Global connections

Ian Pease explores global claims in the context of a number of international decisions and provides some practical advice

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When a contractor is either unable or unwilling to relate individual causes of monetary loss to specific actions of the employer, it is said to make a global or rolled-up claim. This form of claim reaches its zenith in what is called a 'total-cost claim' where the contractor's entire claim can be summarised as 'all these instructions from the employer caused me to incur all this extra cost'.

However, the shorthand term 'global claim' is not a term of art and there are various degrees of 'globality'.

All your eggs in one basket

It is easy to see both the disadvantages and advantages with this form of claim to a contractor. It is disadvantageous in placing all the contractor's claims in one basket. If it fails to prove its case it will fail spectacularly. Holed below the waterline, the entire claim will sink without trace unless the contractor can launch the 'life rafts' and float free a standalone element of claim. However, in being forced to attack individual elements of the contractor's claim (alleging that they are due to the contractor's own failings or duplicative) the employer, by definition, strengthens what remains (particularly where the elements attacked are not too extensive and are fairly defined in nature).

First base

Of course, this type of claim requires that the court allows a dispensation from the norm that individual losses must be linked to individual causes. This is the *sine qua non* of the global claim.

The oft-cited starting point for global claims case law in this country is the 1967 case of *J Crosby & Sons Ltd v Portland Urban District Council* [1967], where Donaldson J (as he then was) said:

> The claimants... say that where you have a series of events which can be categorised as denial of possession of part of the site, suspension of work, and variations, the result is, or may be, that the contractor incurs the extra costs by way of overhead expenses and loss of productivity... 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... 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.

The qualifier for a global claim is clearly stated here: you don't get to first base as a contractor unless you can show that the factual situation you are faced with is 'an extremely complex interaction' between various factors. However, the extent of this complexity is not defined and this constitutes a further problem for the contractor for, having placed all its eggs in the 'global' basket, the court might find that, in

Practical lessons

(1) Minimise the globability of your claim. One total-cost claim is a high-risk strategy. Contractors must critically look at their claims to make sure they cut out events and actions arising from their responsibility.

(2) The $64,000 question: is this a case of an extremely complex interaction of different events? The contractor needs to lead evidence that the case is out of the ordinary; the employer that it was essentially run of the mill. This is the essential tipping point of the case.

(3) There's no replacement for good record-keeping. Administrative incompetence will not be looked on kindly by the courts. Even if extra resources have to be devoted, these should be recoverable (if the contractor wins its case).

(4) Read the contract. Make sure you abide by any particular stipulations on the bringing of (any) claims. A global claim will not get you out of these basic obligations.

(5) Contractors should not regard a global claim as an easy option. The contractor's task is to convince the court that the merits lie with it, that it would be 'unfair' to deprive it of a benefit that it is obviously due. Jettison any marginal claims; they taint the rest.

(6) Experts win cases. That evidence must be practical, understandable and robust. The court will not favour an expert who blinds them with science or is not at the top of their game. Pleadings also tell the story and highlight the extent to which the contractor has gone the extra mile.

reality, the facts were not sufficiently extraordinary to warrant such a claim in the first place.

The international perspective

The thinking behind global claims had also been ongoing in the US for some time. In *FH McGraw & Co v United States* [1955] the court had warned:

> This method of proving damage is by no means satisfactory, because, among other things, it assumes plaintiff's costs were reasonable and that plaintiff was not responsible for any increases in cost, and because it assumes plaintiff's bid was accurately computed, which is not always the case, by any means. Our opinion in *Great Lakes Dredge & Dock Co v United States*... was not intended to give approval to this method of proving damage, except in an extreme case and under proper safeguards.

Furthermore, it is evident from the US cases that they regarded the 'total cost' computation as 'only a starting point' (*River Construction Corp v United States* [1962] and that the recovery based on total cost had to be refined by appropriate further adjustments. Thus the method's use was sanctioned only with proper safeguards.

In one sense the problem only arises as a result of failure by the contractor (perhaps justifiably) to keep adequate contemporaneous records. However the US courts, in noting this, went on to emphasise:

> Nor does the mere fact that plaintiff's books and records do not, in segregated form, show the amounts of the increased costs attributable to the breaches give it automatic license to use the 'total cost' method. Contractors rarely keep their books in such fashion. Such failure, however, normally does not prevent the submission of reasonably satisfactory proof of increased costs incurred during certain contract periods or flowing from certain events based, for instance, on acceptable cost allocation principles or on expert testimony.
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> (*Turnbull, Inc et al v United States* [1967].)

So on both sides of the Atlantic the courts were anxious to place this kind of claim in its context – it was not to be lightly adopted either by claimants or judges. Whilst recognising that completely segmented costing could be beyond what a reasonable contractor could compile, the courts would want to see an effort made both to keep the records in the first place and, upon evidence (both expert and lay), to prove the costs to a reasonable level of particularity.

