

Global Claims in Practice

A Paper to the IBC's 11th Annual Residential Construction Law

Summer School – September 2011

Jonathan Cope

Introduction:

1. This paper aims to answer the following questions:
 - i. What is a global claim?
 - ii. What are the objections to global claims?
 - iii. What are the requirements of a successful global claim?
 - iv. How can a global claim be defeated?
 - v. What happens if a global claim is defeated?
 - vi. How can a contractor avoid having to make a global claim?
2. Whilst this paper will consider the case law currently applicable to global claims, it is not intended to be a historical analysis of the development of the relevant law. Readers looking for such an analysis are referred to two excellent Society of Construction Law papers¹.

Question 1: What is a global claim?

3. Lord Drummond Young summarised what a contractor² normally has to prove in order to succeed with a loss and expense claim under a construction contract, or damages as a result of a breach of contract, in paragraph 10 of the Scottish case of *John Doyle Construction Limited v Laing Management (Scotland) Limited* [2004] BLR 295³:

¹ Winter, J, *Global Claims and John Doyle v Laing Management – Good English Law? Good English Practice?*, Society of Construction Law paper 140, July 2007; and Lynden, J, *Global Claims in Common Law Jurisdictions*, Society of Construction Law paper D91, April 2008

² The terms “contractor” and “employer” have been used throughout this paper. However, the principles equally apply to other contracting parties, for example subcontractors and contractors.

³ The *John Doyle v Laing* case re-ignited the debate on global claims. It concerns an application to strike out a global claim which was initially decided in the Outer House of the Court of Session by Lord Macfadyen ([2002] BLR 393) and then in the Inner House, judgment being given by Lord Drummond Young ([2004] BLR 295 – note that the Building Law Reports incorrectly refer to the judgment being given by Lord MacLean).

*“For a loss and expense claim to succeed, a claimant must aver and prove three matters: first, the existence of one or more events for which the defendant is responsible; secondly, the existence of loss and expense suffered by the claimant; and thirdly, a causal link between the event or events and the loss and expense.”*⁴

4. A global claim is a modification of this principle because a contractor cannot or will not adduce evidence to prove the third matter, i.e. the causal link. Instead, the contractor puts forward a collection of events and the total amount of loss incurred and asserts that the collection of events together caused the loss.
5. There are numerous definitions of global claims⁵, but for the purposes of this paper I will adopt the definition used by the late Ian Duncan Wallace QC in paragraph 8.200 of the 11th edition of *Hudson’s Building and Engineering Contracts*⁶:

“Global claims may be defined as those where a global or composite sum, however computed, is put forward as the measure of damages or of 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 between those matters.”

6. In my experience, the “*matters of claim or complaint*” referred to by Mr Duncan Wallace QC are most likely to be a combination of events that the contractor alleges caused both delay and disruption to the works. Events can include variations, late provision of design information, denial of access to parts of the site, interference by other contractors, etc. Supporters of global claims argue that, if an employer has caused such events to occur, a global claim may be the only way of compensating a contractor for its losses and of preventing the employer from benefiting from the complex situation it has created. They also suggest that the fact that the causal links are impractical or impossible to demonstrate should not prevent a contractor’s claim succeeding. However, whilst this may well be the case, global claims also offer advantages to contractors; for example, there is no need to undertake a detailed analysis of the causal links, and this usually results in claims being quicker and cheaper to prepare. Global claims may also force the employer to go to the

⁴ Decisions of Scottish courts are not binding on English courts, however they are highly persuasive. This is particularly so with *John Doyle v Laing* because it is a decision of a higher Scottish Court and much of the case law referred to in *John Doyle v Laing* is English.

⁵ For example, the definition in Appendix A of *The Society of Construction Law Delay and Disruption Protocol*, paragraph 6.28.1 of *Causation in Construction Law – Principles and Methods of Analysis* by Daniel Atkinson and page 41 of the judgment in *Bernhard’s Rugby Landscapes Ltd v Stockley Park Consortium Limited* [1997] 82 BLR 39

⁶ Duncan Wallace QC, I, *Hudson’s Building and Engineering Contracts*, 11th edition, Sweet & Maxwell, 1995

expense of examining the events, and as a result the employer may agree to a financial settlement rather than going to the expense of undertaking that exercise.

7. It is also worth noting that other terms are often mentioned alongside global claims, in particular “total cost claims”, “composite claims” and “rolled up claims”. Whilst many commentators use these terms as if they are interchangeable alternatives to the term “global claim”, in my view there is a distinction. This is concisely summarised in Daniel Atkinson’s definition at paragraph 6.28 of *Causation in Construction Law – Principles and Methods of Analysis*⁷:

“The term “Total Cost Claim” is a claim where a single sum is claimed which is the difference between the total actual cost and the contract price or variation of the work. If the Total Claim is for more than one event, then it is a particular form of Global Claim.

The terms “Composite Claim” and “Rolled-Up Claim” are claims where there are a number of events and only some are presented as a group in a Global Claim. In this type of claim, separate sums are claimed for particular events and a single sum is claimed for the remaining group of events that are not so particularised....”

Question 2: What are the objections to global claims?

