OPINION OF LORD MACFADYEN OUTER HOUSE, COURT OF SESSION 18th April, 2002

Introduction

1. This action arises out a dispute concerning the construction of new corporate headquarters for Scottish Widows' Fund and Life Assurance Society in Edinburgh. The employers were Edinburgh Construction Services Limited. The defenders were the management contractors. The pursuers were contracted to carry out a number of distinct Works Packages, including Works Package 2010 ("WP2010") and Works Package 2011 ("WP2011").

2. The pursuers seek a number of remedies. First, they seek declarator that they are entitled to an extension of time of twenty-two weeks in respect of WP2011. Secondly, they seek decree ordaining the defenders to procure the ascertainment of the amount of the loss and expense incurred by the pursuers in respect of WP2011. Thirdly, they seek decree ordaining the defenders to procure the final adjustment of the Works Contract Sum for WP2011. Finally, they seek payment of the sum of £4,807,144.16.

3. The action was raised as an ordinary action in mid-1998. It was appointed to the procedure roll by interlocutor dated 13 October 1999. It called before me on the procedure roll on 3 October 2000. At that stage I allowed the pleadings to be amended in terms of the then outstanding minute of amendment for the pursuers and answers for the defenders. That done, however, on the further motion of the pursuers I discharged the procedure roll diet and allowed them to lodge a further minute of amendment by 23 January 2001. On 6 November 2000 I refused *in hoc statu* the defenders' motion for transfer to the commercial roll. The minute of amendment was in due course lodged by the pursuers and answered by the defenders. On 30 July 2001 I allowed the pleadings to be further amended in terms of those documents, as adjusted, and on the pursuers' unopposed motion transferred the action to the commercial roll. On the same date, the defenders having indicated that, notwithstanding the amendment that had taken place, they still wished to debate the relevancy and specification of aspects of the pursuers' pleadings, I appointed the parties to lodge notes of their proposals as to future procedure. The defenders duly lodged a Note (No. 22 of process) in which they identified nine points that they wished to argue at debate. Having heard counsel further at a continued preliminary hearing on 8 October 2001, I appointed the action to debate, but only on the points identified in paragraphs 4 to 9 of the defenders' Note. When the case called before me for debate on 6 December 2001, it was indicated that the points identified in paragraphs 6(c) and 9 would not be argued. I therefore heard debate on the points identified in paragraphs 4, 5, 6(a), (b), (d) and (e), 7 and 8.

Paragraph 4

(a) Averments

4. This paragraph of the Note is concerned with the pursuers' extension of time claim. The defenders contend that the pursuers' averments about the effect of WP2010 on the completion of WP2011 are inconsistent and irrelevant. On that ground they seek to have certain averments excluded from probation. In order to examine the submissions in context, it is necessary to set out the averments in question at some length. I have highlighted in **bold** the passages which the defenders seek to have excluded from probation.

5. In Article 4 of the condescendence (Closed Record, page 9), the pursuers aver that they commenced work on site on 25 September 1995; that completion of WP2011 should have taken place 28 weeks later, i.e. on 7 April 1996; that practical completion of WP2011 was achieved on 7 September 1996; and that the actual period for completion was thus 50 weeks or thereby. They aver that the delay of 22 weeks was caused by Relevant Events within the meaning of Clauses 2.10.2, 2.10.6 and 2.10.7.1 of the Works Contract Conditions. The averments then continue (at pages 9 - 10): *"Delay was caused by the pursuers' compliance with Instructions. Delay was caused by the pursuers not receiving in due time necessary instructions, drawings, details and levels duly requested from the Professional Team. Delay was caused by delay on the part of the Works Contractors responsible for WP2010, the pursuers being unable to take any practicable steps to avoid or reduce the said delay.*

The parties have agreed that the construction of Block A [one of seven blocks into which the building was divided] which contained cores A1 and A2 [the cores being of reinforced concrete columns and beams] was

critical for the completion of WP2011. In terms of the Works Contractors Programme, work on Block A was due to start in the week commencing 27 November 1995 (week 10) and finish at the end of the week commencing 1 April 1996 (week 28). Due to the late issue of construction drawings and reinforcement information, all reinforcement could not be ordered until 16 January 1996. The pursuers were able to make a limited start on 15 January 1996. However, due to the foregoing late information, ***and to restricted access to the work area owing to delay in Work Package 2010****, the pursuers were prevented from making a meaningful start until 12 February 1996, some ten weeks later than planned. While WP2011 required that all ramps on the site be open for access, WP2010 was undertaken on the basis that the ramps would be closed off. Since time for completion of WP2010 was extended, this caused restricted access to WP2011. The pursuers were not liable for any delay, loss or expense caused by this restriction prior to 22 January 1996. Both before and after that date, the pursuers were in any event delayed by late issue of drawings and information."*

There then follow (at pages 10 - 13) averments about the causes of further delay following the commencement of Block A. The passage of averment then concludes: *"Accordingly, the completion of the works package [i.e. WP2011] was delayed by a total of ... 22 weeks, as a result of the above-mentioned causes, none of which is attributable to the fault of the pursuers."*

At page 14 of the Closed Record the pursuers admit that they were awarded an extension of time on WP2010 which expired on 21 January 1996. At page 16 they aver: *"With reference to the defenders' averments anent WP2010, the pursuers' work on that works package was delayed by unforeseen ground conditions and by design changes. The pursuers received an extension of time award and additional payment for WP2010. After February 1996, WP2010 had no further effect on WP2011."*

(b) Submissions

6. For the defenders, Mr Borland submitted that the averments which I have highlighted in bold in the passages quoted in paragraph [5] above should be excluded from probation. On the one hand, the pursuers appeared to accept that they could only rely on the delay to WP2011 caused by the delay to WP2010 up to 21 January 1996. That appeared to be implicit in the averment: "The pursuers were not liable for any delay, loss or expense caused by this restriction prior to 22 January 1996." That was consistent with their admission that they were granted an extension of time in respect of WP2010 which expired on 21 January 1996. Yet on the other hand, in other parts of the same passage, they appeared to be founding on the delay caused by WP2010 beyond that date. In averring that they were prevented from making a meaningful start to WP2011 until 12 February 1996 they relied both on the late information and on "restricted access to the work area owing to delay in Work Package 2010". In the passage quoted above from page 16, they appeared to be asserting that the delay in WP2010 continued to be relied upon until "February 1996". Mr Borland also referred to items B and C in Schedule B to the summons, in which causes of delay derived from WP2010 were relied on beyond 21 January 1996, and to the pursuers' fourth request for an extension of time (No. 7/13 of process) which was incorporated into the pleadings and at page 118 appeared to carry reliance on WP2010 through to April 1996. Given their admission that the extension of time in respect of WP2010 expired on 21 January, the pursuers could not relevantly found on delay caused to WP2011 by the delay in completion of WP2010 beyond 21 January.

