Going global

Ian Pease reviews the courts' latest findings on the issue of global claims

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It is one of the most contentious issues in construction and indeed strikes at the heart of the whole legal process. Technically it is known as causation of loss, less technically as proving your case. In a simple tortious case it involves merely showing that the tortfeasor did you wrong, but applied to more complex factual scenarios, as is often the case in construction, the problem of proving cause and effect becomes exponentially more difficult. The recent Technology and Construction Court case of *London Underground Ltd v Citylink Telecommunications Ltd* [2007] provides a useful addition to the case law on the subject.

Background

The story begins with the case of *J Crosby & Sons Ltd v Portland Urban District Council* [1967]. The contract for a new trunk water main was much delayed and disrupted; there were alleged to have been 46 weeks' delay to the project. The problem, from the contractor's point of view, was proving that each of the matters that it alleged had caused delay gave rise to a particular and defined loss of money.

The arbitrator, as arbitrators often do, had taken a common-sense, but less than strict, position that the contractor was entitled to compensation in respect of 31 weeks of the overall delay, and he proposed to award the contractor a lump sum to compensate it. For the Council, it was said that the arbitrator, in arriving at the amount of the award, should build up the sum by finding amounts due under each of the individual heads of claim upon which the contractor relied in support of the overall claim for delay and disruption. That would have been very difficult for the contractor, mainly because it lacked the primary data that made that connection.

The matter the court had to decide, therefore, was whether a party that lacked the data to strictly prove its case was, nevertheless, to be allowed to recover its alleged losses. Could it gain any special dispensation because of the particularly difficult factual circumstances?

In a landmark judgment Donaldson J said as follows:

> Since... however, the extent of the extra cost incurred depends upon an extremely complex interaction between the consequences of the various denials, suspensions and variations, it may well be difficult or even impossible to make an accurate apportionment of the total extra cost between the several causative events. An artificial apportionment could of course have been made; but why, they ask, should the arbitrator make such an apportionment which has no basis in reality?
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> I can see no answer to this question. Extra costs are a factor common to all these clauses, and so long as the arbitrator does not make any award which contains a profit element, this being permissible under clauses 51 and 52 but not under clauses 41 and 42, and provided he ensures that there is no duplication, I can see no reason why he should not recognise the realities of the situation and make individual awards in respect of those parts of individual items 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.

So, distilling out the essence, there must be, in the court's judgement, an 'extremely complex interaction between' the various alleged causes of delay such that it would be 'difficult or even impossible to make an accurate apportionment' of each loss to its real cause. However, the contractor cannot move directly to that assumption without first going to the effort of trying to prove its case under normal rules of causation.

Given that contractors usually concentrate on staffing a project adequately to build it, rather than working in a huge

overhead for monitoring and documenting of their actions, this judgment was met with much relief on their side but much gnashing of teeth from the employers' corner. All the more so when the result was repeated in *London Borough of Merton v Stanley Hugh Leach Ltd* [1985], with the judge (Vinelott J) remarking:

> I need hardly say that I would be reluctant to differ from a judge of Donaldson J's experience in matters of this kind unless I was convinced that the question had not been fully argued before him or that he had overlooked some material provisions of the contract or some relevant authority. Far from being so convinced, I find his reasoning compelling.
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> ... I think I should nonetheless say that it is implicit in the reasoning of Donaldson J, first, 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.

However, the global claim always possessed an Achilles heel in that, assuming that the developer managed to prove that part of the claim was erroneous and not caused by it, this impeached the whole claim. It stands or falls as a whole.

This lacuna in the argument was pointed out by Lord Macfadyen in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2002]:

> The requirement that the pursuer prove that his loss was caused by a factor for which the defender was legally responsible did not disappear because there was more than one potential cause of loss. In such a situation, for each item of loss it was necessary for the pursuer to show that it had been caused in a way for which the defender bore contractual responsibility. Otherwise the defender would be at risk of being held liable to reimburse loss for which the contract did not make him responsible.
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> In principle, therefore, in a case where there were many causes of loss and many items of loss, it was incumbent on the pursuer to trace the connection between each cause and the loss which resulted from it. In practice where many causes interacted with each other to bring about loss, in such a way that the causal connections between individual events and individual items of loss could not be teased out, a pursuer was faced with a difficulty. There were, however, circumstances in which that difficulty might be overcome without proof of individual causal connections. If the Court could be satisfied that every event which played a part in causing the total loss suffered by the pursuer was an event for which the defender was responsible in law, the question of which event caused which part of the loss was academic, and an attempt to trace individual causal connections would be artificial.
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> In such circumstances a global claim could be regarded as legitimate. Such a claim could only be made, however, if it was impossible or at least impracticable to trace individual causal connections between events and items of loss. Moreover, such a claim could only be upheld if all of the causative events were events for which the defender was contractually responsible. To uphold such a global claim where only some of the events which contributed to causation of the total loss were events for which the defender was responsible would be to make the defender bear loss for which he had no legal liability.

Of course, a contractor, faced with a successful defence that some of the global claim was not the responsibility of the employer, may be able to salvage some of that claim by proving distinct cause and effect of other parts. However, given that its previous position must have been that this was an impossible task, that looks like a forlorn hope.

The latest case

This was again an appeal from an arbitrator's award under s68(2)(a) of the Arbitration Act 1996 to have the award set aside on the basis that there had been serious irregularities. It gives an endorsement for the Macfadyen view of global claims. Quoting extensively from his judgment, Judge Ramsey stated that:

> In deciding whether there was serious irregularity, I consider that the proper approach to global claims is relevant. The approach set out in the decision in *Laing v Doyle* is not challenged on this application and I accept that approach... The essence of a global claim is that, whilst the breaches and the relief claimed are specified, the question of causation linking the breaches and the relief claimed is based substantially on inference, usually derived from factual and expert evidence.
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> As Lord Macfadyen said in relation to pleading of causation at paragraph 20 of *Laing v Doyle*:
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> '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...'
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> If, on the facts which had been in evidence in the arbitration, the arbitrator were able to find, as a matter of inference or otherwise from those facts that a particular breach had caused a delay... then I consider that the arbitrator would be entitled to make such a finding on the pleaded and argued case, subject to being satisfied that the findings were within the limits of that case and that fairness did not require further submissions to be made.

The global claim is here to stay, and the construction industry, via cases such as *Crosby* and *Stanley Hugh Leach*, has succeeded in testing and, indeed, curtailing the normal rules as to proof of cause and effect. However, given the full endorsement of *John Doyle* in *London Underground*, the developer's tactic of seeking to 'prick the contractor's bubble' has now also been fully endorsed by the courts in this country.

The risks and advantages of 'going global' are now evident for all to see. ■

J Crosby & Sons Ltd v Portland Urban District Council (1967) 5 BLR 121

John Doyle Construction Ltd v Laing Management (Scotland) Ltd (2002) 1 BLR 393

London Borough of Merton v Stanley Hugh Leach Ltd (1985) 32 BLR 51

London Underground Ltd v Citylink Telecommunications Ltd [2007] All ER (D) 318 (Jul)