8. The main objections to global claims can be summarised as follows:
 - i. Global claims offend the generally accepted legal position on what a contractor must prove in order to succeed with a claim⁸, namely the causal link between the sums claimed and each individual event. As a result, a global claim can have the effect of reversing the burden of proof so that it is the employer, rather than the contractor, who has to undertake a detailed analysis of the events and quantum to show why the global approach is not justified – *“the defendant or court should not have to do the claimant’s job for it”*⁹;
 - ii. Global claims tend to ignore many other explanations for the causes of additional costs that the employer is not responsible for but the contractor may be. For example, lack of supervision or cost control, unrealistically low tender price, weather, labour or materials shortages, etc;

⁷ Atkinson, D, *Causation in Construction Law – Principles and Methods of Analysis*, Daniel Atkinson Limited, 2007

⁸ A contractor can rely on events under a construction contract in order to claim loss and expense, or alternatively rely on breaches of the contract in order to claim damages. For simplicity I only refer to the former situation in this paper, but readers should assume that the same principles apply to breaches of contract and damages.

⁹ Page 14 of Winter, J, *Global Claims and John Doyle v Laing Management – Good English Law? Good English Practice?*, Society of Construction Law paper 140, July 2007

- iii. Global claims can result in a lump sum or remeasurement contract being converted into a cost reimbursable contract;
- iv. Global claims are “almost invariably unfair and highly prejudicial to defendants, since they avoid indicating the precise case to be met and enable the plaintiff to “change course” during the evidence”¹⁰. As a result, employers will often contend that they cannot understand the case against them and the claim should therefore be struck out.

Question 3: What are the requirements of a successful global claim?

9. The requirements of a successful global claim are as follows:

Requirement 1 – The claim must be pleaded with sufficient particularity to enable the defendant to know the case against it

10. This is particularly important when making global claims in order to avoid criticism from an employer that it cannot understand the case against it. In *John Doyle v Laing* Lord Drummond Young confirmed that the same is required of a contractor pleading a global claim as for any other claim when it comes to the events and loss:

*“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 issues that are actually in dispute.... 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.....”*¹¹

11. A contractor bringing a global claim therefore cannot assert that it is impossible to formulate its claim and that it should be allowed to continue unspecified in the hope that, when it comes to trial, it may be able to reconstitute its case and make good what it feels able to plead¹². In some cases where courts have refused to strike-out global claims, they have provided guidance on how the pleadings should be amended:

¹⁰ Paragraph 8.201 of Duncan Wallace QC, I, *Hudson's Building and Engineering Contracts*, 11th edition, Sweet & Maxwell, 1995

¹¹ Paragraph 20 of *John Doyle Construction Limited v Laing Management (Scotland) Limited* [2004] BLR 295

¹² Page 23 of *Wharf Properties Limited v Eric Cumine Associates (No2)* [1991] 52 BLR 1

- i. In *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Limited* [1997] 82 BLR 39 HHJ Humphrey LLoyd QC ordered the contractor to provide a list in relation to all of the alleged causes of delay other than variations that set out the relevant contract condition relied on or any other special circumstance, in which case the nature of the cause or breach also had to be particularised¹³;
- ii. If one of the events is that the specification is inadequate, then sufficient details would include (i) how the specification was inadequate and the effect of that particular inadequacy to a particular trade or why the inadequacy contributed to the delay and extra cost, (ii) the dates between which the delay occurred, and (iii) whether the delay was continuous or intermittent. Similarly, if the event was delay due to supply of information then it is necessary to give details of when the information ought to have been given, when it was given or the nature of the work which was delayed or why it was delayed¹⁴.

Requirement 2 – All other contractual requirements for a valid claim must have been complied with

12. The courts have repeatedly emphasised the need for contractors to satisfy the contractual pre-conditions to entitlement in respect of each of the events relied on¹⁵. Whilst this requirement applies to all claims and not just global claims, it is worth further mention.
13. Probably the most important contractual pre-condition that needs to be satisfied is the giving of notice by a contractor that an event has occurred which may delay the project and/or result in the contractor incurring loss. For example, under clause 4.23.1 of the *JCT Standard Form of Building Contract With Quantities 2005 Edition*¹⁶, a contractor has to make its application for loss and expense “.....as soon as it has become, or should reasonably have become, apparent to him that the regular progress has been or is likely to be affected”. Under clause 61.3 of *NEC3*¹⁷, if the contractor does not notify the project manager of a compensation event within eight weeks of becoming aware of that event then “he is not entitled to change the Price, Completion Date or a Key Date....”. The extent to which clauses such as these are condition precedents to a claim is too large a subject to explore in this paper, but readers are referred to the many excellent papers on the topic¹⁸.

¹³ Cited by Daniel Atkinson at paragraph 6.34 of *Causation in Construction Law – Principles and Methods of Analysis*, Daniel Atkinson Limited, 2007

¹⁴ Paragraph 6.34 of *Causation in Construction Law – Principles and Methods of Analysis*, Daniel Atkinson Limited, 2007 – *Imperial Chemical Industries Plc v Bovis Construction Limited* (1992) 32 ConLR 90 cited.

¹⁵ Pages 102 and 103 of *London Borough of Merton v Stanley Hugh Leach* [1985] 32 BLR 51 and *Mid Glamorgan County Council v. Devonald Williams and Partners* (1992) 8 Constr LJ 61

¹⁶ Sweet and Maxwell Limited, 2005

¹⁷ ICE/Thomas Telford, 2005

¹⁸ For example, Lal, H, *The Rise and Rise of Time-Bar Clauses for Contractor's Claims: Issues for Construction Arbitrators*, Society of Construction Law paper 142, September 2007

However, a contractor should nevertheless endeavour to comply with these clauses in order to avoid allegations that it failed to give notice of the events.