7. In addition, Mr Borland submitted, the pursuers' reliance on the delay to WP2010 as justifying an extension of time in respect of WP2011 in respect of the period after 21 January 1996 was inconsistent with an agreement that had been reached between the parties. The agreement was to be found in a letter from the defenders to the pursuers dated 18 October 1996 and the pursuers' acceptance endorsed thereon dated 22 October 1996 (together forming No. 7/12 of process). There had been reference to that document in the defenders' pleadings for some considerable time, but no response from the pursuers. In paragraph 5 of the letter the defenders wrote: *"You hereby agree that no account shall be taken of any matters arising out of or in connection with Works Package 2010, except insofar as an extension of time has been awarded in accordance with our letter dated 23 July 1996, in determining any claim or entitlement you may have to payment or extension of time under your Contract for Works Package 2011, including any claim for breach of contract for Works Package 2011."*

The clear effect of that agreement, Mr Borland submitted, was to preclude the pursuers from founding on any effect on WP2011 of the delay to WP2010 in respect of the period beyond the date on which the extension of time granted in respect of WP2010 expired. Mr Howie, senior counsel for the defenders, although his submissions on the effect of the agreement were made primarily in the context of the global claim for loss and expense rather than in the context of the extension of time claim, reiterated that its clear effect was to absolve the defenders of responsibility for any effect of WP2010 on WP2011 from and after 22 January. There was no room for proof as to the meaning of the agreement; it was a simple matter of construction. No surrounding circumstances had been averred by the pursuers. They had offered no assertion in their pleadings that the agreement meant something other than was contended for by the defenders.

8. In the course of the response to this argument by Mr Smith, junior counsel for the pursuers, it was recognised that the incorporation into the pursuers' pleadings of the reference in No. 7/13 of process (at page 118) to April 1996 resulted in an inconsistency in the pursuers' pleadings. An amendment to deal with that matter was proposed but, in the event, by agreement between counsel for the parties, the tendering of the minute of amendment was delayed until the continued diet of debate on 4 January 2002. On that date I granted the pursuers' unopposed motion to amend in terms of a minute of amendment which *inter alia* deleted the incorporation of the offending part of No. 7/13 of process.

9. Mr Smith's position was that, apart from the reference to April subsequently removed by the amendment to which I have just referred, there was, on a fair reading of the pursuers' pleadings, no inconsistency in their position. Their averment at page 10 - that due to late information and restricted access due to delay in WP2010 they were prevented from making a meaningful start on WP2011 until 12 February 1996 - was consistent with the detail given in Schedule B, items B, C and D. The averment that the pursuers are not liable for any delay, loss or expense caused by the WP2010 restriction prior to 22 January involved no inconsistency. It was, in light of the WP2010 extension of time, correct according to its terms. It carried, however, no implication that from 22 January onwards the pursuers were, or the defenders were not, so liable. As I understood him, Mr McNeill, senior counsel for the pursuers, adopted those submissions without adding to them.

10. Mr McNeill, however, restated the pursuers' position in respect of the agreement contained in No. 7/12 of process. It arose as an issue, he submitted, because the defenders relied on it in their pleadings. The pursuers accepted that the agreement existed, but it was open to construction. It was primarily concerned with the final settlement between the parties in respect of WP2010. WP2011 was mentioned only in paragraph 5. The defenders contended that the wording of that paragraph meant that in determining claims under WP2011 no account would be taken of **the effect** of matters arising out of or in connection with WP2010, except insofar as the extension of time had been granted. There were other possibilities. One was that the paragraph meant that in determining such claims no account was to be taken of any of the matters already settled in terms of the agreement. Another was that the exception relating to the WP2010 extension of time might have been intended to cover any knock-on effects of that extension, since it was, he suggested, otherwise unclear why there was reference to it. It was not obvious as a matter of pleading that the effect of the agreement was that the pursuers were bound to fail in their claim in respect of the period from 22 January to 12 February 1996. The issue should be reserved for determination after proof before answer.

(c) Discussion

11. Despite the long procedural history of this case and the several opportunities to amend their pleadings that have been afforded to the pursuers, the expression of their position in respect of the issue raised in paragraph 4 of the defenders' Note remains, in my view, unsatisfactory. I take as the primary statement of their position the averment that: *"... due to the foregoing late information, and to restricted access to the work area owing to delay in Work Package 2010, the pursuers were prevented from making a meaningful start until 12 February 1996, some ten weeks later than planned".*

The pursuers do not attempt to argue that that averment is capable of meaning that the restricted access was a cause of delay only up to 21 January and that the late information then took over as the cause. Such an argument is precluded by the terms of items A, B and C of Schedule B to the summons.

The pursuers are therefore seeking to say as matter of fact that the restricted access because of the delay to WP2010 continued to prevent progress with WP2011 into February 1996. They are also seeking to rely on that fact as part of the ground for their claims against the defenders. It is in that context that it is necessary to consider the pursuers' admission that the WP2010 extension of time expired on 21 January 1996, and their averment that they are "not liable for any delay, loss or expense caused by this restriction prior to 22 January 1996". In a sense, Mr Smith was no doubt correct to say that the last-mentioned averment does not necessarily imply acceptance that the pursuers are liable, and the defenders are not liable, from 22 January onwards. But it seems to me that that point falls short of a satisfactory explanation of the pursuers' position. No doubt it can be said, on that basis, as Mr Smith did, that there is no inconsistency in the pursuers' pleadings. That, however, does not seem to me to provide a satisfactory answer to the real substance of Mr Borland's attack. The pursuers are claiming an extension of time of 22 weeks in respect of WP2011. They do so on the basis stated in their averment at page 13 that none of the causes of delay was attributable to their fault. In respect of the delay caused to WP2011 by the delay to completion of WP2010, that proposition can be vouched, for the period up to 21 January, by the fact that they were awarded an extension of time in respect of WP2010. That leaves them, however, in a position in which they must look elsewhere for a basis for saying that the delay to WP2011 caused by the continuing work on WP2010 after the expiry of the period of extension of time was not attributable to their fault. Beyond 21 January, the delay to commencement of WP2011 caused by continuing work on WP2010 was, it seems to me, *prima facie* attributable to their failure to complete WP2010 within the extended period allowed. Yet they offer no other basis for the contention that the delay to WP2011, so far as caused by continuing work on WP2010 after 21 January, is not to be regarded as attributable to their own fault. It appears to me to follow that the averments of delay caused after 21 January by continuing work on WP2010 are not relevant to support the claim for extension of time in respect of WP2011.

12. If I am right so far, and if the agreement contained in No 7/12 of process is to be construed in the way contended for by the defenders, that agreement merely provides a second basis for holding that the pursuers are not entitled to found a claim for an extension of time in respect of WP2011 on delay after 21 January caused by WP2010. It seems to me to be clear, as a matter of construction of the agreement, that it does have the effect contended for by the defenders. That contention has been in the defenders' pleadings for some time, and forms part of the argument summarised in paragraph 4 of their Note (No. 22 of process). In these circumstances it seems to me to be regrettable that the pursuers did not see fit to articulate in advance of the debate their competing contentions as to the proper interpretation and effect of the agreement. The position, however, is that they neither contend in their pleadings for a different construction nor seek to found on surrounding circumstances to yield a different construction. The alternative interpretations suggested by Mr McNeill in his submissions do not seem to me to be the natural reading of the language of the agreement. I do not consider that there is any basis for deferring a conclusion on the meaning of the agreement until after proof, because there is nothing averred which might put a different complexion on the language used. I am therefore of opinion that the agreement does constitute a second ground for holding that the averments about the effect of WP2010 between 22 January and 12 February are not relevant to support the extension of time claim.

