

CONSTRUCTION CONTRACT & MANAGEMENT ISSUES

In this first quarter issue of Master Builders Journal for 2013, BK Burns & Ong Sdn Bhd, a subsidiary of **BK Asia Pacific**, an international construction consultancy group providing project, commercial and contractual management services joins with **Entrusty Group**, a multi-disciplinary group, collectively named **BK Entrusty**, to present a **new series of construction contract and management articles** in areas related to project, commercial, contracts, risks, quality, value and the like. This quarter article on **“Is Global Claim Dead or Still Alive?”**

INTRODUCTION

‘Global claim’ or ‘composite claim’ or ‘rolled-up claim’, as is often called is used to describe a claim for time extension, loss and/or expense or damages arising from a number of different causes, which may be interrelated and/or difficult to isolate or particularise into their respective cause and effect. In the past, such claims seldom succeed due to the interrelated events, usually with only few or no contemporaneous records available to support them.

In the assessment of any entitlement to claims, whether additional time and/or money, it has always been grounded on ‘cause and effect’ principle by establishing the causal linkages, supported by the relevant documentary evidence, which global claims often lack.

In order to succeed, the Claimant or Contractor, in making such claim against the Employer, must be able to show the connection between the events for which the Contractor is neither responsible nor culpable for but was made to suffer or incur additional time, loss and/or expense or damages as a consequence of the events concern.

Since global claims often lack the causal linkages and relevant supporting documents, many have ended up in tribunals and/or courts for their review and decision. In the past, the paths to such legal recourse have been rather bumpy and uncertain, until lately.

In this article, BK Entrusty aims to provide readers with an appreciation and understanding of global claims by eliciting the past and recent case law and decisions concerning such claims, in particular the recent landmark case of *Walter Lilly v MacKay* as decided by Justice Akenhead, the judge in charge of Technology and Construction Court (“TCC”), who had provided some interesting and important ruling on several pertinent issues in construction law.

The contents of this article, is sub-headed, as follows:-

- What is global claim?
- Why global claims?
- Global claim vs. substantiated/justified claim
- Past legal cases on global claims

- Recent legal position on global claims
- What should contractors do?
- Can global claims be challenged?
- Conclusion

WHAT IS GLOBAL CLAIM?

Depending on the sources and focus, authors of construction contract/law books and/or articles defined global claims differently, but principally the same. It is also interesting to note that legal cases have their fair share of interpreting and defining global claims, as well.

The following are a few examples of Global Claim/s definition:-

“.....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 claimed between those matters”
- **Hudson’s**

“...is one that provides an inadequate explanation of the causal nexus between the breaches of contract or relevant events/matters relied upon and the alleged loss and damage or delay that relief is claimed for”
- **Keating’s**

“...one in which the Contractor seeks compensation for a group of Employer Risk Events but does not or cannot demonstrate a direct link between loss incurred and the individual Employer Risk Events”
- **The Society of Construction Law. Delay and Disruption Protocol**

The recent legal cases relating Global Claims, which provided some interpretation and explanation on such claims can be found in the following :-

London Borough of Merton v Stanley Hugh Leach [1985] 32 BLR 31:

“.....for reimbursement of direct loss and expense attributable to more than one head of claim and at the time when the loss or expense comes to be ascertained, it is impractical 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 attributable to the two causes ...”.

In John Holland Construction v Kvaerner R.J. Brown Pty Ltd [1996] 82 BLR 83 (Supreme Court of Victoria)

Byrne J. gave the following definition:
“The claim as pleaded ... is a global claim, that is, the claimant does not seek to attribute any specific loss to a specific breach of contract, but is content to allege a composite loss as a result of all the breaches alleged, or presumably as a result of such breaches as are ultimately proved”.

Other terms similar to Global Claims, such as **Composite, Rolled up or Total Cost** claims have been defined, as follows:-

“... ‘Composite Claim’ and ‘Rolled-up Claim’ are claims where there are a number of events and only some are presented as a group of 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 ...” “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...” - Atkinson’s

WHY GLOBAL CLAIMS?

Keating stated that:

“Contractors often have claims dependent on a number of separate causes each of which has contributed to delay and extra cost. In principle, the loss attributable to each cause should be separately identified and particularised, but separation may be difficult.”

However there are those contractors who prepare global claims with the aim to overcome linking ‘cause and effect’ of the events. In some cases, the intention in preparing such claims may be due to shortcomings in their case, thereby needing to use such claim approach to hide or camouflage them. In many cases, the causes are often put together to give an overall effect, ignoring the necessity to explain them, including those for which the Contractor is culpable for, by mingling up with those the Employer is responsible and/or liable for. For example, insufficient supervision, poor cost control, under-pricing, bad weather, resource shortages, incompetent management, etc. This may explain why global claims have often been viewed with suspicion and sometimes treated as baseless or frivolous claims.