14. A contractor also needs to substantiate its claim by providing particulars of delays and/or the loss alleged. For example, under clause 4.23.2 of the *JCT Standard Form of Building Contract With Quantities 2005 Edition*¹⁹, in support of an application for loss and expense a contractor has to provide, on request, “*such information as will reasonably enable the Architect/Contract Administrator to form an opinion*”. Contractors therefore need to ensure that they maintain adequate records to support their claims, albeit the extent of the records required will vary from case to case.

Requirement 3 – It must be impossible or impractical to separate out the consequences of each of the events

15. This essential requirement for any global claim was emphasised by Recorder Tackaberry QC in *Mid Glamorgan County Council v. Devonald Williams and Partners* (1992) 8 Constr LJ 61²⁰ after reviewing the authorities on global claims:

“Where, however, 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 impractical, it is permissible [sic] to maintain a composite claim.”

16. What a contractor therefore needs to prove is that: (i) each of the events occurred, (ii) the employer bears the risk for these events, (iii) the events interact in an extremely complex manner, and (iv) as a result of the complex interaction it is either difficult or impossible to apportion the total extra cost between the various events. The key question is therefore how complex the interaction between a group of events has to be in order for it to become impractical or impossible to identify the causal links and to apportion the loss between each event. This is a question of degree that will turn on the facts of each case, but examples can be found in decided cases. For example, in the seminal global claims case of *J. Crosby and Sons Limited v Portland Urban and District Council* [1977] 5 BLR 121, an arbitrator found that the delay and loss of productivity caused by five events including suspensions of work and failure to give possession were cumulative and it was impossible to assess the delay and loss caused by each event in isolation. The arbitrator awarded a lump sum, partly for extended overheads and partly for loss of productivity. Donaldson J refused to set the

¹⁹ Sweet and Maxwell Limited, 2005

²⁰ Page 69.

award aside. The type of evidence a contractor may rely on to satisfy this requirement could be:

- i. Witness statements by its employees, in particular the site agent or foreman;
 - ii. A contemporaneously prepared site diary detailing what work was undertaken on what days, in what areas and by whom;
 - iii. Minutes of meetings and/or correspondence recording events on site;
 - iv. Site instructions;
 - v. Photographs, dated where possible. Photographs are particularly important to demonstrate access restrictions and the like;
 - vi. Expert evidence to support the contention that as a result of the complex interaction it is either difficult or impossible to apportion the total extra cost between the various events.
17. In *Petromec Inc v Petroleo Brasileiro S.A. Petrobras & ors* [2007] EWCA Civ 1371 the Court of Appeal re-emphasised that a global claim will not succeed if it is possible to apportion the total extra costs between the various events. The Court of Appeal held that the first instance judgment of Cooke J²¹ was correct, and in particular that *Petromec* had to identify the additional work and costs resulting from a change to the specification.

Requirement 4 – Any significant matters the employer is not responsible for must be eliminated

18. Until *John Doyle v Laing* it was generally considered that if an employer could prove that one of the causes of the delay or the contractor's loss was not the employer's responsibility under the contract then the entire contractor's claim would fail. For example, in paragraph 8.204 of the 11th edition of *Hudson's Building and Engineering Contracts* Mr Duncan Wallace QC states²²:

“.....even if [a global] claim is allowed to proceed, it should only be on the basis that, on proof of any not merely trivial damage or additional cost being established (or indeed any other cause of the additional cost, such as under-pricing) for which the owner is not contractually responsible, the entire claim will be dismissed.”

²¹ *Petromec Inc v Petroleo Brasileiro S.A. Petrobras & ors* [2007] EWHC 1589 (Comm)

²² Duncan Wallace QC, I, *Hudson's Building and Engineering Contracts*, 11th edition, Sweet & Maxwell, 1995

19. Therefore, if an employer could demonstrate that at least part of the contractor's loss had been caused by a "not merely trivial" event that was not the employer's responsibility, then the contractor's global claim would fail in its entirety. This was described by some commentators as the "exocet" defence²³. However, *John Doyle v Laing* changed the law in this area because the event the employer is not responsible for no longer has to be "not merely trivial", but has to be "significant". What will constitute a "significant" cause will vary depending on the facts of a case. For example, losses arising from a delay of 10 days out of a total of 200 caused by exceptionally inclement weather or inefficient working may not be "significant", but a delay of 50 days might be. Pre *John Doyle v Laing*, the delay of 10 days out of 200 might have been enough to be considered "not merely trivial".
20. Lord Drummond Young also went on to say that the question of causation must be treated by the application of common sense to the logical principles of causation, and the dominant cause approach is relevant:

".....it is frequently possible to say that an item of loss has been caused by a particular event notwithstanding that other events played a part in its occurrence. In such cases, if an event or events for which the employer is responsible can be described as the dominant cause of an item of loss, that will be sufficient to establish liability, notwithstanding the existence of other causes that are to some degree at least concurrent....."