13. Despite what I have said so far, I do not propose to exclude from probation the averments highlighted in **bold** in paragraph [5] above. Although my view is that the pursuers have put forward no relevant basis for treating delay to WP2011 caused after 21 January by continuing work on WP2010 as ground for an extension of time in respect of WP2011, that is not to say that they are wrong in asserting as a matter of fact that the delay to WP2011 between 22 January and 12 February was partly caused by the continuing works on WP2010. In that situation it seems to me that it would be unhelpful to exclude the criticised averments from probation. It would, in my view, be artificial to withhold from the knowledge of the court one aspect of the factual circumstances which may have contributed to the occurrence of delay in WP2011 simply because that aspect of the circumstances does not go to support the pursuers' claim for an extension of time.

Paragraph 5

(a) Averments

14. This paragraph of the defenders' Note is concerned with the relevancy of the averments in support of the pursuers' claim for loss and expense. Those averments are set out principally in article 5 of the condescendence. They begin: *"During the period of the works contract, the progress of the pursuers' works was materially disrupted in the following ways, by matters set out in clause 4.46 of the Works Contract:- ..."*.

Mr Borland identified as critical to the pursuers' case a passage beginning at page 27 of the Closed Record, which is in the following terms:

"During the contract works, the pursuers estimated that their recoverable uneconomic labour costs amounted to £1,649,505. That analysis depended upon a comparison between pre-contract estimates and actual costs. The causes of delay and disruption which led to the uneconomic use of labour are enumerated in the narrative sheets contained in the pursuers' claim submissions and now brought down to the end of the WP2011. These narrative sheets are produced herewith as Schedule A to the summons, the terms of which Schedule are incorporated herein for the sake of brevity. They demonstrate in detail the following delays to the various blocks:-

Block A

Under the Construction Programme, Block A was to be the penultimate block to start, and was due to be completed in week 28, the last week of the contract period. In the absence of more extensive delays in other blocks, therefore, a delay in Block A had a direct effect upon the overall completion of WP2011. A limited start to the Block was made on 15 January 1996. However, because the main access ramp to the workface was through Block A, and core A2 was under this access ramp, the cores from level -2 to level -1 could not make a meaningful start until 12 February 1996."

It can thus be seen that in connection with their claim for loss and expense caused by disruption the pursuers are founding inter alia on the same element of delay in WP2011 consequent on the access difficulties caused by the delay in completion of WP2010 as they found on in their extension of time claim. There follow further averments about disruption of work on Block A, then averments about disruption of the work on other blocks. The averments then continue (at page 32):

"Despite the pursuers' best efforts, it is not possible to identify causative links between each such cause of delay and disruption, and the cost consequence thereof. As the narrative sheets at Schedule A show, the effects of late issue of information were concurrent with, and superimposed upon, variations on construction scope and detail. In these circumstances, although it is not possible to show direct cause and effect, the pursuers have analysed labour costs in the following fashion, as set out in the Report entitled "Uneconomic Use of Labour". They have compared labour productivity actually achieved by them on site when work was largely free from disruption ('normal' work) with labour productivity achieved when work was disrupted ('disrupted' work)."

The point is then elaborated further, but the passages which I have quoted provide a sufficient background for the submissions which were made.

(b) Submissions

15. Mr Borland pointed out that the pursuers' claim for loss and expense was expressed in the form that has come to be known as a global claim. Normally a party making a claim required to aver a causal connection between an event for which the party against whom the claim was made was in law responsible and each item of loss and expense. Mr Borland recognised, however, that there were circumstances in which a global claim might be made on the basis that the aggregate loss had been caused by the interaction of a number of events, if the party against whom the claim was made was legally responsible for all of those events. In such a case it was incumbent on the party making the claim to aver that that it was impracticable to trace the causal nexus between individual event and individual item of loss. The pursuers made such an averment in the present case, in the passage quoted in paragraph [14] above from page 32 of the Closed Record. It was, nevertheless, Mr Borland's submission that the pursuers' global claim was not supported by relevant averments. He submitted that the relevancy of a global claim depended on what he described as certain "***assumptions***" holding true. He identified the key assumptions for present purposes as being (1) that the pursuers were not themselves responsible to any material extent for the increased costs in respect of which the global

claim was advanced, and (2) that the defenders were responsible for all of the causal factors that contributed to the increased costs. It undermined the relevancy of the whole global claim if the pursuers were responsible for any factor which contributed to causation of the increased costs. The success of a global claim was periled on all the causal factors being factors for which the defenders were legally responsible. In order to advance a global claim, the pursuers asserted that it was impossible to trace causal connection between individual events and individual items of loss. It followed that, if one factor founded on as playing a material part in causation of the global loss could be seen to be the responsibility of the pursuers, or otherwise not the responsibility of the defenders, there was no rational basis in the pursuers' pleadings for maintaining any part of the claim.

16. In support of that approach, Mr Borland referred to several textbooks on construction law. First, he referred to *Emden's Construction Law*, eighth edition, III, [231], in which global claims are discussed in the following terms: *"Some contractors have ... been tempted to put performance claims on a 'global' or 'total cost' basis, merely making a comparison between actual and anticipated costs, either for the whole project or the whole part of the works affected. Such a claim faces a number of problems. ... Second, it relies on a number of assumptions: one, in particular, being that the difference between actual and anticipated costs results entirely from matters for which the defendant is responsible. ... It is now clear, however, that presenting a claim on such a basis is unacceptable unless any other form of evaluation is either impossible or impracticable in the circumstances."*

Secondly, Mr Borland cited *Keating on Building Contracts*, eighth edition, paragraph 17-18: *"The danger of advancing a composite financial claim is that it might fail completely if any significant part of the delay is not established and the court finds no basis for awarding less than the whole. It might also conceivably fail if the court were to find that proper separate identification and linking of the factual consequences constituting the contractor's entitlement to claim and his losses could have been made."*

Thirdly, he cited *Hudson's Building and Engineering Contracts*, eleventh edition, paragraphs 8-200 to 8-204. Paragraph 8-200 sets out useful definitions of the terms used, which are not precisely interchangeable: *"Global claims may be defined as those where a global or composite sum, however computed, is put forward as the measure of damage or contractual compensation where there are two or more separate matters of claim or complaint, and where it is said to be impractical or impossible to provide a breakdown or sub-division of the sum claimed between those matters. 'Total actual cost' or 'total cost' are American expressions used ... to describe those claims, whether in respect of one only or more than one matter of complaint, where the alleged total costs of the contractor ... is (sic) compared with the contract value or price, and the difference then put forward as representing the measure of damage or additional cost caused by the one or more matters complained of. Where more than one separate matter is relied on, as is very often the case, a total cost claim will also, therefore, constitute a global claim as above defined."*

In paragraph 8-201 the view is expressed that there are major objections of principle to both these types of computation. One of these is that: *"The tribunal in such a case ... has no satisfactory material before it to reduce the overall claim in respect of disallowed individual claims, unless it is prepared to rescue the plaintiff by embarking on an inquiry or calculations of its own at a late stage of the proceedings, which can again be very unfair to the defendant."*

In paragraph 8-203, after discussion of certain American authorities, to which I shall return, the view is expressed that: *"Even where this type of calculation has been permitted, the United States cases show that it will be hedged about with a number of strict conditions requiring affirmative evidence; namely [inter alia] ... there must be no contribution to the cost in any marked degree by the contractor (or no doubt by any other events for which the owner is not responsible)."*

These texts, Mr Borland submitted, were unanimous in identifying that a key assumption of a global claim is that the pursuer must not be responsible for any of the material factors causing the cost increase in respect of which the global claim is advanced.

