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## Chapter 9

# Global claims

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### 9.1 *Basic principles of global claims*

In general, it is necessary for the contractor to establish each and every head of claim, by means of supporting documentation and other evidence. However, often a contractor will attempt to form its claim on a global basis. *London Underground Ltd v Kennington Ford Plc & Others*<sup>1</sup> concerned, among other things, a claim for delay due to the alleged excessive number of requests for information (RFIs) which had to be made. The judge neatly summarised the position:

‘In the manner of pointing a blunderbuss at a target it is maintained that there were many RFIs, and there was considerable delay. The delay in part can be explained by other causes but a balance is left which must be caused by the volume of RFIs. And by reason of the volume of them negligence must be concluded. It is termed a global claim. It can properly be described as a global claim in the sense that it is the antithesis of a claim where the causal nexus between the alleged wrongful act or omission of the defendant and the loss of the plaintiff has been clearly spelt out and pleaded.’<sup>2</sup>

In another case, not concerned with construction, such claims were termed ‘total-total’, where the totality of the losses is attributable to the totality of misrepresentations, breaches of contract and acts of negligence. This is compared to a ‘cumulative-total’ case where the cumulative effect of all the breaches led to the totality of the losses claimed.<sup>3</sup> This concept was explained later in an extract from the particulars of claim:

“Accordingly, it is not primarily the plaintiff’s case that particular aspects of the losses are individually attributable to any particular misrepresentation, breach of contract or act of negligence. The plaintiff’s case is that in respect of each of the allegations of misrepresentation, breach of contract and negligence the cumulative effect thereof led to the totality of the losses claimed in the action. Further, as set out in more detail hereunder, some of the individual acts of misrepresentation, breach of contract and negligence were sufficient to cause the entirety of the plaintiff’s losses.

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<sup>1</sup> (1998) 63 Con LR 1.

<sup>2</sup> (1998) 63 Con LR 1 at 4 per Judge Wilcox.

<sup>3</sup> *GAB Robins Holdings Ltd v Specialist Computer Centres Ltd* (1999) 15 Const LJ 43.

Generally, however, it is not possible directly to attach individual losses to individual allegations of misrepresentation, breach of contract or negligence in the manner implied by the form of request. The plaintiff's case is that the totality of the losses claimed arise from the totality of the wrongful acts established to have been committed by the defendant. This is not to be taken as advancing a case that no loss is shown unless all the pleaded wrongful acts are proved but as advancing a case that all of the claimed losses resulted from the deficiencies shown to have existed in the defendant's conduct and the resultant software . . ."

The last two paragraphs in those particulars seek to establish a comprehensive claim on the part of the plaintiff which seeks to cover every eventuality and ensure out of an abundance of caution that no aspect of the claim is lost in support of the overall claim for damages of £2.8 million. One can understand how the defendant is somewhat alarmed by this approach. However, bearing in mind that this is a general statement of the plaintiff's claim, I do not consider that a case has been made out which would warrant the striking out of either paragraph 31 in its original form, or any part of the particulars under headings (A), (B) and (C).<sup>4</sup>

It is clear that, in some circumstances, a global approach to formulating a claim may be admissible whether the claim is for an extension of time or for loss and/or expense. The case most often cited in support is *J Crosby & Sons Ltd v Portland UDC*<sup>5</sup> a dispute under the ICE Conditions of Contract (4th edition) and which is recognised as establishing the acceptable criteria for a global claim. The contract concerned the laying of a water main. The case arose because an arbitrator proposed to award a lump sum whereas the employer contended that the contractor should only recover in relation to specific claims where losses could be separately proved and that the arbitrator must necessarily build up the sum by finding amounts due under each of the individual heads of claim upon which the contractor relied in support of its overall claim for delay and disruption. The contractor had made a broad claim for delay and disruption. A large number of disparate matters had delayed completion, some of which entitled the contractor to extensions of time or loss and/or expense, but some of the matters gave no such entitlement. The court upheld the opinion of the arbitrator that the contractor was entitled to be paid on a global basis and rejected the employer's contention that the arbitrator must find what amounts were due under each head of claim in order to establish the total sum due.

