.

The minority view, given by Lord Mance, thought the Act was plain in its ambit, and affected the parties' rights to set up contract clauses to the contrary.

However, for the majority, Lord Hoffmann stated:

> It seems to me... that it would be absurd to impute to Parliament an intention to nullify clauses like 27.6.5.1, not by express provision in the statute, but by the device of providing a notice requirement with which the employer can never comply. **Section 111(1) must be construed in a way which is compatible with the operation of clause 27.6.5.1** [emphasis supplied].

This is an extraordinary statement. The lower courts have spent the last nine years upholding the supremacy of the payment and adjudication provisions of the Act. This case goes substantially in the opposite direction. ■

Going global
Maersk Oil UK Ltd v Dresser-Rand (UK) Ltd [2007]

Ever since *Crosby & Sons Ltd v Portland UDC* [1967], we have known that claims by contractors put on a 'global' basis (not proving a link between individual causes and effects) are possible. However, such proof must be difficult or even impossible, or there must be an extremely complex interaction of different causative events.

If there are competing delaying events, the contractor must show that the dominant proximate cause of the delay is that of the employer. Even where this cannot be shown, there is the possibility of apportioning the loss.

In *Maersk Oil*, Wilcox J remarked that if an apportionment is possible, then it would be 'manifestly unjust' to deny a remedy where there are plain contractual breaches by the employer. In the final analysis, however, he found that there was no possibility of apportioning and hence the global claim failed in its entirety.

The duty to warn – a level playing field?
Heart Investments Ltd v Fidler [2007]

This case relates to a structural engineer who, while retained to advise the claimant client on the permanent works, did not have, in its retainer, any explicit obligation in relation to the temporary works. Indeed, there was a further engineer retained by the contractor who advised about those temporary works.

As it turned out, there was a collapse of an excavation due to a failure of the temporary works. The court's decision was that the claimant's structural engineer was under an implied contractual duty to take such steps as were open to him to obviate the danger, in short there was a duty to warn his employer about the obvious dangers and his failure to so warn was a breach of contract and was negligent.

The engineer could count himself somewhat unlucky in that there are solicitors' cases (notably *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1978]) where the court stayed strictly within the ambit of the retainer and appeared to eschew any implied duties.

Divide and rule

Multiplex Constructions Ltd v Cleveland Bridge Ltd [2007]

Costs were one of the primary drivers for introducing the Civil Procedure Rules (CPR). Hence, Part 44.3(5) gives the court wide discretion in investigating parties' conduct during the litigation, including:

> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
> (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
> (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

In the old days, cost orders generally followed the principle that 'winner takes all'. However, since the CPR came into force in 1998, parties must be much more careful in deciding which points to take, and when to concede on matters that may turn out to be unsustainable.

In *Rediffusion v Phonographic Performance* [1999] Lord Woolf made it clear that:

> ... the 'follow the event principle' will still play a significant role, but it will be a starting point from which a court can readily depart.

The problem of recovering your costs in complex litigation is not unique to construction cases. However, due to their complexity, these newer style 'divisible' cost orders are felt most acutely in this field.

Another matter that often arises in construction cases is what costs order should be made consequent upon a preliminary issues judgment? Should the winning party always be paid its costs of the issues? This question becomes increasingly difficult when the losing party reveals that it has made a payment into court. Under those circumstances, the winning party may have won on the preliminary point, but could yet lose the case on quantum if the payment into court is not beaten.

In *Multiplex* Jackson J decided:

> ... the court may make an order for costs in favour of the party that has won that issue... however... if the judge is told that the unsuccessful party on that issue has made a payment into court, or a Part 36 offer, the normal order should be to reserve costs. Nevertheless, in an exceptional case... the judge may still make an immediate order for costs if the circumstances warrant such a course.

There is plainly a tension between cutting the case up into salami slices and costing each part immediately, and the court keeping its powder dry until the dust settles at the end of the case.

In the end, he appears to have decided that this was one of his 'exceptional cases'.

The moral is to keep a careful eye on any bits of your case that are objectively unsustainable. Concede them sooner rather than later (see also *McGlinn v Waltham Contractors Ltd* [2007]). ■

Crosby v Portland UDC (1967) 5 BLR 121
Heart Investments Ltd v Fidler & anor [2007] All ER (D) 519
Laing Management (Scotland) Ltd v John Doyle Construction Ltd [2004] 1 BLR 295
Maersk Oil UK Ltd v Dresser-Rand (UK) Ltd [2007] EWHC 1039 (TCC)
McGlinn v Waltham Contractors Ltd [2007] EWHC 149 (TCC)
Melville Dundas Ltd & ors v George Wimpey UK Ltd & ors (Scotland) [2007] UKHL 18
Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp [1978] 3 All ER 571
Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd (No 3) [2007] EWHC 659 (TCC)
Rediffusion v Phonographic Performance [1999] 1 WLR 1507