17. Mr Borland turned next to a series of American cases. By way of introduction to them, he put before me an extract from Sweet, *Legal Aspects of Architecture, Engineering and the Construction Process*, second edition, which at page 598, section 29.17(B), sets out an explanation of the role of the Federal Court of

Claims in relation to federal procurement contracts. It appears that disputes under such contracts are determined initially by the contracting officer of the federal agency which awarded the contract. Appeals from his decisions are heard by a Board of Appeals. From the decision of the Board of Appeals a further appeal on error of law or in relation to "factual conclusions unsupported by substantial evidence" lies to the Federal Court of Claims. Such appeals are first heard by a Commissioner, whose decision is passed to the Federal Court of Claims, which may adopt it or write its own opinion. Mr Borland referred to four American cases, all but the first of which were decisions of the Federal Court of Claims. The first case was ***Lichter* v *Mellon-Stuart Co***. 305 F. 2d 216 (1962), a decision of the US Court of Appeals, Third Circuit. The three Federal Court of Claims cases were ***Wunderlich Contracting Co and Others* v *United States*** 351 F. 2d 956 (1965), ***Phillips Construction Co Inc* v *United States*** 394 F 2d 834 (1968), and ***Boyajian* v *United States*** 423 F 2d 1231 (1970). Mr Borland submitted that they too supported the proposition that it was fatal to a global claim if one of the causal factors contributing to the global loss was not the responsibility of the defenders.

18. In ***Lichter*** the appellants undertook two subcontracts, described as relating respectively to interior masonry work and exterior stone work. At page 219 the court said: *"But even if Southern [i.e. the appellants, the subcontractor] is correct in its contention that Mellon [i.e. the main contractor] breached the contract by insisting that the subcontractor proceed under conditions necessitating piecemeal performance of the masonry work, we think there is an insuperable obstacle to recovery on this record. In the opinion of the court below ... this difficulty is stated as follows:*

'Even if one could find from the evidence that one or more of the interfering contingencies was a wrongful act on the part of the defendant, no basis appears for even an educated guess as to the increased costs suffered by the plaintiffs due to that particular breach or breaches as distinguished from those causes from which the defendant is contractually exempt from responding in damages.'

"The record shows that in proving damages the subcontractor introduced testimony as to what it would have cost to perform all of the masonry work if that undertaking had proceeded without untoward occurrences in the manner contemplated at the time of contracting. Next, the actual cost of the entire masonry job as delayed, interrupted and hindered by all causes was proved. The entire difference was claimed as damages without any itemization."

At page 220 the court concluded: *"On the whole record, we think the court was justified in concluding that a substantial amount of the lump sum which Southern proved as the extra cost of the masonry work was the consequence of factors other than a breach or breaches of contract by Mellon. Since the court could find no basis for allocation of this lump sum between those causes which were actionable and those which were not, it was proper to reject the entire claim."*

19. In ***Wunderlich*** the plaintiffs claimed damages for breach of warranty in respect of disruption caused by the provision of defective plans. The Federal Court of Claims noted (at page 964): *"Plaintiffs seek to recover as damages for this breach of warranty their entire loss on the project, measured by the difference between the total cost of performance (plus profit allowance) and the income received through payment of the contract price, as increased by the change orders. No attempt is made to distinguish between expenses arising out of deficiencies in the plans and expenses attributable to purely extraneous factors. Plaintiffs simply ask for a blanket recovery of all un-recouped costs on the contract, regardless of source."*

The Court then went on to observe (at 965): *"The 'total cost plus profit' theory of computing damages advanced here by plaintiffs is appropriate only in 'extreme cases', where no more satisfactory method is available. ... It assumes, inter alia, that defendant is in fact liable for all the injuries sustained, that plaintiff's bid was accurately computed, and that the costs incurred were reasonable. ... The case at hand is ill-suited to application of this method of computation. There is no reliable evidence in the record to serve as a basis for approximating the extent to which defendant, and not the Korean War or other factors beyond the control of defendant, was responsible for any of the loss sustained by plaintiffs on the contract."*

20. **In *Phillips Construction*** the Court of Claims observed (at page 841*): "However ... this method [the total cost approach] is not preferred by the court and will be used only in an extreme case. The reason for its reluctance to apply the total cost approach are explained by the court in ... **F. H. McGraw & Co v United***

States *131 Ct. Cl. 501, 130 F. Supp. 394 (1955). The court said: '**This method of proving damage is by no means satisfactory, because, among other things, it assumes plaintiff's costs were reasonable and that plaintiff was not responsible for any increases in cost, and because it assumes plaintiff's bid was accurately computed, which is not always the case, by any means.**'"*

21. In ***Boyajian*** the Court of Claims, quoting from ***WRB Corp* v *United States*** 183 Ct. Cl. 409 (1968), observed (at page 1243): *"The acceptability of the method [the total cost approach] hinges on proof that (1) the nature of the particular losses make (sic) it impossible or highly impracticable to determine them with a reasonable degree of accuracy; (2) the plaintiff's bid or estimate was realistic; (3) its actual costs were reasonable; and (4) it was not responsible for the added expenses."*

Later (at page 1244) the Court added: *"In situations where the court has rejected the 'total cost' method of proving damages, but where the record nevertheless contains reasonably satisfactory evidence of what the damages are, computed on an acceptable basis, the court has adopted such other evidence."*

22. In light of the approach adopted by the textbook writers and in the American authorities, Mr Borland submitted that the pursuers' global claim was not supported by relevant averments. The pursuers in advancing their extension of time claim clearly relied on the effect of delay in completion of WP2010 beyond the end of the extension of time as part of the explanation for the delay in completing WP2011. That causal factor was carried through into their disruption claim. They sought to advance a global claim for loss and expense caused by disruption on the basis that one of the factors causative of the disruption was the delay until 12 February in commencing WP2011 consequent on the delay in completion of WP2010. If, as the defenders submitted, there was no relevant averment that the WP2010 delay was the responsibility of the defenders, and *a fortiori* if it was evident that that delay was the responsibility of the pursuers, the result was that the pursuers could not say that **all** of the factors causative of the disruption which resulted in the global loss were the responsibility of the defenders. The necessary foundation for a global claim was therefore absent. There was no rational basis offered by the pursuers for separating out the causal factors for which the defenders were responsible, and the loss caused exclusively by those factors. After proof, the Lord Ordinary would therefore have no proper evidential basis for calculating the loss and expense attributable to factors for which the defenders were in law responsible (c.f. ***Duncan* v *Gumleys*** 1987 SLT 729). The claim must therefore fail as a whole.