21. As a result of *John Doyle v Laing*, a contractor now only needs to eliminate "significant" events that the employer is not responsible for, rather than events which are simply "not merely trivial". A contractor should also contend that the events the employer is responsible for are the dominant cause of the delay or loss and therefore all other events can be disregarded.

Requirement 5 – All parts of the claim where a causal link can be demonstrated must be pleaded separately

22. The need to separate out those parts of the claim where the causal link can be demonstrated was identified in *J. Crosby and Sons Limited v Portland Urban and District Council* [1977] 5 BLR 121²⁴:

".....so long as the arbitrator does not make any award which contains a profit element..... and provided he ensures that there is no duplication, I can see no reason

²³ Pennicott I, *Global Claims*, 8th June 2006, Keating Chambers website

²⁴ Page 136

*why he should not recognise the realities of the situation and **make individual awards in respect of those parts of the claim which can be dealt with in isolation** and a supplementary award in respect of the remainder of these claims as a composite whole.” [emphasis added]*

23. After separating out those parts of the claim where the causal link can be demonstrated, the global claim becomes a “composite claim” or “rolled-up claim” as described above. In *John Doyle v Laing* Lord Drummond Young referred to such claims as a “modified total cost claim”:

“A modified total cost claim is more restrictive, and involves the contractor dividing up his additional costs and only claiming that certain parts of those costs are a result of events that are the employer’s responsibility. This terminology has the advantage of emphasising that the technique involved in calculating a global claim need not be applied to the whole of the contractor’s claim. Instead, the contractor can divide his loss and expense into discrete parts and use the global claim technique for only one, or a limited number, of such parts. In relation to the remaining parts of the loss and expense the contractor may seek to prove causation in a conventional manner.”

24. But why does a contractor need to separate out those parts where the causal link can be demonstrated? There are a number of reasons:
- i. A contractor will not need to satisfy the onerous tests which apply to global claims in respect of those parts which can be separated out, thereby increasing the contractor’s chances of succeeding with the claim;
 - ii. The different heads of claim may have different legal or contractual bases, and consequently different methods of valuation. For example, a variation will usually be valued by reference to existing rates and prices in the contract; a claim for unforeseen ground conditions will be valued in accordance with the specific provisions of the relevant clause in the contract, as will loss and expense; and damages for breach of contract will have to be assessed in accordance with the relevant law. Some of these remedies may allow profit, some may not. Most will be cost based, but not variations²⁵;
 - iii. The contractor may not be able to reopen matters that have already been agreed, for example the value of variations.

²⁵ Page 14 of Winter, J, *Global Claims and John Doyle v Laing Management – Good English Law? Good English Practice?*, Society of Construction Law paper 140, July 2007

25. A contractor should consider the following when considering which events it can establish a causal link for:

Variations:

26. Differences in the unit cost of activities should normally be capable of identification, and where possible contractors should separate out variations from the remainder of the claim and value them under the relevant provisions in the contract. However, one of the reasons a contractor might have brought a global claim is because simply substituting labour and material rates will not account for the full amount of the increased costs that may result from, or be connected to, the variation. A contractor could incorporate the remainder of the increased costs in its global claim. However, another alternative would be to incorporate the remainder of the increased costs in the valuation of the variation. For example, the *JCT Standard Form of Building Contract With Quantities 2005 Edition*²⁶ provides in clause 5.6.1.2:

“where the additional or substituted work is of similar character to work set out in Contract Bills but is not executed under similar conditions thereto and/or significantly changes its quantity, the rates and prices for the work so set out shall be the basis for determining the valuation and the Valuation shall include a fair allowance for such difference in conditions and/or quantity;”

27. The contractor could therefore make a percentage adjustment to a rate to account for such a “*difference in conditions*”, arguing that, considering the complexity of the events connected with the variation, this is “*a fair allowance*”. The contractor could incorporate all of its loss into variations, dispensing with the need for a global claim altogether. However, contractors should be cautious about making such claims because percentage adjustments may be difficult to justify and an employer may recognise this for what it is, i.e. a global claim via the “back door”. Clause 5.10.2 of the JCT Contract also states:

“No allowance shall be made under the Valuation Rules for any effect upon the regular progress of the Works or of any part of them or for any other direct loss and/or expense for which the Contractor would be reimbursed by payment under any other provision in these Conditions.”

²⁶ Sweet and Maxwell Limited, 2005

Prolongation Costs:

28. It should be possible for the contractor to identify the costs associated with any prolongation and claim them under the loss and expense provisions in the contract. This could include site costs including site agents and foremen, labourers, site huts, small plant, scaffolding, etc. A claim for head office overheads could also be made as part of the prolongation costs.

Disruption Costs:

29. Whilst disruption sometimes forms part of a claim for prolongation, a contractor should attempt to separate the associated costs, i.e. those costs associated with loss of productivity, disturbance, hindrance or interruption to progress, such that the work is carried out less efficiently than it would otherwise have been. A contractor can normally claim these costs under the loss and expense provisions in the contract.

30. One of the most effective means of establishing disruption is the “measured mile” technique. This compares productivity achieved on an undisrupted part of the works with productivity achieved on the disrupted part. The comparison can be made on a location or time period basis, and the comparative periods are usually converted to units for comparison purposes.

31. If there is no undisrupted part of the works to create the “measured mile” then it may be possible to compare productivity on other contracts undertaken by the contractor or to refer to productivity information produced by professional or trade bodies. Failing this, a contractor may have to compare the resources it anticipated using in its tender.