The case set out guidelines for this approach which have formed the basis for assessing global claims ever since. Essentially, the global approach is only justified where a claim depends 'on an extremely complex interaction in the consequences of various denials, suspensions and variations' and where 'it may well be difficult or even impossible to make an accurate apportionment of the total extra cost between the several causative events'. In those clearly defined circumstances it seems that there is no reason why an architect, engineer or arbitrator 'should not recognise the realities of the situation and make individual awards in respect of those parts of individual

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<sup>4</sup> *GAB Robins Holdings Ltd v Specialist Computer Centres Ltd* (1999) 15 Const LJ 43 at 47 per Otton LJ.

<sup>5</sup> (1967) 5 BLR 121.

items of the claim which can be dealt with in isolation and a supplementary award in respect of the remainder of those claims as a composite whole.<sup>6</sup>

The fact that the courts are prepared to accept global claims in certain very clear circumstances does not relieve the contractor from producing substantiating evidence and proving each head of claim. What it does is to enable the architect or quantity surveyor to adopt a sensible method of ascertaining certain complex claims where it is either impossible or totally impracticable to prove the cost resulting from each individual item. It has been rightly said:

‘It is implicit [in *Crosby*] that a rolled-up award can only be made in a case where the loss or expense attributable to each head of claim cannot in reality be separated and secondly that a rolled-up award can only be made where apart from that practical impossibility the conditions which have to be satisfied before an award can be made have been satisfied in relation to each head of claim’<sup>7</sup>.

In a useful commentary to the case, the basic position has been well put as follows:

‘The events which are the subject of the claim must be complex and interact so that it is difficult if not impossible to make an accurate apportionment. It is very tempting to take the easy course and to lump all the delaying events together in order to justify the total overrun or total financial shortfall. That argument is justifiable only if the alternative course is shown to be impracticable.’<sup>8</sup>

## 9.2 Unacceptable global claims

What is clear is that the global approach is the ‘when all else fails’ approach and it should not be adopted as a standard method of formulating a contractual claim. A contractor may sometimes be misled into believing that the decision in *Crosby* allows a claim to be made when a contractor cannot actually demonstrate a valid claim but can only show a shortfall in its income. The well-known American case *Bruno Law v US*,<sup>9</sup> illustrates the danger in that approach. There, a contractor claimed a substantial sum, apparently on the basis that it was enough to take the overrun between the original and actual completion dates, point to a number of individual delays for which the employer was allegedly responsible, and which contributed to the overall delay, and then arrive at the conclusion that the entire overrun time was attributable to the employer. Unfortunately, many contractors still claim on that basis. The trial commissioner pointed out that, upon the evidence:

‘Many of the incidents relied on by plaintiff were isolated and non-sequential and therefore could not possibly have caused any significant delay in the overall progress of the contract. Furthermore, with respect to the great bulk of such incidents, plaintiff has failed to prove, or indeed even to attempt to prove, the

<sup>6</sup> (1967) 5 BLR 121 at 136 per Donaldson J.

<sup>7</sup> *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 102 per Vinelott J.

<sup>8</sup> (1967) 5 BLR 121 at 123.

<sup>9</sup> (1971) 195 Ct C1 370.

crucial factors of the specific extent of the alleged wrongful delay to the project operations caused thereby.<sup>10</sup>

The same point was made again, quite forcibly, in *London Borough of Merton v Stanley Hugh Leach Ltd*<sup>11</sup> which was considering an arbitrator's award. The arbitrator, in a passage quoted by the court, dismissively described the contractor's claim as follows:

'The calculation commences with the "direct site costs", which I can only interpret as being the total expenditure incurred by [Leach] on all labour, plant and materials involved in the construction works. From the very limited information available to me I can interpret the word "direct" as indicating that the costs relate to [Leach's] own expenditure and that of his direct sub-contractors to the exclusion of expenditure through nominated sub-contractors and suppliers.

From this total site cost, [Leach] deduct the assessment for fluctuations which under clause 31A of the conditions are to be adjusted on a net basis. A percentage for profit and overheads is then added to the total site costs excluding fluctuations and finally the net fluctuations are added back to arrive at the alleged remunerable total cost to the contractor of £3,721,970.

If one could imagine a building contract which proceeded to completion without any hitch, delay or variation whatsoever this calculation would provide [Leach] at line (5) with a direct comparison with his tender figure. However as that ideal situation is rarely, if ever, met and certainly was not met in the instant contract, the figures in line (1) (and so those in lines (4) and (7)) must include the costs to [Leach] of all the "hitches" of whatever nature that occurred on the site.'