23. Mr Howie adopted and elaborated upon Mr Borland's submissions on the paragraph 5 point. The pursuers' claim for loss and expense was based on Clause 4.45 of the Works Contract, which placed on the defenders liability in respect of loss and expense caused by the events listed in Clause 4.46. It was presented as a global claim, but not all of the factors said to have caused the delay and disruption which resulted in the loss and expense were events listed in Clause 4.46. That undermined the global claim. It was enough to undermine it that not all of the factors said to have played a causal role were in terms of the contract the responsibility of the defenders. It was not necessary that there be such factors which were the responsibility of the pursuers. The underlying logic of a global claim emerged in the following way. It was incumbent on a pursuer who sought compensation for loss to prove that his loss was caused by something for which the defender was in law responsible. That applied to a contractual claim for loss and expense in the same way as it applied to a common law claim for damages. The requirement that the pursuer prove that his loss was caused by a factor for which the defender was legally responsible did not disappear because there was more than one potential cause of loss. In such a situation, for each item of loss it was necessary for the pursuer to show that it had been caused in a way for which the defender bore contractual responsibility. Otherwise the defender would be at risk of being held liable to reimburse loss for which the contract did not make him responsible. In principle, therefore, in a case where there were many causes of loss and many items of loss, it was incumbent on the pursuer to trace the connection between each cause and the loss which resulted from it. In practice where many causes interacted with each other to bring about loss, in such a way that the causal connections between individual events and individual items of loss could not be teased out, a pursuer was faced with a difficulty. There were, however, circumstances in which that difficulty might be overcome without proof of individual causal connections. If the court could be

satisfied that every event which played a part in causing the total loss suffered by the pursuer was an event for which the defender was responsible in law, the question of which event caused which part of the loss was academic, and an attempt to trace individual causal connections would be artificial. In such circumstances a global claim could be regarded as legitimate. Such a claim could only be made, however, if it was impossible or at least impracticable to trace individual causal connections between events and items of loss. Moreover, such a claim could only be upheld if **all** of the causative events were events for which the defender was contractually responsible. To uphold such a global claim where only some of the events which contributed to causation of the total loss were events for which the defender was responsible would be to make the defender bear loss for which he had no legal liability.

24. The proposition that a global claim could only be resorted to if it was impossible or impracticable to disentangle the causal connections contributing to the global loss was, Mr Howie submitted, supported by ***Mid Glamorgan County Council* v *J. Devonald Williams & Partner*** (1992) 29 Con LR 129 at 154, where Mr Recorder Tackaberry QC said: *"Where ... a claim is 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, it is permissible to maintain a composite claim."*

The proposition that a global claim could not succeed if one or more of the causal factors were matters for which the defender was not legally responsible depended on the same logic as underlay the "***weaker alternative***" rule in Scottish pleadings. The difficulty faced by a global claim was understated in *Keating on Building Contracts* at paragraph 17-18; the global claim **would** fail (not merely **might** fail) if the pursuer failed to prove, in respect of any factor that contributed materially to the causation of the global loss, that it was the responsibility of the defender, and there was no basis for attributing a particular part of the loss to a particular causative event for which the defender was responsible. Some at least of the American cases could not be distinguished on the basis that they dealt with total loss claims rather than global claims (using those expressions in the sense defined in *Hudson's Building and Engineering Contracts*, paragraph 8-200). The claim in *Lichter* failed because the claimant could not show that all of the losses were caused by factors for which the defendant was contractually responsible. In ***Wunderlich* t**he problem was that part of the causation of the loss was attributable to the Korean War, a factor for which the defendant had no responsibility.

25. Mr Howie also founded on ***John Holland Construction & Engineering Pty Ltd* v *Kvaerner R J Brown Pty Ltd*** **(**1996) 82 BLR 83, in which the Supreme Court of Victoria discussed the treatment of global claims. Byrne J first set out a number of general propositions, including (at 84I): *"Where the loss is caused by a breach of contract, causation for the purposes of a claim for damages must be determined by the application of common sense to the logical principles of causation";*

and (at 85A): *"... it is possible to say that a given loss was in law caused by a particular act or omission notwithstanding that other acts or omissions played a part in its occurrence. It is sufficient that the breach be a material cause... This last matter may be of particular importance in a case like the present where a number of potential causal factors may be present."*

Byrne J went on to note (at 85D) that a global claim had been held to be permissible in the case where it was impracticable to disentangle that part of the loss which is attributable to each head of claim, and this situation had not been brought about by delay or other conduct of the claimant (***London Borough of Merton* v *Stanley Hugh Leach Ltd*** (1985) 32 BLR 51 *per* Vinelott J at 102). Byrne J then noted that the global claim before him was a total cost claim. He said (at 85E-86E): *"The logic of such a claim is this:*

a. the contractor might reasonably have expected to perform the work for a particular sum, usually the contract price;
b. the proprietor committed breaches of contract;
c. the actual reasonable cost of the work was a sum greater than the expected cost.

The logical consequence implicit in this is that the proprietor's breaches caused that extra cost or cost overrun. This implication is valid only so long as, and to the extent that, the three propositions are proved and a further unstated one is accepted: the proprietor's breaches represent the only causally significant factor responsible for

Adjudication Law Reports. Typeset by NADR. Crown Copyright reserved.

the difference between the expected cost and the actual cost. ... The unstated assumption underlying the inference may be further analysed. What is involved here is two things: first, the breaches of contract caused some extra cost; secondly, the contractor's cost overrun is this extra cost. ... It is the second aspect of the unstated assumption ... which is likely to cause the more obvious problem because it involves an allegation that the breaches of contract were the material cause of all of the contractor's cost overrun. This involves an assertion that, given that the breaches of contract caused some extra cost, they must have caused the whole of the extra cost because no other relevant cause was responsible for any part of it."

26. In the present case, Mr Howie submitted, the pursuers' claim for loss and expense was in respect of prolongation and disruption. The global claim could not be apportioned according to the period of delay ultimately established by the pursuers to have been caused by factors for which the defenders bore responsibility under clause 4.46, because it was impossible to tell what the disruptive effect of any particular period of delay was. The effect of the agreement contained in No. 7/12 of process was that the defenders had no responsibility for the consequences of the effect of delay in WP2010 after 21 January on progress with WP2011. Yet it was plain from the pursuers' pleadings in the passages quoted at paragraphs [5] and [14] above that they were asserting that the effect of WP2010 between 21 January and 12 February was the cause, or a critical cause, of prolongation and disruption. It was impossible to tell what the disruptive effect of that particular delaying factor was. The consequence was that the whole claim was irrelevantly stated. The pursuers could not avoid that consequence by saying that, even if one cause of delay was not the defenders' responsibility, there were other concurrent delays that were their responsibility. It was clear from Schedule C to the summons that between 22 January and mid-February, the causes of delay said by the pursuers themselves to be "***critical***" were (i) the effects of WP2010 and (ii) snow. Neither of these was a cause for which the defenders had any liability to pay for loss and expense.

27. Mr Howie recognised that there was support in some of the American authorities for the view that a court, faced with a failure on the pursuer's part to establish responsibility on the defender's part for all the causal factors which yielded the global loss, could award a lesser sum if there was an evidential basis for finding a causal connection between the factors for which the defender was proved to be responsible and some identifiable part or parts of the loss. He submitted, however, that in the present case there was no real basis for adopting that approach. Even in respect of the claimed prolongation cost of £75,000 (item (a) in the table at page 54 of the Closed Record) it was impossible to tell whether the three weeks' delay between 22 January and 12 February resulted in three weeks' prolongation. There was therefore no basis on which the court could adjust that claim downwards to take account of the fact that the defenders were not responsible for that period of delay. *A fortiori* there was no basis in the pleadings on which the court might attempt to adjust the disruption element of the global claim to take account of the causal factors for which the defenders were not responsible.

