

# Caught in the chains of causation

*Ian Pease reviews a past case that demonstrates the recurrent problem of causation of loss in construction contracts*



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There is an endemic problem for the construction industry generated as a result of both its chains of contracts and the common multiplicity of blame; a problem made starker by the central role of arbitration. The problem is this: if I'm in the middle of a contractual chain, being sued for what is said to be my breach of contract, and wanting to allege a similar breach against a sub-contractor, how can I settle up the line without the sub-contractor alleging that my actions in settling have in fact caused the very loss that I want to claim against it? Hence the employer may allege a failure of workmanship against the contractor, who in turn may make the same allegation against the sub-contractor they engaged to do the work.

### **Wessex: a second bite of the cherry**

Of course the conundrum can equally apply to an employer: being sued by the contractor and considering that the claims really arise as a result of negligence by members of the professional team.

This usually gives rise to questions of causation of loss: do the settlor's actions constitute a *novus actus interveniens*, thereby breaking the chain of causation and preventing the recovery of any loss occurring as a result of the act of settlement? However, there are additional arguments surrounding whether there is any right to proceed against the professional at all. Is the sole legitimate cause of action for recovery of delays and losses against the contractor via the arbitration clause in the building contract? I faced such arguments in

*Wessex Regional Health Authority v HLM Design* [1995].

*Wessex* throws up the difficult logistical position that the employer finds itself in, dependent, as it often is, on the assistance of its professional team for evidence. By the time the case came to us there had been a previous arbitration that had not gone well for *Wessex*. The project, the Royal Bournemouth Hospital, then new, had not gone well, with massive delays of 84 weeks. The architect, HLM, had granted the contractor (ARC) a 74-week extension of time, but ARC wanted more and sought the missing ten weeks. Eventually *Wessex's* legal representatives were forced to settle against ARC, largely due to a lack of supporting evidence from *Wessex's* professional team.

Not unreasonably, *Wessex* was dissatisfied with this outcome, changed its legal team, and brought in my firm to sue the professionals who were then regarded as the cause of substantial losses.

When proceedings against HLM were issued (alleging negligence in granting extensions of time), it brought the contractor in as a third party, claiming a contribution. The contractor then threatened to bring in *Wessex* itself as a fourth party for inducing a breach of the arbitration's compromise agreement. The defence to the claim raised both causation of loss and whether there was any cause of action possible at all.

HLM pleaded:

If and insofar as *Wessex* has suffered loss and damage... then:



(a) the same arose by reason of Wessex's settlement of its claim with ARC... and did not arise by reason of the alleged or any act or omission of HLM, alternatively

[...]

(c) by agreeing to pay to ARC the sum of £91.65 million in full and final settlement of all the claims... Wessex has failed to mitigate its loss.

[...]

Further or alternatively, the loss and damage alleged... is too remote and/or not reasonably foreseeable as the consequence of the alleged or any acts or otherwise of HLM and are thus not recoverable from HLM.

Wessex also put in play its right to pursue HLM, alleging:

... it is Wessex's case that it... is... entitled to pursue causes of action against HLM independently of any cause of action it had... against ARC in the arbitration and accordingly that:

- (a) the existence of the arbitration machinery under its contract with ARC whether capable of achieving a complete remedy for Wessex in relation to ARC or not; and/or
- (b) the fact that Wessex's settlement of the arbitration with ARC and/or the terms of the settlement, whether reasonable or unreasonable; do not as a matter of law either:
  - (i) preclude Wessex seeking the relief it claims against HLM in this action; or
  - (ii) reduce or limit the extent of such relief.

Also, Wessex sought to explain the reasonableness of the settlement that it had been forced to reach with ARC, alleging that its actions did not break the chain of causation and the loss that resulted was not too remote.

In reply HLM pleaded an alleged implied term that would prevent Wessex proceeding 'independently' against HLM once there had been a final settlement in the arbitration, saying:

It was a term to be implied in the contract between Wessex and HLM... that in the event that Wessex and ARC submitted a dispute as to the final contract sum to arbitration, and the arbitrator published an award which fixed... the final contract sum... Wessex and HLM would be bound by such award for the purposes of fixing the remuneration due to HLM and it would not be open to Wessex or HLM to challenge the validity or impugn the correctness of the final contract sum.

The following thorny matters were set down for a preliminary issues trial:

- Did Wessex's actions in settling with ARC in the arbitration break the chain of causation arising

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from HLM's alleged negligence in awarding extensions of time to ARC?

- Is any loss irrecoverable due to the compromise with ARC in the arbitration?
- Is the loss too remote or not reasonably foreseeable because of Wessex's actions in compromising with ARC?
- Can Wessex challenge the validity of the final contract sum agreed with ARC after that arbitration?

The preliminary issues assumed there had been underlying negligence but it was not assumed that the settlement had been made reasonably.

The main arguments revolved around the question of whether an employer has any independent cause of action against an architect under the terms of the architect's appointment in respect of grants of extensions of time to the contractor under the building contract.

The first plank for Wessex was to establish that, in general, any architect or valuer is liable to the person

who employs them if through their negligence they cause loss: see *Sutcliffe v Thackrah* [1974]. In other words there was no immunity against suit, and by issuing certificates the architect was not acting in an 'arbitral' capacity.