Requirement 6 – There must be sufficient evidence to support the losses claimed

32. Whilst this is another requirement that applies to any claim, it is worth reinforcing here because there is no point in a contractor being able to satisfy the previous five requirements if the evidence to support its losses is then inadequate. Evidence that could be required to support the losses claimed may include:

- i. Timesheets for each employee and/or subcontractor to demonstrate which employees and/or subcontractors were working and when;
- ii. Daywork sheets, preferably signed by the contract administrator, project manager, etc.;

- iii. Evidence of payments to employees (payslips, salary records, CIS payment certificates, etc.) and/or subcontractors, together with other relevant costs including company car allowances, pensions contributions, healthcare etc.;
- iv. Plant and material invoices.

Question 4: How can a global claim be defeated?

An employer can obviously raise defences to each of the above requirements in an attempt to defeat a contractor's global claim. One of the most effective defences an employer can deploy is to demonstrate that it was not responsible for a significant cause of the loss, and that this was the dominant cause of the delay or loss.

- 33. In my experience it is usually reasonably straightforward for an employer to demonstrate that it is not responsible for at least part of the delay or loss. For example, the employer may be able to demonstrate periods of exceptionally inclement weather (which it does not bear the risk for), or provide site sign-in sheets which show that the contractor had inadequate labour on site, or refer to minutes which detail a lack of supervision throughout the project. However, the employer will need to demonstrate that such events were a "significant" cause of the delay or loss, and whether an event is "significant" will depend on the facts of each case. The employer should also argue that these events were the dominant cause of the delay or loss.
- 34. As a result of its defences, an employer may attempt to strike-out the claim altogether. The main argument is that the claim is hopelessly vague and unclear and is prejudicial to its defence. Such a course of action is envisaged by Mr Duncan Wallace QC in paragraph 8.204 of *Hudson's Building and Engineering Contracts*²⁷:

*"It is submitted that, in English and related Commonwealth jurisdictions, claims on a total cost basis, a fortiori²⁸ if in respect of a number of disparate claims, will prima facie²⁹ be embarrassing and an abuse of the process of the court, **justifying their being struck out and the action dismissed at an interlocutory stage.**" [emphasis added]*

- 35. Much of the case law on global claims, including *John Doyle v Laing*, has resulted from applications to strike out global claims. One such application succeeded in front of the

²⁷ Duncan Wallace QC, I, *Hudson's Building and Engineering Contracts*, 11th edition, Sweet & Maxwell, 1995

²⁸ "a fortiori" means "even more so"

²⁹ "prima facie" means "at first sight"

Privy Council in the case of *Wharf Properties Limited v Eric Cumine Associates (No2)* [1991] 52 BLR 1. However, most commentators see this case as an exception because it was eventually struck-out as an abuse of process after the claimant refused to supply particulars in the face of orders and agreements to do so. In most of the other cases applications to strike-out have failed, with the courts instead preferring to order amendments to the claim³⁰.

Question 5: What happens if a global claim is defeated?

36. Both houses of the Court of Session made it clear in *John Doyle v Laing* that, just because a global claim fails, it does not follow that no other claim succeeds. In particular, at paragraphs 16 and 17 of the judgment of the Inner House, Lord Drummond Young referred to a situation where a contractor is unable to demonstrate that the events for which the employer is responsible are the dominant cause of the loss:

“[16] even if it cannot be said that events for which the employer is responsible are the dominant cause of the loss, it may be possible to apportion the loss between the causes for which the employer is responsible and other causes. In such a case it is obviously necessary that the event or events for which the employer is responsible should be a material cause of the loss. Provided that condition is met, however, we are of opinion that apportionment of loss between the different causes is possible in an appropriate case. Such a procedure may be appropriate in a case where the causes of the loss are truly concurrent, in the sense that both operate together at the same time to produce a single consequence. For example, work on a construction project might be held up for a period owing to the late provision of information by the architect, but during that period bad weather might have prevented work for part of the time. In such a case responsibility for the loss can be apportioned between the two causes, according to their relative significance. Where the consequence is delay as against disruption, that can be done fairly readily on the basis of the time during which each of the causes was operative. During the period when both operated, we are of opinion that each should normally be treated as contributing to the loss, with the result that the employer is responsible for only part of the delay during that period. Unless there are special reasons to the contrary, responsibility during that period should probably be divided on an equal basis, at least where the concurrent cause is not the

³⁰ Applications to strike-out failed in *Mid Glamorgan County Council v. Devonald Williams and Partners* (1992) 8 Constr LJ 61, *Imperial Chemical Industries Plc v Bovis Construction Limited* (1992) 32 ConLR 90, *British Airways Pensions Trustees Limited v Sir Robert McAlpine & Sons Limited* [1994] 72 BLR 26, *John Holland Construction and Engineering Pty Limited v Kvaerner RJ Brown Pty Limited* [1996] 82 BLR 83, *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Limited* [1997] 82 BLR 39 and *John Doyle Construction Limited v Laing Management (Scotland) Limited* [2004] BLR 295

contractor's responsibility. Where it is his responsibility, however, it may be appropriate to deny him any recovery for the period of delay during which he is in default.