28. Mr Smith put at the forefront of this aspect of his submissions on the global claim the proposition that, even if the averments about delay and disruption caused to WP2011 by the delay in completion of WP2010 beyond 21 January were held to be irrelevant, that would not undermine the global claim because there was an overlapping cause of that delay in the form of late information, and that cause was the responsibility of the defenders. Moreover, although to justify the adoption of a global claim it was necessary that it be impossible or impracticable to trace the connection between each and every causal factor to its consequent loss, it did not follow that the ability to trace some causal connections precluded the adoption of a global claim. Mr Smith summarised the defenders' approach as being: (1) that the key assumption underlying the pursuers' global claim was that the pursuers were not themselves responsible to any material extent for any event said to be causative of the increase in cost in respect of which the global claim was made; (2) that if the pursuers were themselves responsible to any material extent for any increase in cost, it could not be inferred that the entire increase in cost was the defenders' responsibility; and (3) that if the pursuers were responsible for one of the causal factors, there was no rational method of separating that part for which the pursuers were responsible from the total claim, and no rational basis for quantifying the loss for which the defenders were responsible. In criticism of those submissions, Mr Smith argued that the first two propositions were of limited effect, in that they did not make any allowance for the phenomenon of concurrent causes of a period of

Adjudication Law Reports. Typeset by NADR. Crown Copyright reserved.

delay. If there were such concurrent causes, their significance required to be worked out at proof before answer. The third proposition went too far. It did not follow, if the pursuers were responsible for a causal factor, that there could be no rational basis for separating out from the global claim a part for which the defenders could properly be held liable. Even where it was impossible to analyse the entirety of the network of causal connections, it did not follow that no part of those connections could be worked out. The correct approach, Mr Smith submitted, was (1) that where alternative concurrent causes were relied on by the pursuers for a period of delay, a conclusion that one of them was not relevantly attributed to the defenders' responsibility did not necessarily cause the claim to fail; (2) that even where a single cause for a period of delay was stated, and was held to be the pursuers' responsibility, that would not be fatal to a global claim if a rational basis for awarding an appropriate part of the global claim could be found; and (3) because of the unattractive consequences of the defenders' approach, which would dismiss the whole global claim because one causal element among many was held not to be relevantly attributed to the defenders, the court should be slow to sustain that argument at debate, but should allow a proof before answer.

29. Turning to the textbooks, Mr Smith submitted that *Keating* at paragraph 17-18 supported his submission: the global claim might fail if (i) the defenders' responsibility for a significant part of the delay was not established, **and** (ii) the court found no basis for awarding less than the whole claim. ***Emden*** (at paragraph [231]) was silent as to how concurrent causes were to be dealt with, and about the possibility of awarding less than the global claim if an evidential basis for doing so emerged. ***Hudson*** was critical of the latter course, but did not rule it out. In general the textbooks did not speak with one voice. They were not unequivocally against the pursuers' position, and *Keating* supported it.

30. In discussing the American cases, Mr Smith pointed out that in ***Lichter*** the court, when dealing with the second claim, namely the one in respect of exterior stone work, adopted the approach for which the pursuers argued. At page 221 it is recorded that the court below had allocated part of the extra costs to a compensable causal factor, guided by the evidence about the extra time required as a result of that factor. It held that that could not be said to be an arbitrary method of allocation. The claim in ***Wunderlich*** failed because, as the court recorded at page 964, "*No attempt [was] made to distinguish between expenses arising out of deficiencies in the plans and expenses attributable to purely extraneous factors*", and at page 965, *"There was no reliable evidence in the record to serve as a basis for approximating the extent to which the defendant, and not the Korean War or other factors beyond the control of the defendant, was responsible for any of the loss"*. In ***Phillips*****,** the Court of Claims upheld the decision of the Board which, while rejecting the total cost claim, did the best it could on the material before it. In ***Boyajian*** reference was made (at page 1240) to the total cost computation being taken as "*only a starting point*". Mr Smith also referred to ***F Brown plc* v *Tarmac Construction (Contracts) Ltd***, an unreported decision of mine dated 11 February 2000, in which a global claim was admitted to proof before answer, but I do not find that case helpful; the matter argued in it was the specification of the global claim, not the point which the defenders advance as one of principle in the present case.

31. Mr Smith argued that the global claim in the present case should be admitted to proof before answer. Even if it were correct that the pursuers could not relevantly found on delay caused by WP2010 after 21 January, the whole of the period from 22 January to 12 February was one in respect of which a concurrent cause of delay, relevantly attributed to the defenders, was founded upon, namely late issue of drawings and information. That was sufficient to make it necessary to admit the global claim to proof before answer so that the question of the cause of the disruption could be properly determined in light of the evidence. In any event, it could not be said at this stage that if the pursuers failed to prove that the defenders were responsible for every cause of delay founded upon the pursuers' whole claim must necessarily fail. The evidence properly led on the basis of the pleadings might afford a rationale an adequately based assessment apportioning part of the global claim to those causes for which the defenders were held responsible.

32. Mr McNeill reiterated Mr Smith's motion that the global claim should be admitted to proof before answer. The court should, he submitted, be slow to dismiss such a case at debate. A global claim was not contrary to any principle of Scots law or practice. The American cases showed that in that

jurisdiction such claims could be upheld in part in light of the evidence, even where the defendant was not held responsible for all the factors that contributed to the global loss. The Scottish cases cited were no help. ***Duncan* v *Gumley*** was not in point, and ***Brown* v *Tarmac***, although concerned with a global claim, did not touch on the issues argued in the present case. A global claim was appropriate where the causal relationships between events for which the defenders bore contractual responsibility and items of loss and expense were complex. In such a situation, it was unreasonable to expect the pursuer to identify all possible permutations. If a pursuer advanced a global claim, asserting that global loss of £X was caused by the inter-reaction of six causal factors alleged all to be the contractual responsibility of the defender, and after proof established the defender's responsibility for five of those six factors, the pursuer did not necessarily fail outright. The proper result required consideration of how the causal factors related to each other, and whether there was in the evidence a basis for apportioning the global loss. One possibility was that the claim would succeed in its entirety because the causal factor for which responsibility was not established was concurrent with another for which responsibility was established (***Holland* v *Kvaerner***, at 85A). Although certain causes of delay were described as "***critical***" in Schedule C to the summons, that was not the approach adopted in the body of the pleadings - see page 10 of the Closed Record: *"Both before and after [22 January 1996] the Pursuers were in any event delayed by late issue of drawings and instruction"*. Another possibility was that there were some elements of the claim that could be broken down on the basis of the evidence in such a way as to allow the court a proper basis for reducing the global award to take account of the failure to establish one causal factor (***Lichter***, at 219; *Wunderlich*, at 965; ***Phillips*,** at 256; ***Boyajian***, at 1244). It was inherently sensible to leave those issues until evidence had been led. It could not be said at this stage of the present case that the pursuers' claim for loss and expense was bound to fail. It was therefore inappropriate to dismiss the loss and expense claim on the basis contended for by the defenders.