The judge next had to consider the contractual context where there is mis-certification by an architect, citing *Hutchinson v Harris* [1978] at first instance, in which Judge Fey said:

... where the duty of a contracting party is to supervise the work of another contracting party, it seems to me there is a direct causal connection between the supervisor's negligent failure to prevent negligent work, and the damage represented by that negligent work. No doubt the builder is also liable. It is a case of concurrent

breaches of contract producing the same damage. In my judgment the plaintiff has an action against both, although she cannot obtain damages twice over.

*Townsend v Stone Toms* [1985] was also indicative of a twin cause of action that the employer would possess against contractor and certifier under the building contract and the professionals' contracts. Oliver LJ said:

Finally there was a claim against [the architects] for wrongful certification... and thus overlapping the claims against Laings for the return of moneys overpaid.

The problem from Wessex's point of view was the Court of Appeal decision in *Pacific Associates Inc v Baxter* [1990]. That case involved an arbitration settlement following which the contractor sought a further bite of the cherry by suing the employer's engineer for alleged failures to properly certify and administer the contract. The case differed factually from *Wessex* in that there was no contract between the engineer and the contractor and hence the causes of action were essentially

tortious. The contractor in *Pacific Associates* was not successful and it was said that Wessex should fail for similar reasons. The case contained helpful *dicta* from HLM's point of view. Purchas LJ said:

[Counsel for the engineer] submitted that any damages which might have been suffered by the contractor in this case did not flow from the breach of the duty, if such existed, owed by the engineer to the contractor.

*In Wessex the judge took the view that the decision in Pacific Associates was based on the reasoning in Sutcliffe that there was no duty of care owed by the engineer to the contractor. Hence there was no sustainable cause of action in tort at all.*

His submission was that the event of the arbitration and its settlement constituted a *novus actus interveniens*... Any damage suffered by the contractor resulting from such a breach was recoverable in the arbitration proceedings provided for by the clause. These proceedings were instituted by the contractor and were the subject matter of the settlement... In my judgment there is considerable force in Mr Tuckey's submissions that the settlement occurring in the context of the arbitration constituted a *novus actus interveniens* and would prevent the recovery of any loss occurring to the contractor as a result of the settlement in that arbitration.

In short, *Pacific Associates* shows that a party has to seek its full and final recompense in the arbitration and cannot come back for a second bite of the cherry. Ralph Gibson LJ put it in terms of foreseeability of loss, as follows:

As to foresight of harm, I have stated above that such risk as the engineer could reasonably foresee of the contractor suffering loss, as a result of any want of care on the part of the engineer... is, in my judgment, remote, because the contract provided for the correction of any such mistake by the process of arbitration.

**Pacific Associates: whom does it support?**

In *Wessex* the judge took the view that the actual decision in *Pacific Associates* (as opposed to the *obiter* references above) was based on the reasoning in *Sutcliffe* that there was no duty of care owed by the engineer to the contractor. Hence (unlike *Wessex*, where there was an admitted contract) there was no sustainable cause of action in tort at all, and it was for that reason that the claim in *Pacific Associates* failed, rather than

because of a lack of causation of loss. If on the other hand there was a contract in place under which a cause of action could arise, the position would be different, as Ralph Gibson LJ envisaged:

If the decisions and advice of the engineer that cause the arbitration proceedings to be taken were shown by the employer to have been made and given by the engineer in breach of the engineer's contractual duties to the employer, the employer would recover his losses from the engineer.

Hence, properly analysed, the decision in *Pacific Associates*, although superficially helpful to HLM, was based on a substantially different factual scenario.

HLM hypothesised that if there were independent, concurrent and unlimited causes of action arising from over-certification against both the contractor and the architect, then this would lead to employers turning first to architects rather than arbitrating against contractors. However, this fails to realise that this route to recovery is far more difficult because of the need to prove negligence against the professional. There will always be the incentive to first seek recovery against the contractor. However, the practical problems encountered in the preceding *Wessex* arbitration are not uncommon,

and the employer's evidence will often substantially depend on the professional team, a team that may consider itself in the firing line and so be loath to provide the employer with more than the bare minimum of assistance.

**Untrammelled independent causes of action**

In the end the judge in *Wessex* decided that the various arguments did not give rise to a defence to Wessex's claim, and the various submissions as to foreseeability, remoteness, causation and *novus interveniens* failed. In summary the judge said:

There would appear to be much to be said for contractual arrangements which require the employer to pursue his remedy against the contractor who had been overpaid and only gave him limited rights against his architect. But if in the absence of such contractual arrangements there are untrammelled independent causes of action, then unless the procedural law declines to assist in the enforcement of the cause of action against the architect it is difficult to see how it is relevant whether the employer acted competently or incompetently in the arbitration or whether the settlement reached was reasonable or unreasonable. The employer can sue either or both and in the case of the latter in such order as he wishes.

History shows that this is fertile ground for parties seeking to avoid liability in the chains of contracts that bedevil the construction industry. The latest instance of this, *Siemens Building Technologies FE Ltd v Supershield Ltd* [2009], is unlikely to be the last. ■

*Hutchinson v Harris*  
[1978] 10 BLR 19  
*Pacific Associates Inc v Baxter*  
[1990] 1 QB 993  
*Siemens Building Technologies FE Ltd v Supershield Ltd*  
[2009] EWHC 927 (TCC)  
*Sutcliffe v Thackrah*  
[1974] AC 727  
*Townsend v Stone Toms*  
(1985) 27 BLR 26  
*Wessex Regional Health Authority v HLM Design*  
(1995) 71 BLR 32