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Don't forget the contract

The next important matter, which can easily be overlooked in generalisations about global claims, is the influence of the particular contract terms. Vinelott J stated as follows in *London Borough of Merton v Stanley Hugh Leach Ltd* [1985]:

> I think I should nonetheless say that it is implicit in the reasoning of Donaldson J [in *Crosby*], 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.

That is, for example, if the contract states that the contractor is to give notice of delays or changes in the works within a certain period of their occurrence, it will not succeed in a global claim if it has failed to fulfil those contractual conditions.

In *Crosby* the contract influenced the global claim in that the contractor had to calculate its claims differently in the different heads of contract (in some it could claim profit as well as costs). To this extent it was forced (at least to the extent that it wanted to claim profit) to move away from a full total-cost claim.

Merits win cases

The contractor's global claim thus needs to overcome the obstacles of contractual and normal cause and effect

requirements. However, this fails to recognise one of the most powerful influences on any court, an influence that is shown up by this quotation of Vinelott J in *Merton*:

> It is said that under those provisions the architect cannot make an award unless he is in a position to ascertain the direct loss stemming from a specific cause identified in the application and cannot therefore make an award if the loss stemming from the two different causes cannot be separated and each separate part identified as the direct loss stemming from each cause.
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> This broad submission is clearly and admittedly inconsistent with the decision of Donaldson J in *Crosby*... I need hardly say that I would be reluctant to differ from a judge of Donaldson J's experience... Far from being so convinced, I find his reasoning compelling.
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> The position in the instant case is, I think, as follows. If application is made... for reimbursement of direct loss or expense attributable to more than one head of claim and at the time when the loss or expense comes to be ascertained it is impracticable to disentangle or disintegrate the part directly attributable to each head of claim, then, provided of course that the contractor has not unreasonably delayed in making the claim and so has himself created the difficulty, the architect must ascertain the global loss directly attributable to the two causes, disregarding, as in *Crosby*, any loss or expense which would have been recoverable if the claim had been made under one head in isolation and which would not have been recoverable under the other head taken in isolation. To this extent the law supplements the contractual machinery which no longer works in the way in which it was intended to work so as to ensure that the contractor is not unfairly deprived of the benefit which the parties clearly intend he should have.

Now, aside from the obvious importance of precedent (particularly when it comes from a judge such as Donaldson J), the courts will generally not find favour with arguments that lead to manifest injustice. Patently, if the contractor can show that it was administratively overwhelmed by the piling of variation upon variation and the employer argues that each element of loss and expense has to be closely 'ascertained', then the reaction of the court will often be 'ensure that the contractor is not unfairly deprived of the benefit which the parties clearly intend he should have'.

Although a global claim may seem an easy option, it is not. The contractor must have gone the extra mile and still not have been able to link individual losses to individual actions of the employer. Furthermore, it must keep a close eye on the contract to see that the claim does not fall foul.

The Scottish case

All these competing factors are evident in the Scottish case of *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2002]. How is it possible to hold an employer liable where it had manifestly caused loss to the contractor, while still not charging it for delays for which the contractor was responsible? It is perhaps summarised by the following passage:

> 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... If the Court could be satisfied that every event which played a part in causing the total loss suffered by the pursuer was an event for which the defender was responsible in law, the question of which event caused which part of the loss was academic, and an attempt to trace individual causal connections would be artificial. In such circumstances a global claim could be regarded as legitimate.

In the final analysis

Although a global claim may seem an easy option, it is not. The contractor must have gone the extra mile and still not have been able to link individual losses to individual actions of the employer. Furthermore, it must keep a close eye on the contract to see that the claim does not fall foul. Above all it must recognise the court's requirements:

> ... the point of logical weakness inherent in such claims, the causal nexus between the wrongful acts or omissions of the defendant and the loss of the plaintiff, must be addressed... each aspect of the nexus must be fully set out in the pleading unless its probable existence is demonstrated by evidence or argument and further, it is demonstrated that it is impossible or impractical for it to be spelt out further in the pleading. Moreover, the court should be assiduous in pressing the plaintiff to set out this nexus with sufficient particularity to enable the defendant to know exactly what is the case it is required to meet and to enable the defendant to direct its discovery and its attention generally to that case.
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> (*John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996].) ■

FH McGraw & Co v United States
(130 F Supp 394, 131 Ct Cl 501 (1955))

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

John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd
(1996) 82 BLR 81

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

River Construction Corp v United States
(159 Ct Cl 254, 270 (1962))

Turnbull, Inc et al v United States
(389 F 2d 1007 (1967))