[17] Apportionment in this way, on a time basis, is relatively straightforward in cases that involve only delay. Where disruption to the contractor's work is involved, matters become more complex. Nevertheless, we are of opinion that apportionment will frequently be possible in such cases, according to the relative importance of the various causative events in producing the loss. Whether it is possible will clearly depend on the assessment made by the judge or arbiter, who must of course approach it on a wholly objective basis. It may be said that such an approach produces a somewhat rough and ready result. This procedure does not, however, seem to us to be fundamentally different in nature from that used in relation to contributory negligence or contribution among joint wrongdoers. Moreover, the alternative to such an approach is the strict view that, if a contractor sustains a loss caused partly by events for which the employer is responsible and partly by other events, he cannot recover anything because he cannot demonstrate that the whole of the loss is the responsibility of the employer. That would deny him a remedy even if the conduct of the employer or the architect is plainly culpable, as where an architect fails to produce instructions despite repeated requests and indications that work is being delayed. It seems to us that in such cases the contractor should be able to recover for part of his loss and expense, and we are not persuaded that the practical difficulties of carrying out the exercise should prevent him from doing so."

37. Lord Drummond Young therefore envisaged that, even if a global claim failed, it would be possible for the court to make a rational apportionment of part of the global claim to the causative events an employer is held liable for. Whilst it has been correctly identified that these views were obiter dicta³¹ because the action was still at a pleading stage³², much comment and analysis has still been made of them.
38. In his paper on global claims, Jeremy Winter raises the question of what information a court will use to carry out its apportionment exercise, in particular because a contractor is likely to have asserted that it is impossible to allocate costs to particular causes and so will not have provided data that will allow any apportionment to be easily done. He also questions when

³¹ "obiter dictum" (plural "obiter dicta") means something said by a judge that was not essential to the decision in the case. It does not create a binding precedent but may be cited as persuasive authority.

³² Page 10 of Winter, J, *Global Claims and John Doyle v Laing Management – Good English Law? Good English Practice?*, Society of Construction Law paper 140, July 2007

the apportionment exercise will be undertaken and whether the tribunal will need to give the parties the opportunity to comment on the apportionment.

39. Lord Drummond Young's comments regarding apportionment received further judicial support from the Inner House of the Court of Session in *City Inn Limited v Shepherd Construction Limited* [2010] CSIH 68. Whilst this case concerned issues of concurrency in extension of time claims rather than global claims, Lord Osborne stated "...it appears to me that the possibility of apportionment as between different causative factors, contemplated as legitimate in [the *John Doyle v Laing*] case tend to support the approach taken by the Lord Ordinary in the present one". However, the authors of the 12th edition of *Hudson's Building and Engineering Contracts*³³ submit that Lord Osborne's assessment is wrong.
40. The case of *London Underground Limited v Citylink Telecommunications Limited* [2007] EWHC 1749 (TCC) gives some guidance on what may happen if a tribunal finds that a global claim has failed. Citylink made a global claim for an extension of time which was referred to arbitration. The arbitrator rejected the global claim, but followed the process contemplated in *John Doyle v Laing* and granted Citylink an extension of time of 48 weeks for one individual event. Both parties challenged the arbitrator's award in court. LUL submitted that the arbitrator was correct in finding that the global claim should fail, but argued that he had determined the remaining extension of time on a basis that had not been addressed or argued by the parties and fairness therefore dictated that LUL should be given the opportunity to deal with the new case.
41. Ramsey J noted that *John Doyle v Laing* was not challenged by the parties and he therefore accepted it. The parties' challenges failed because Ramsey J decided that the arbitrator's award was based on the primary facts that had been in issue in the proceedings and he had therefore not been required to seek further submissions by the parties. Ramsey J recognised that tribunals will often have to deal with cases where there has been only partial success, and the parties do not have an opportunity to deal with the tribunal's findings. At paragraph 145 he stated:

"Tribunals frequently have to deal with cases where a claim or a defence has not wholly succeeded and it is necessary to determine what result flows from the partial success or failure. Provided that the result is based on primary facts which have been in issue in the proceedings, there can in principle be no objection to a tribunal taking such a course. There will, though, be limits and it will be a matter of fact or degree in

³³ Atkin Chambers, *Hudson's Building and Engineering Contracts*, 12th edition, Sweet & Maxwell, 2010

a particular case whether the findings made by the Arbitrator fall outside the limits and fairness requires the Arbitrator to seek further submissions from the parties.”

42. A tribunal should nevertheless be wary of deciding the surviving part of a claim without giving the parties the opportunity to make further submissions, particularly considering the wealth of case law in both arbitration³⁴ and domestic UK adjudication³⁵ which highlights the dangers of tribunals using their own expertise and failing to disclose it to the parties.
43. In summary, even if a global claim is defeated, it does not follow that no other claim will succeed. A tribunal may make a rational apportionment of part of the global claim to the causative events it finds the employer liable for (as suggested in *John Doyle v Laing*), or it may find a causal link between an individual loss and an individual event (as happened in *LUL v Citylink*). However, a contractor should not assume that the tribunal will make its case for it if a global claim fails.

Question 6: How can a contractor avoid having to make a global claim?

