The High Court has given important guidance on the correct approach to “global” claims, the calculation of extensions of time and ascertaining loss and expense.

In [Walter Lilly v Giles Patrick Mackay] [2012] EWHC 1773 (TCC) Mr Justice Akenhead provided guidance in a dispute over construction of a residential property under a JCT standard form of contract. The project fell into significant delay and the Claimant, represented by Sean Brannigan QC of 4 Pump Court, sought an extension of time and claimed for loss and expense.

Mr Justice Akenhead undertook a comprehensive review of the authorities and provided guidance on these important issues:

**Extensions of Time**

Mr Justice Akenhead refocused attention on the role the court generally plays when
considering questions of extensions of time. A court or arbitrator makes its decision based on the evidence, both actual and expert, unlike the Architect who, prior to Practical Completion must make a best assessment. In undertaking that exercise the Court considered what the approach should be where a delay is caused by both the contractor and an employer default. Having considered the relevant authorities Mr Justice Akenhead approved the comments of Mr Justice Dyson in Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR 32, and expressly rejected the “apportionment” approach of City Inn Ltd v Shepherd Construction Ltd [2010] BLR 473. In doing so, he said:

“I am clearly of the view that, where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time.”

Loss and Expense – the correct approach under standard form contracts

Mr Justice Akenhead considered the application of a typical standard form “loss and expense” clause. He concluded the following in relation to the JCT loss and expense clause under consideration (Clause 26):

a) That in construing clause 26.1.3, the contractor will not lose the right to recover loss and expense where for some of the loss details are not provided “[o]therwise, one can have the absurd position that where £10 out of a £1 million claim is not adequately detailed but the rest of the claim is, the whole claim would fail to satisfy the condition precedent...”;

b) Under clause 26.1.3 the contractor need only submit details which “are reasonably necessary” for ascertaining loss and expense and that allowing the Architect or Quantity Surveyor to inspect the contractor’s records could constitute adequate submission of details;

c) The requisite details “do not necessarily include all the backup accounting information which might support such detail...”

d) That clauses such as clause 26.1.3 should not be construed too strictly against the contractor “bearing in mind that all the Clause 26.2 grounds which give rise to the loss and expense entitlements are the fault and risk of the Employer.”

e) “It is legitimate to bear in mind that the Architect and the Quantity surveyor are not strangers to the project in considering what needs to be provided to them; this is consistent with the judgment of Mr Justice Vinelott in the Merton case...”

Global Claims

The Defendant in Walter Lilly argued that the loss and expense claim was a “global” one
and, as a result, could not succeed. That prompted Mr Justice Akenhead to embark on a careful consideration of the authorities surrounding “global” claims and to form the following conclusions:

a) Subject to express contractual requirements, claims by contractors for loss and expense must be proved as a matter of fact. The contractor must establish that: (i) events occurred which entitle it to loss and expense; (ii) that those events resulted in delay and/or disruption; and (iii) that such delay and/or disruption caused it to incur loss and expense. There is no requirement in principle for the contractor to show that it is impossible to plead and prove the cause and effect in the conventional way or that that impossibility is not the contractor’s fault.

b) The contractor can prove the three requirements by whatever evidence will discharge the burden of proof.

c) Although global claims face added evidential difficulties, there is nothing in principle to make them impermissible. A contractor will generally have to establish that its loss would not have been incurred in any event. This will involve showing that its tender was adequately priced so that it would have made a net return.

d) If events other than those relied on by the contractor, or which are at the contractor’s risk caused or contributed to the total loss, the contractor’s claim does not necessarily fail except to the extent that those other events caused the loss. Mr Justice Akenhead gave the example of a £1m global claim where it could be proved that, except for an unpriced item of £50,000 in the accepted tender, the contractor would probably have made a net return. In those circumstances, the global claim would not fail in its entirety. The global loss would simply reduced by £50,000.

e) The tribunal may treat a global claim with more scepticism if the more conventional approach of proving a direct linkage is available but has not been adopted.

f) Mr Justice Akenhead expressly rejected the suggestion that a global award should not be made where the contractor has himself created the impossibility of disentangling the claim. Unless the contract expressly states that a global claim cannot be made unless certain conditions are complied with, such a claim is, in principle, permissible subject to the contractor discharging the burden of proof.

These principles provide valuable guidance on how courts and arbitrators should approach “global” claims which will assist parties in formulating and seeking to prove such claims.

**Conclusion**

Mr Justice Akenhead has delivered a judgment that brings welcome clarity. Although the decision does not make new law, it appears to have put an end to the debate over whether or not the approach to concurrent delay in *City Inn* is good law in England. The comments on global claims are also likely to bring a certain amount of relief to contractors and to make
them less reticent about having their claims characterised as being “global”.