The judge commented on that in this way:

'I find it impossible to see how [this calculation] can be treated as even an approximation for a claim, whether or not rolled up (as in *Crosby*), under clause 11(6) or 24(1) [of JCT 63]. As the arbitrator points out in the passage I have cited, the calculation in effect relieves Leach from the burden of additional costs resulting from delays in respect of which Leach is not entitled to any extension of the completion date'<sup>12</sup>

This kind of claim (a claim in that case for a sum in seven figures and contained on one side of a sheet of A4 paper albeit backed up with a vast mass of other material) is quite common, but should stand no chance of success if architect and quantity surveyor are taking their professional responsibilities seriously.

Contractors are faced with difficult problems where the facts are truly interconnected in such a complex way that to unravel them into the classic approach of particularised cause and effect is impossible. On the other hand, it is clearly inequitable if an employer responsible for just one occurrence giving rise to a delay, and for which a clear causal nexus can be demonstrated, is more likely to be made to suffer the consequences than an employer guilty of a large number of interconnected occurrences.

<sup>10</sup> (1971) 195 Ct C1 370.

<sup>11</sup> (1985) 32 BLR 51.

<sup>12</sup> (1985) 32 BLR 51 at 112 per Vinelott J.

### 9.3 The current position

Despite the fact that the Committee stated quite categorically that the judgment involved no question of general importance, the Privy Council decision in *Wharf Properties Ltd v Eric Cumine Associates*<sup>13</sup> was seized upon by some commentators as ringing the death knell on global claims. The case was brought against a firm of architects and the question was whether the pleadings as presented by the plaintiffs established an essential link between the breaches and the damages claimed. It was asserted by the defendants that the pleadings disclosed no reasonable cause of action or that they were so embarrassing as to warrant them being struck out as an abuse of the court process. The Committee held that, although the plaintiffs would face ‘extraordinary evidential difficulties’, there were no grounds for saying that the pleadings disclosed no reasonable cause of action, but they were an abuse of the process. The most useful part of the decision is as follows:

‘... the pleading is hopelessly embarrassing as it stands and their Lordships are wholly unpersuaded by Counsel for Wharf’s submission that the two cases of *J Crosby and Sons v Portland Urban District Council* and *Merton v Leach* provide any basis for saying that an unparticularised pleading in this form ought to be permitted to stand. Those cases establish no more than this, that in cases where the full extent of extra costs incurred through delay depend upon a complex interaction between the consequences of various events, so that it may be difficult to make an accurate apportionment of the total extra costs, it may be proper for an Arbitrator to make individual financial awards in respect of claims which can conveniently be dealt with in isolation and a supplementary award in respect of the financial consequences of the remainder as a composite whole. This has, however, no bearing upon the obligation of a Plaintiff to plead his case with such particularity as is sufficient to alert the opposite party to the case which is going to be made against him at the trial. ECA are concerned at this stage not so much with quantification of the financial consequences – the point with which the two cases referred to were concerned – but with the specification of the factual consequences of the breaches pleaded in terms of periods of delay. The failure even to attempt to specify any discernible nexus between the wrong alleged, and the consequent delay, provides, to use the phrase of Counsel for ECA, “no agenda” for the trial.’<sup>14</sup>

This decision does not overturn *Crosby* and *Merton*, quite the reverse, it upholds them. Essentially, it was the link between cause and effect – the liability – with which the Privy Council was concerned. The decision was followed in *Mid Glamorgan County Council v J Devonald Williams and Partner*<sup>15</sup> although in that case the pleadings were not struck out on the facts. There, the position was analysed as follows:

<sup>13</sup> (1991) 52 BLR 1.

<sup>14</sup> (1991) 52 BLR 1 at 20 per Lord Oliver.

<sup>15</sup> (1993) 8 Const LJ 61. See also *Imperial Chemical Industries PLC v Bovis Construction Ltd, GMW Partnership and Oscar Faber Consulting Engineers* (1992) 8 Const LJ 293.