44. Whilst a global claim might be successful if a contractor satisfies the six requirements summarised above, if possible a contractor should avoid making a global claim altogether. The most effective way of achieving this is for the contractor to maintain accurate records of events on site. The importance of records was eloquently explained by Max Abrahamson in 1979³⁶:

“It is grossly unfair both to employers and contractors that the mechanism to determine the actual full costs of disruption to a contractor, and to divide them from the costs due to his own inefficiency, is lacking more often than not. To improve the mechanism it is necessary to have better arbitration procedure.....and better records.

A party to a dispute, particularly if there is arbitration, will learn three lessons (often too late): the importance of records, the importance of records and the importance of records. It is impossible to exaggerate the extent to which lawyers can find unexpected grounds, often quite real, on which to cast doubt on evidence if it is not backed by meticulously established records. It must also be remembered that the arbitrator will know nothing about the history of the works, which must be

³⁴ For example, *Fox v PG Welfair Limited* [1981] 2 Lloyds Rep 514

³⁵ For example, *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] EWHC 597 (TCC)

³⁶ Page 442 of Abrahamson, M, *Engineering Law and the ICE Contracts*, 4th edition, Elsevier Applied Science, 1979, cited by Winter, J, *Global Claims and John Doyle v Laing Management – Good English Law? Good English Practice?*, Society of Construction Law paper 140, July 2007

reconstructed for him with all its complexities and nuances, from the records available.”

45. This is reinforced at paragraph 1.14.2 of *The Society of Construction Law Delay and Disruption Protocol*³⁷ which states, in effect, that if accurate and complete records are maintained, the contractor should be able to establish the causal link between an employer risk event and the resultant loss suffered thereby disposing of the need to make a global claim.
46. The *SCL Protocol* provides a model clause that can be included in a contract, and sets out what records a contractor should maintain. Whether it is a mandatory requirement for a contractor to maintain such records under the contract or not, I would recommend the maintenance of these records in any event. Whilst it would be naïve to suggest that maintaining such records will avoid global claims altogether, it would certainly reduce the need to rely on them. The model clause in the *SCL Protocol* is as follows:

“Records clause for medium to high value or medium to highly complex projects

2.1 The Contractor shall maintain and submit current records of activities, including the work of sub-contractors and suppliers.

2.2 The records shall be in a form as agreed between the parties and shall include:

2.2.1 identification of contractor/sub-contractor working and their area of responsibility;

2.2.2 operating plant/equipment with hours worked, idle or down for repair;

2.2.3 work performed to date giving the location, description and by whom, and reference to the contract programme;

2.2.4 test results and references to specification requirements. List deficiencies identified, together with the corrective action;

2.2.5 material received with statement as to its acceptability and storage;

2.2.6 information or drawings reviewed with reference to the contract job specifications, by whom, and action taken;

2.2.7 job safety evaluations;

2.2.8 progress photographs;

³⁷ Society of Construction Law, October 2002

- 2.2.9 *a list of instructions given and received and any conflicts in plans and/or specifications;*
 - 2.2.10 *weather conditions encountered;*
 - 2.2.12 *the number of persons working on-site by trade, activity and location;*
 - 2.2.13 *information required from and by the Employer/CA;*
 - 2.2.14 *any delays encountered.*
- 2.3 *The parties should agree the intervals at which each of these types of records should be delivered to the CA.*
- 2.4 *The daily reports shall be delivered to the CA at the end of the working week to which they relate (or as otherwise agreed).*
- 2.5 *A report shall be submitted for each day of work performed and shall be numbered sequentially.*
- 2.6 *The report shall be signed and dated by the CA.*
- 2.7 *Any deficiency in the work shall be identified. As deficiencies are corrected, such corrections shall be acknowledged on the daily report.*
- 2.8 *The CA shall notify the Contractor of any non-compliance with the reporting requirements. All the deficiencies cited and verbal instructions given to the Contractor by the Employer/CA shall be entered on the daily report.*
- 2.9 *A weekly report shall be delivered by the contractor to the Employer/CA within 2 workings days of the end of the week to which it relates (or as otherwise agreed). The weekly report shall be in a form as agreed between the parties and shall include:*
- 2.9.1 *summary of the work performed;*
 - 2.9.2 *summary of the works performed as referenced on the agreed programme;*
 - 2.9.3 *summary of the list of deficiencies;*
 - 2.9.4 *summary of any delays encountered.*

2.10 A monthly report shall be delivered by the Contractor to the Employer/CA within 5 days of the end of each agreed monthly period (or as otherwise agreed). The monthly report shall be in a form as agreed between the parties and shall include;

2.10.1 summary of the work performed;

2.10.2 summary of the works performed as referenced on the agreed programme;

2.10.3 summary of the list of deficiencies;

2.10.4 summary of any delays encountered.”

Conclusion:

47. The concept of global claims will always provoke controversy, and balancing the rights of the parties will continue to vex tribunals. This balancing act was succinctly explained by HHJ Humphrey LLOYD QC at paragraph 136.1 of *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Limited* [1997] 82 BLR 39:

“Whilst a party is entitled to present its case as it thinks fit and it is not to be directed as to the method by which it is to plead or prove its claim whether on liability or quantum, a defendant on the other hand is entitled to know the case that it has to meet.”

48. However, it is clear from all of the case law that the judiciary is intent on doing justice, ensuring that employers pay no more than the amount for which they are properly liable and that contractors do not walk away empty handed simply because they have been unable to progress beyond making a global claim³⁸. A summary of my conclusions are as follows:

Question 1: What is a global claim?

