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Rolled Up Claims and Wharf Properties Revisited (Part 2)

ROLLED UP CLAIMS AND WHARF PROPERTIES REVISITED (Part 2)

This concluding article on rolled up claims suggests that they can still succeed in spite of the apparent implications of the Wharf Properties case.

It has been suggested by the editors of *Building Law Reports*, in their commentary on ***Wharf Properties Ltd v Eric Cumine Associates (1991) 52 BLR 1*** that Lord Oliver restricted the use of rolled up claims and awards to matters of quantum and that in future the causal nexus between events giving rise to the claim and the alleged delay or disruption would have to be fully particularised.

Superficially, this appears to be in accord with the approach adopted by the arbitrator in ***Crosby v Portland UDC (1967) 5 BLR 121***, when he held that:

> "The result, in terms of delay and disorganisation, of each of the matters (for which the respondents were solely responsible) was a continuing one. As each matter occurred, its consequences were added to the cumulative consequences of the matters which had preceded it.
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> "The delay and disorganisation which ultimately resulted was cumulative and attributable to the combined effect of all these matters. It is therefore impracticable, if not impossible, to assess the additional expense caused by delay and disorganisation due to any of these matters in isolation."

On closer reading, however, it was only because individual portions of delay and disruption could not be identified and added separately to the cumulative total of delay and disruption that a rolled up award of quantum was required at all. If separate identification had been possible, then it would have been relatively easy to assess individually the loss caused thereby.

This, in substance, was the interpretation favoured by Recorder Tackaberry QC in ***Mid-Glamorgan County Council v Devonald Williams (1991) 32 Const. LR 90***. Glamorgan brought a claim against its architects alleging that because of their failure to provide adequate information to the contractor, Fairclough, the latter was able to recover additional sums under its contract with Glamorgan.

The causal nexus of the alleged defaults and the delay and disruption suffered by Fairclough was not particularised, but was apparently to be implied from the fact that the architects had not supplied information relating to construction activities two weeks before they were programmed to commence.

The architects applied to strike out this claim on the grounds that, inter alia, the causal nexus was not particularised and that it was embarrassing or otherwise an abuse of process. Having reviewed ***Crosby v Portland UDC, London Borough of Merton v Stanley Hugh Leach Ltd*** and ***Wharf Properties Ltd v Eric Cumine Associates***, the judge said that Lord Oliver had not intended to restrict the principle established in the former cases to issues of quantum and that a rolled up claim could be made -

> "for extra costs incurred through delay as a result of various events whose consequences have a complex interaction that renders specific relation between event and time/money consequence impossible or impracticable."

He refused to strike out Glamorgan's claim as -

> "the council has asserted a case which is theoretically possible as a matter of fact and arguably sustainable in law.
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> "Of course, the council is pinning its colours to a case that creates evidential difficulties and is unlikely to be successful. However, I do not consider that such matters justify the draconian remedy of striking out."

Scott Schedule

A somewhat similar approach was adopted by Judge Fox Andrews QC in ***Imperial Chemical Industries ("ICI") plc v Bovis Construction Ltd and Others (1992) 32 Const. LR 90***. In that case, ICI had previously been ordered to serve further particulars by way of a Scott Schedule, identifying, among other things, each alleged complaint, the defendant against which the complaint was made, which clause of which agreement had been breached and the alleged factual consequences, including the financial consequences of any such breach.

The Scott Schedule eventually served in response to this order continued in many respects to put forward a rolled up claim. ICI sought to justify this approach on the grounds that an actual apportionment between the various events alleged to have contributed to the losses was not possible. It contended that any of the alleged events would have been sufficient, on its own, to cause the consequences alleged and it did not seek to recover more in damages than its actual losses.

The defendants applied to strike out the claim on the grounds that it remained inadequately particularised.

The judge, after reviewing the authorities, observed that, whether the court was faced with an application to strike out an inadequately particularised Scott Schedule or with an application for its better particularisation, the question was the same. It was whether the Scott Schedule was of sufficient particularity to alert the opposite party to the case it would have to meet at trial.

He held that, although the Scott Schedule was inadequate in many respects, this case was quite different from ***Wharf Properties Ltd v Eric Cumine Associates***. There was no evidence of any contumelious behaviour on the part of ICI or its advisers. He was satisfied that:

> "On the basis of the decision in Merton it is permissible in certain circumstances to plead that a large number of matters contributed to prolongation and therefore additional expense."

Nevertheless, this principle did not entitle ICI to plead, in effect, that an unapportioned, but relatively small, breach could on its own have given rise to a claim in millions of pounds. The judge appeared to be concerned that what ICI was trying to do was to leave it to trial to establish, for example, which instruction or revision gave rise to an alleged delay and which was the fault of the defendant. This was considered unacceptable.

ICI was ordered to set out a fully particularised case, identifying the revisions and instructions that gave rise to the alleged periods of delay and the reasons why they did. This did not mean that ICI had to put a period of delay against each revision or instruction on which it relied, but some indication had to be given of those matters that seriously delayed the relevant trade and why this should have been so.

Australian case

Similar issues emerged in ***Naura Phosphate Royalties Trust v Matthew Hall (27 August 1992, unreported)***, where the Supreme Court of Victoria, Australia, dismissed applications by Naura inter alia to remove an arbitrator for misconduct for failing to order further particulars of a rolled up claim, and for that claim to be stayed as embarrassing or as an abuse of process.

In the arbitration, Matthew Hall presented a rolled up claim, alleging that its works had been delayed and disrupted by events for which Naura was contractually responsible. The substance of the complaint was that the works took many more man hours to complete than was reasonably necessary, as evidenced by the other tenders for the work.

It argued that a sufficient causal nexus could be inferred between the events giving rise to its claim and the delay and disruption, because the descriptions of the events indicated their disruptive potential and because there was no other explanation for the excess man hours worked.

In spite of repeated requests by Naura, Matthew Hall refused to particularise the manner and extent to which each event had disrupted the works and caused loss. It argued that a detailed exploration of such

matters was not part of its case. The arbitrator concluded that Nauru had sufficient information to prepare for trial and refused to order Matthew Hall to provide these particulars.

The court reviewed the authorities and rejected the argument that ***Wharf Properties Ltd v Eric Cumine Associates*** restricted the ambit of rolled up claims to issues of quantum. The court approved the reasoning in ***Mid-Glamorgan County Council v Devonald Williams***.

The court also rejected the argument that a rolled up claim could not be maintained because it placed the burden of disproving causation on Nauru. Although a tactical or evidential burden passed to Nauru, the legal burden of proof remained with Matthew Hall.

Smith J. observed:

> "Matthew Hall ... is not obliged to give particulars of 'nexus' when it is not part of its case to establish a nexus between each alleged disrupting event, particular disruptions and loss.
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> "Having stated that conclusion, I would not want it thought that I see no value in the English approach. On the contrary, a global approach can hide a bogus claim ... I can see no reason why ... a judge ... or arbitrator could not require the plaintiff to particularise the ‚nexus' or justify its assertion that it is not possible to do so."

His concerns did not, however, justify judicial intervention in the arbitration.

Conclusion

After a period of uncertainty, the principles concerning rolled up claims derived from ***Crosby & Sons v Portland UDC*** and ***Merton v Stanley Hugh Leach*** have emerged largely unaffected by the decision in ***Wharf Properties Ltd v Eric Cumine Associates***. The recent judicial interest in rolled up claims has, however, resulted in a greater understanding of their limitations.