(c) Discussion

33. This case is not concerned with whether a global claim for loss and expense may relevantly be advanced by a contractor under a construction contract. The debate proceeded on the basis that it was common ground that such a claim could in principle relevantly be made (***London Borough of Merton* v *Stanley Hugh Leach Ltd*; *Wharf Properties Ltd* v *Eric Cumine Associates*** (1991) 52 BLR 8; ***Holland* v *Kvaerner***). Nor is it in issue in this case at this stage whether the circumstances are such as to permit a claim to be made in that form. The pursuers aver (at page 32 of the Closed Record): *"Despite the Pursuers' best efforts, it is not possible to identify causal links between each such cause of delay and disruption, and the cost consequences thereof"*.

That averment having been made, the defenders accept that the pursuers are in principle entitled to advance a global claim. I prefer to reserve my opinion on whether such an averment is essential to the relevancy of a global claim, on what the pursuers need do to establish that averment, and on what the consequences would be if they failed to do so.

34. The pursuers attribute their global loss to a number of causal factors. One of these is the delaying and disruptive effect on WP2011 of delay, between 22 January and 12 February 1996, in completion of WP2010. As I have already held, that is not a relevant basis for an extension of time in relation to WP2011, and is in any event a factor on which the pursuers are contractually barred from founding for that purpose. It is equally not a relevant basis for a claim for loss and expense. The contractual bar also operates, in my opinion, in the context of a claim for loss and expense. The issue which arises is whether the fact that the global loss and expense is said to have been caused *inter alia* by that factor for which the defenders have no contractual responsibility is fatal to the relevancy of the global claim. (The defenders also point to a short period when delay is said to have been caused by snow, which is also a cause which does not relevantly found a loss and expense claim.)

35. Ordinarily, in order to make a relevant claim for contractual loss and expense under a construction contract (or a common law claim for damages) the pursuer must aver (1) the occurrence of an event for which the defender bears legal responsibility, (2) that he has suffered loss or incurred expense, and (3) that the loss or expense was caused by the event. In some circumstances, relatively commonly in

the context of construction contracts, a whole series of events occur which individually would form the basis of a claim for loss and expense. These events may inter-react with each other in very complex ways, so that it becomes very difficult, if not impossible, to identify what loss and expense each event has caused. The emergence of such a difficulty does not, however, absolve the pursuer from the need to aver and prove the causal connections between the events and the loss and expense. However, if all the events are events for which the defender is legally responsible, it is unnecessary to insist on proof of which loss has been caused by each event. In such circumstances, it will suffice for the pursuer to aver and prove that he has suffered a global loss to the causation of which each of the events for which the defenders is responsible has contributed. Thus far, provided the pursuer is able to give adequate specification of the events, of the basis of the defender's responsibility for each of them, of the fact of the defender's involvement in causing his global loss, and of the method of computation of that loss, there is no difficulty in principle in permitting a claim to be advanced in that way.

36. The logic of a global claim demands, however, that all the events which contribute to causing the global loss be events for which the defender is liable. If the causal events include events for which the defender bears no liability, the effect of upholding the global claim is to impose on the defender a liability which, in part, is not legally his. That is unjustified. A global claim, as such, must therefore fail if any material contribution to the causation of the global loss is made by a factor or factors for which the defender bears no legal liability. That point has been noted in *Keating* at paragraph 17-18, in *Hudson* at paragraph 8-210, more clearly in *Emden* at paragraph [231], in the American cases, and most clearly by Byrne J in ***Holland* v *Kvaerner*** at 85H and 86D (see paragraph [25] above). The point has on occasions been expressed in terms of a requirement that the pursuer should not himself have been responsible for any factor contributing materially to the global loss, but it is in my view clearly more accurate to say that there must be no material causative factor for which the defender is not liable.

37. Advancing a claim for loss and expense in global form is therefore a risky enterprise. Failure to prove that a particular event for which the defender was liable played a part in causing the global loss will not have any adverse effect on the claim, provided the remaining events for which the defender was liable are proved to have caused the global loss. On the other hand, proof that an event played a material part in causing the global loss, combined with failure to prove that that event was one for which the defender was responsible, will undermine the logic of the global claim. Moreover, the defender may set out to prove that, in addition to the factors for which he is liable founded on by the pursuer, a material contribution to the causation of the global loss has been made by another factor or other factors for which he has no liability. If he succeeds in proving that, again the global claim will be undermined.

38. The rigour of that analysis is in my view mitigated by two considerations. The first of these is that while, in the circumstances outlined, the global claim as such will fail, it does not follow that no claim will succeed. The fact that a pursuer has been driven (or chosen) to advance a global claim because of the difficulty of relating each causative event to an individual sum of loss or expense does not mean that after evidence has been led it will remain impossible to attribute individual sums of loss or expense to individual causative events. The point is illustrated in certain of the American cases. The global claim may fail, but there may be in the evidence a sufficient basis to find causal connections between individual losses and individual events, or to make a rational apportionment of part of the global loss to the causitive events for which the defender has been held responsible.

39. The second factor mitigating the rigour of the logic of global claims is that causation must be treated as a common sense matter (***Holland* v *Kvaerner***, *per* Byrne J at 84I). That is particularly important, in my view, where averments are made attributing, for example, the same period of delay to more than one cause.

40. The particular issue that arises in this case is whether the pursuers' reliance on a causal factor (or factors) which can be held, as a matter of relevancy, not to involve liability on the part of the defenders should result in dismissal of the loss and expense claim, or whether in the circumstances a proof before answer should be allowed. In my judgment the defenders' submission on the point comes very close to success. I am, however, persuaded that a proof before answer should be allowed by a

combination of two considerations. The first is that in my view on a fair reading of the pursuers' pleadings they do aver concurrent causes of delay in respect of the period between 22 January and 12 February 1996. Although there is reference in Schedule C to the summons to WP2010 and snow being "critical" causes, I do not consider that the averment on page 10 - that before and after 22 January 1996 the pursuers were in any event delayed by late issue of drawings and information - can properly be ignored. How each of the concurrent causes ought to be viewed in determining whether the causes for which the defenders had no liability played a material part in causing the global loss is a matter that is, in my view, best left for consideration at the conclusion of a proof before answer. The second consideration which leads me to allow a proof before answer on the global claim is that it would be wrong to exclude, at this stage, the possibility that the evidence properly led at proof before answer will afford a satisfactory basis for an award of some lesser sum than the full global claim.

41. Before leaving this aspect of the debate, I would make two further observations. The first is that the risk that the pursuers' global claim will fail because a material part of the causation of the loss and expense was an event for which the defenders are not liable, if the evidence discloses no rational basis for the award of any lesser sum, remains a live one. Secondly, the allowance of a proof before answer does not afford the pursuers *carte blanche* to attempt to prove their loss and expense in any way they choose. Their pleadings remain the measure of what they are entitled to prove by way of computation of loss and expense. If a lesser claim is to be made out, that must be done on the basis of evidence which is properly led within the scope of the existing pleadings.

Paragraph 6(a) and (b)

42. At page 10 of the Closed Record the pursuers aver: *"Due to the late issue of construction drawings and reinforcement information, all reinforcement could not be ordered until 19 January 1996."*

Two lines later, there is reference to "*the foregoing late information*". Mr Borland submitted that those averments were lacking in specification. They did not identify which drawings and which pieces of information were late; when they should have been issued; when they were issued; and how their late issue caused delay. He therefore submitted that they should not be admitted to probation.