Answer: Global claims may be defined as those where a global or composite sum, however computed, is put forward as the measure of damages or of 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 between those matters.

Question 2: What are the objections to global claims?

- i. **Answer:** (i) they offend the generally accepted legal position as to what a contractor must prove in order to succeed with a claim and this can have the effect of reversing the burden of proof, (ii) they ignore the many other explanations of why an additional cost might have been incurred, (iii) they can result in a lump sum or remeasurement contract being converted into a cost reimbursable contract, and (iv) they often fail to indicate the precise case to be met.

Question 3: What are the requirements of a successful global claim?

Answer: The six requirements are as follows:

³⁸ Richards, D, *Global Claims*, 2009, Construction Law Review

- ii. The claim must be pleaded with sufficient particularity to enable the employer to know the case against it;
- iii. All other contractual requirements for a valid claim must have been complied with;
- iv. It must be impossible or impractical to separate out the consequences of each of the events;
- v. Any significant matters the employer is not responsible for must be eliminated;
- vi. All parts of the claim where a causal link can be demonstrated must be pleaded separately;
- vii. There must be sufficient evidence to support the losses claimed.

Question 4: How can a global claim be defeated?

Answer: By the employer raising successful defences to one or more of the six requirements referred to above, in particular demonstrating that it is not responsible for a significant cause of the delay or loss, and that this was the dominant cause of the delay or loss.

The employer could also argue that, as a consequence of the defences, the claim should be struck out. However, this argument is unlikely to succeed.

Question 5: What happens if a global claim is defeated?

Answer: The claim will not necessarily fail entirely and the tribunal may make a rational apportionment of part of the claim to the causative events it finds the employer liable for or find a causal link between an individual delay or loss and an individual event.

Question 6: How can a contractor avoid having to make a global claim?

Answer: By maintaining adequate records.

Jonathan Cope

Director, MCMS Limited (www.mcms.co.uk)

Bibliography

Books

Abrahamson, M, *Engineering Law and the ICE Contracts*, 4th edition, Elsevier Applied Science, 1979

Atkin Chmabers, *Hudson's Building and Engineering Contracts*, 12th edition, Sweet & Maxwell, 2010

Atkinson, D, *Causation in Construction Law – Principles and Methods of Analysis*, Daniel Atkinson Limited, 2007

Davison, R P, and Mullen, J, *Evaluating Contract Claims*, 2nd edition, Blackwell Publishing Limited, 2009

Duncan Wallace QC, I, *Hudson's Building and Engineering Contracts*, 11th edition, Sweet & Maxwell, 1995

Published Papers

Lynden, J, *Global Claims in Common Law Jurisdictions*, Society of Construction Law paper D91, April 2008

Lal, H, *The Rise and Rise of Time-Bar Clauses for Contractor's Claims: Issues for Construction Arbitrators*, Society of Construction Law paper 142, September 2007

Winter, J, *Global Claims and John Doyle v Laing Management – Good English Law? Good English Practice?*, Society of Construction Law paper 140, July 2007

The Society of Construction Law Delay and Disruption Protocol, Society of Construction Law, October 2002

Articles and Electronic Media

Pennicott I, *Global Claims*, 8th June 2006, Keating Chambers website (www.keatingchambers.co.uk)

Richards, D, *Global Claims*, 2009, Construction Law Review

Table of Statutes

Arbitration Act 1996

Housing Grants, Construction and Regeneration Act 1996

Table of Cases

Balfour Beatty Construction Ltd v London Borough of Lambeth [2002] EWHC 597 (TCC)

Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Limited [1997] 82 BLR 39

British Airways Pensions Trustees Limited v Sir Robert McAlpine & Sons Limited [1994] 72 BLR 26

City Inn Limited v Shepherd Construction Limited [2010] CSIH 68

Fox v PG Welfair Limited [1981] 2 Lloyds Rep 514

Imperial Chemical Industries Plc v Bovis Construction Limited (1992) 32 ConLR 90

J. Crosby and Sons Limited v Portland Urban and District Council [1977] 5 BLR 121

John Doyle Construction Limited v Laing Management (Scotland) Limited [2002] BLR 393

John Doyle Construction Limited v Laing Management (Scotland) Limited [2004] BLR 295

John Holland Construction and Engineering Pty Limited v Kvaerner RJ Brown Pty Limited [1996] 82 BLR 83

London Borough of Merton v Stanley Hugh Leach [1985] 32 BLR 51

London Underground Limited v Citylink Telecommunications Limited [2007] EWHC 1749 (TCC)

Mid Glamorgan County Council v Devonald Williams and Partners (1992) 8 Constr LJ 61

Petromec Inc v Petroleo Brasileiro S.A. Petrobras & ors [2007] EWHC 1589 (Comm)

Petromec Inc v Petroleo Brasileiro S.A. Petrobras & ors [2007] EWCA Civ 1371

Skanska Construction UK Limited v Egger (Barony) Limited [2004] EWHC 1748 (TCC);

Wharf Properties Limited v Eric Cumine Associates (No2) [1991] 52 BLR 1

Standard Forms of Contract

JCT Standard Form of Building Contract With Quantities 2005 Edition, Sweet and Maxwell Limited, 2005

Engineering and Construction Contract (NEC 3), ICE/Thomas Telford, 2005