- ‘56.1 A proper cause of action has to be pleaded.  
 56.2 Where specific events are relied upon as giving rise to a claim for moneys under the contract then any preconditions which are made applicable to such claims by the terms of the relevant contract will have to be satisfied, and satisfied in respect of each of the causes of events relied upon.  
 56.3 When it comes to quantum, whether time based or not, and whether claimed under the contract or by way of damages, that proper nexus should be pleaded which relates each event relied upon to the money claimed.  
 56.4 Where, however, a claim is made for extra costs incurred through delays as a result of various events whose consequences have a complex interaction that renders specific relation between event and time/money consequence impossible and impracticable, it is permissible to maintain a composite claim.’<sup>16</sup>

The logic of a ‘total cost claim’ has been explained like 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 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.’<sup>17</sup>

The problems inherent in this kind of analysis are obvious. Nevertheless, the courts have continued to allow claims to be made on a global basis.<sup>18</sup> Duncan Wallace provides a useful, if slightly provocative, summary of the global claim position,<sup>19</sup> but his conclusion that global claims are always embarrassing has been questioned in some

<sup>16</sup> *Mid Glamorgan County Council v J Devonald Williams and Partner* (1993) 8 Const LJ 61 at 69 per Mr Recorder Tackaberry.

<sup>17</sup> *John Holland Construction & Engineering Pty Ltd v Kvaerner R J Brown Pty Ltd* (1996) 82 BLR 83 at 85 per Byrne J.

<sup>18</sup> See for example *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical and Electrical Engineers Pty Ltd & Another* (1992) 10 BCL 178; *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd & Others* (1994) 72 BLR 102; *Bernard’s Rugby Landscapes Ltd v Stockley Park Consortium Ltd* (1997) 82 BLR 39; *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2002] BLR 393.

<sup>19</sup> I N Duncan Wallace, *Hudson’s Building and Engineering Contracts*, 11th edition, 1995, Sweet & Maxwell, vol. 1, pp.1086–9.

cases.<sup>20</sup> It seems that it may be enough if the contractor sets out the claim in sufficient detail that the employer knows what is being claimed and, in some instances, it may be that the employer is in a perfectly good position to calculate the amount the contractor should be paid without the contractor being obliged to separate the claim into its various parts for the purpose of allocating value.<sup>21</sup> The position seems to be that the contractor is entitled to put its claim in any rational way albeit that putting forward a claim on a global basis may present particular evidential difficulties.<sup>22</sup> A particular difficulty is the establishment of a definable connection between the alleged wrong and the consequent delay and damage.<sup>23</sup> The position was re-emphasised in an Australian case. It held that where the connection between cause and loss is not apparent, each aspect of the connection must be set out unless the probable existence of the connection can be demonstrated by evidence or argument, or unless it can be shown that it is impossible or impracticable for it to be itemised further.<sup>24</sup>

In *Petromec Inc v Petroleo Brasileiro SA (Petrobras) & Another*<sup>25</sup> the Court of Appeal had to consider a preliminary issue in regard to a claim in respect of a large number of variations carried out to a semi-submersible oil platform. The claimant argued that a global approach was permissible, because all the work had been carried out to the instruction and under the supervision of the defendant. Moreover, it had already been held that the claimant was not responsible for any delay or defective work. The Court held that it made no difference whether multiple breaches or multiple variations were being considered, the overall principle was the same. The Court of Appeal approved the view of the trial judge when he said:

‘For the reasons set out above, on the proper construction of the supervision agreement, the sum due to Petromec pursuant to cl 12.1 and 12.2 cannot be ascertained by calculating the difference in the manner which Petromec proposes. Petromec must specify the instructions, the work required to comply with those instructions (or the amended specification under cl 11) and the cost attributable to that work. The changes and causal nexus must be pleaded. It can contend that the work and the cost is reasonable and wait for any challenge to that but its own methodology is not what cl 12 envisages, not what the law allows, nor what the rules of court require for it to put and establish its case. Petromec is not compelled to do so by reference to the VOs it has previously put forward, which do not correspond to the requirements of cl 12, although the material in them refers to work which Petromec alleges to be work done for cl 12 purposes. By one means or another, it must, with sufficient particularity, plead the work done and the cost thereof by reference to the amended specification or the instructions given.’<sup>26</sup>

<sup>20</sup> See *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd & Others* (1994) 72 BLR 102 and *Inserco Ltd v Honeywell Control Systems Ltd*, 19 April 1996 unreported.

<sup>21</sup> *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd & Others* (1994) 72 BLR 102.

<sup>22</sup> *GMTC Tools and Equipment Ltd v Yuasa Warwick Machinery Ltd* (1994) 73 BLR 102.