43. In response, Mr Smith submitted that the averments were sufficiently specific. The defenders, as the management contractors, knew or were in a position to ascertain when drawings were due to be issued and when they were actually issued, and which drawings affected the ordering of reinforcement (c.f. ***Brown* v *Tarmac***, at page 12). It was clearly stated that the late issue caused delay by preventing the ordering of reinforcement. The defenders did not appear to have been hampered in their response to the averments complained of - see page 19 of the Closed Record.

44. In my opinion, there is no merit in this point. For the reasons given by Mr Smith I am satisfied that the averment gives the defenders adequate notice of the case they have to meet.

Paragraph 6(d)

45. This paragraph of the defenders Note is concerned with the averment in numbered paragraph (2) at the top of page 13 of the Closed Record. Mr Borland pointed out that the averment was inconsistent with the content of item K in Schedule B to the summons. That discrepancy was, however, cured by the minute of amendment allowed in the course of the debate. Beyond that, the defenders' complaint of lack of specification was of the same general nature as that advanced in paragraph 6(a). In my view the averment affords adequate specification in the circumstances.

Paragraph 6(e)

46. In this paragraph the defenders criticise the specification of the passage of averment on page 15 of the Closed Record beginning, *"With reference to the Defenders' averments anent express deliveries ..."*, and ending, *"... Variation Account Summary dated 10th July 1997"*. Mr Smith pointed out that the averment was in response to the defenders' averment at page 16, *"Admitted that once the revised reinforcement arrived, the Pursuers fixed it into position, under explanation that they should have express delivered any reinforcement necessary but did not do so."* I accept his submission that in that context the pursuers' averments adequately focus the issue between the parties.

Paragraph 7

47. In the table at pages 53 and 54 of the Closed Record the pursuers include in their claim, at item (b), *"Crane overtime and bonus in original period: £67,141.17".* The only averment in support of that item is at page 37, where they aver, "Tower crane overtime and bonus in the original contract period amounted to £67,141.17". Mr Borland submitted that the pursuers made no averment disclosing the contractual basis on which the defenders were liable to meet that item. He accordingly sought exclusion of those averments from probation. Mr Smith sought to explain the item by reference to Clause 48.6 of the contract, but accepted that the basis of the claim could and should have been spelt out more clearly. I have no doubt that the claim is capable of being expressed with adequate specification. As the averments presently stand, they are, however, in my view completely lacking in specification of the contractual basis of the claim. Given that the complaint of lack of specification was clearly made in the defenders' Note lodged on 20 October 2001, but was not addressed by the pursuers prior to the debate or even in the minute of amendment lodged in the course of the debate, I am of opinion that the pursuers would have no ground for complaint if I were simply to exclude the averments from probation. It seems to me, however, that the more constructive course is for me to order the pursuers to lodge a document specifying the contractual and factual basis of the claim.

Paragraph 8

48. As framed in the Note, this paragraph was concerned with the pursuers' claims for (i) overheads and (ii) financing charges, but in the course of the debate, Mr Borland confined it to the issue of overheads. At page 37 of the Closed Record the pursuers' averment is: *"Overheads ... amounting to £205,125.90 ... are also claimed, on the basis set out in the schedules 'Calculations of Overheads and Finance Costs' produced herewith and incorporated herein for the sake of brevity."*

The overheads claim also appears as item (g) in the table at page 54 of the Closed Record. Mr Borland indicated that in the schedules referred to, the overheads appeared to have been calculated on the basis of a flat rate of 7%. He submitted that the pursuers averred no relevant basis for recovery of overheads. The point had been expressly taken in the defenders' pleadings at page 58 of the Closed Record at paragraph (g), where they aver: *"Overhead costs - the pursuers have failed to produce material (i) showing how these costs have been calculated; and (ii) demonstrating how the recovery of overheads is justified on the basis that the pursuers were denied an opportunity of earning a contribution from other work in relation to which they were unable to tender as a direct result of the defenders' failures."*

They go on to make two further points about matters said to have been left out of account in the pursuers' calculations. To those averments the pursuers responded by averring (at page 55): *"With reference to the defenders' averments anent overhead recovery, explained and averred that the pursuers' present calculation is made upon the basis agreed between 1996 and 1998 during talks held between Turner and Townsend (negotiating for the Defenders) and the Pursuers. In particular, it was agreed that the Pursuers' claim should seek payment of only their proven overhead cost percentage calculated from the Pursuers' accounts, and applied to their additional costs on the Works Package 2011. (This results in a lower claim than that brought out by the pursuers' original basis of calculation.)"*

Mr Borland complained of a lack of specification in the averments about the agreement, in that they covered a two year period, but did not in any more particular way identify when the agreement was struck or who the persons concerned in the negotiations were. There was, moreover, no specification of what the pursuers' "proven overhead cost percentage" meant, or how it was calculated. In the circumstances, Mr Borland submitted, the whole overheads claim should be excluded from probation.

49. Mr Smith accepted that the pursuers' overheads claim was wholly based on the agreement said to have been reached in discussions with Turner and Townsend. The rate of 7% was the pursuers' substantiated overhead cost, which was agreed. The computation was therefore specified in a way which conformed to the agreement. The averment about the constitution of the agreement was adequately specific.

50. In my view, if there was indeed an agreement between the pursuers on the one hand and Turner and Townsend acting for the defenders on the other to the effect that the pursuers would be entitled to recover overheads on a specified basis, that supersedes the need for averment of any other legal basis

Adjudication Law Reports. Typeset by NADR. Crown Copyright reserved.

for entitlement to make such recovery. The pursuers advance the claim solely on the basis of the alleged agreement, and it is therefore unnecessary to look behind it to see whether, if it had not been reached, the pursuers would have had a proper basis for recovery. In my view the averment of the agreement is adequately specific. It identifies the period of the relevant discussions and the parties to the discussions. It identifies what was said to have been agreed. I am unclear, however, whether it is the pursuers' position that the rate of 7% was a part of the agreement (as Mr Smith appeared at one stage to suggest), or whether the agreement was that the rate to be applied was simply their "proven overhead cost percentage", leaving that figure to be subsequently established (as the averments suggest). Be that as it may, I am of opinion that the defenders are entitled to have the basis of the calculation more fully explained. It would not, I think, be constructive to exclude the averments about overheads recovery from probation on the basis that the computation is inadequately specified. Instead, I am minded to order the pursuers to lodge a document explaining fully the computation of the claim, (including the justification for the rate of 7% if it is not their contention that that was expressly agreed).

Result

51. For the reasons which I have set out I shall allow a proof before answer.

52. I am minded also to make orders on the pursuers to the effect discussed in paragraphs [47] and [50] above. Before doing so, however, I shall put the case out By Order in order to discuss the precise terms in which the orders should be made, and the time limits which should be set for compliance with them.

53. More generally, it will be necessary to discuss future procedure in some detail in order to identify the most efficient way in which to address the issues that remain outstanding between the parties. That too can be considered when the case is put out By Order.

Pursuers: McNeill, Q.C., Smith; MacRoberts
Defenders: Howie, Q.C., Borland; Masons