<sup>23</sup> *Ralph M Lee Pty Ltd v Gardner and Naylor Industries Pty Ltd* (1997) 12 Const LJ 125.

<sup>24</sup> *John Holland Construction & Engineering Pty Ltd v Kvaerner R J Brown Pty Ltd* (1996) 82 BLR 83. This judgment was considered with apparent approval in *Bernard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd* (1997) 82 BLR 39.

<sup>25</sup> (2007) 115 Con LR 11.

<sup>26</sup> (2007) 115 Con LR 11 at 33 per Cooke J.

The Court acknowledged that it would not be easy to prove the connection between each instruction requiring a variation and its cost, but the fact that it was difficult was not sufficient in itself not to require such proof. However, the Court accepted that for much of the direct work, the causal nexus would be obvious and need not be spelled out.

The topic of global claims was examined again from first principles by the Scottish courts in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* and it is instructive to read what was said:

‘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 . . .

. . . 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 . . .

. . . 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 a failure to prove that the 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.<sup>27</sup>

This thoughtful judgment emphasises the necessity for the employer to be responsible for all the major causative factors before a global claim can succeed, a point that is often overlooked when such claims are made. This change in emphasis starkly highlights the difficulties involved in successfully making such claims. This judgment was affirmed on appeal. The Inner House of the Court of Session added some useful observations about how a party should plead causation when making a global claim. The paragraph is worth quoting in full:

‘All that is required is that a party’s averments should satisfy the fundamental requirements of any pleadings, namely that they should give fair notice to the other party of the facts that are relied on, together with the general structure of the legal consequences that are said to follow from those facts. In doing that, the pleadings of one party should disclose sufficient to enable the other party to prepare its own case and to enable the parties and the court to determine the

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<sup>27</sup> [2002] BLR 393 at 407 per Lord McFadyen.

issues that are actually in dispute. The relevancy of pleadings must always be tested against these fundamental requirements. In a case involving the causal links that may exist between events having contractual significance and losses suffered by the pursuer, it is obviously necessary that the events relied on should be set out comprehensively. It is also essential that the heads of loss should be set out comprehensively, although that can often best be achieved by a schedule that is separate from the pleadings themselves. So far as the causal links are concerned, however, there will usually be no need to do more than set out the general proposition that such links exist. Causation is largely a matter of inference, and each side in practice will put forward its own contentions as to what the appropriate inferences are. In commercial cases, at least, it is normal for those contentions to be based on expert reports, which should be lodged in process at a relatively early stage in the action. In these circumstances there is relatively little scope for one side to be taken by surprise at proof, and it will not normally be difficult for a defender to take a sufficiently definite view of causation to lodge a tender, if that is thought appropriate. What is not necessary is that averments of causation should be over-elaborate, covering every possible combination of contractual events that might exist and the loss or losses that might be said to follow from such events.<sup>28</sup>

The approach set out in this case has been expressly accepted by a trial judge in a later case when rejecting an application for leave to appeal an arbitrator's award on a question of law.<sup>29</sup> A somewhat earlier excellent judgment usefully set out in some detail what is required of the contractor when making a claim.<sup>30</sup> A summary of the court's findings can be expressed as follows:

- The claimant must set out an intelligible claim which must identify the loss, why it has occurred and why the other party has an enforceable obligation recognised at law to compensate for the loss.
- The claim should tie the breaches relied on to the terms of the contract and identify the relevant contract terms.
- Explanatory cause and effect should be linked.
- There is no requirement that the total amount of loss must be broken down so that the sum claimed for each specific breach can be identified. But an 'all or nothing' claim will fail in its entirety if a few causative events are not established.
- Therefore, a global claim must identify two matters:
  - The means by which the loss is to be calculated if some of the causative events alleged have been eliminated. In other words, what formula or device is put forward to enable an appropriate scaling down of the claim to be made?
  - The means of scaling down the claim to take account of other irrevocable factors such as defects, inefficiencies or events at the contractor's risk?

This still seems to be an exceptionally clear exposition of the current position.

<sup>28</sup> *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2004] Sc LR 872 at paragraph 20 per Lord Drummond Young affirming [2002] BLR 393.

<sup>29</sup> *London Underground Ltd v Citylink Telecommunications Ltd* (2007) 115 Con LR 1.

<sup>30</sup> *How Engineering Services Ltd v Lindner Ceilings Partitions PLC* 17 May 1995 unreported.