GLOBAL CLAIM VS SUBSTANTIATED / JUSTIFIED CLAIM

In order to have a better understanding of the pertinent difference between a global claim and a valid substantiated/justifiable claim, the following is a tabulated comparison of the two categories of loss and/or expense claim:-

Item	Description	Global Claim	Substantiated / Justified Claim
1	Loss and/or expense claim	Loss and/or expense is attributed to various heads of claim, linked directly or indirectly, which cannot be separated or is integrated.	Loss and/or expense is based on “cause and effect”, properly linked and separated for each head of claim.
2	Architect, Engineer or S.O. Instruction.	Limited and/or no instructions are attributable to various heads of claim, linked directly or indirectly.	Each instruction is attributable to each head of claim, which is directly related to the event.
3	Notification of Claim	Timely notice not evident or is difficult to prove or possibly combining more than one heads of claim lacking causal linkages.	Valid timely notice from the instruction date and/or event occurrence given.
4	Records of site meetings, correspondences and/or similar documents.	Limited or no records available to support the various heads of claim.	Proper and contemporaneous records available for each head of claim.
5	Employer’s responsibility	Difficult or lack of proof of causal linkage of the head of claim to the Employer’s responsibilities and/or liabilities.	Clear documentary evidence available to demonstrate the Employer’s responsibilities and/or liabilities towards each head of claim.

PAST LEGAL CASES ON GLOBAL CLAIMS

Whilst many past legal cases on global claims have failed because they were presented without any assessment, analysis, justification and/or documentary substantiation, some were successfully affirmed by the tribunals/courts as legitimate claims.

These decided legal cases on global claims are, as follows:-

- a) **London Borough of Merton v Stanley Hugh Leach Ltd [1985] 32 BLR 5**, a dispute under JCT contract, Clause 24 (current Clause 26), whereby one of the issues considered was whether contractual terms about the recovery of direct loss and/or expense permitted the Contractor to recover the same in respect of any alleged event when it is not possible to state the amount of loss and/or expense attributable thereto. However, it was decided in principle that a global claim for loss and expense was permissible under Clauses 11 and 24 of the old JCT 1963 Form of Contract, based upon the case of *J Crosby and Sons Ltd v Portland Urban District Council (1967)*, in which the learned judge agreed with the arbitrator's decision on a 'lump sum' delay without giving the individual delay periods for each head of claim.
- b) **Wharf Properties Ltd v Eric Cumine Associates (no.2) [1991]52 BLR1**, a Hong Kong case between the Employer and his Architect, whereby the Court of Appeal struck out the claim which was prepared on global basis.
- c) **McAlpine Humberoak v McDermott International [1992] 52 BLR 1**, concerns a case appeal after a full lengthy trial, a contractor's composite claim was dismissed on the basis that the evidence was wholly inadequate to prove the claim.
- d) **Imperial Chemical Industries v Bovis Construction Ltd [1993] Con LR 90**, the global claim pleaded in the original Scott Schedule format was held to be inadequate. However, it was determined that it would not be right to debar the claimant from pursuing its claim and a fresh schedule was ordered to be served with the alleged consequences of each claim, including the contract clause/s breached.
- e) **Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd [1997] 82 BLR 39**, an attempt to strike out a global claim failed. Amendments were permitted and 'Further and Better Particulars' were ordered to be provided. The court held that the global claim was a total cost claim and ordered the Contractor to provide a list in relation to all the alleged causes of delay (other than variations) that set out the relevant contract condition relied on or any other special circumstance, whereby the nature of the cause or breach had to be particularised, as well.
- f) **John Holland Property Ltd v Hunter Valley Earth Moving [2003] Const. LJ 171** (New South Wales), the Court refused leave to appeal an Arbitrator's award found in favour of global claim.
- g) **John Doyle Construction Ltd v Laing Management (Scotland) Ltd [2002] BLR 393 and [2004] BLR 295**, the Court in refusing to strike out a global/total loss claim, held that even if a global claim failed, it was possible for the tribunal to make a rational apportionment of part of the global claim involving the events for which the Employer is not responsible.

From the above cases, it can be reasonably concluded that global claims are recognised claims but often fail due to no or lack of causal linkages and documentary evidence or relevant particulars.

For a loss and expense claim to succeed, the learned Judge in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd (2004) BLR 295*, stated "...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."

RECENT LEGAL POSITION ON GLOBAL CLAIMS

In a recent case of *Walter Lilly & Company Ltd v Giles Patrick Cyril Mackay and DMW Developments Ltd [2012] EWHC 1773(TCC)*, which concerned a luxurious development project in London between the Employer, Mackay and the Contractor, Walter Lilly under the JCT Form of Building Contract (1998 - without quantities) with Contractor's Design, there were considerable delays suffered by the Contractor who claimed for extension of time and loss and expense subsequently following strained relations between the parties, including with the Employer's professional team.

The aforesaid case which dealt with several pertinent construction law issues lead to several important rulings on concurrent delay events, global claims, claims notification and information provision by the Contractor, narrated and summarised briefly, as follows:-

1. Concurrent Delay

Where the delay is caused by more than one event, at least one of which is the Employer's responsibility, the Contractor is entitled to the full extension of time, provided it is a relevant event for extension of time under the contract, which should be applied strictly, not to be apportioned or reduced. Apparently, 'the test is primarily a causation one' according to the Court, who added that the *Scottish's City Ann Ltd v Shepherd Construction Ltd (2010) CSIH 68*, which decided that concurrent delays should be approached in a fair and

reasonable way by apportionment between the relevant event and the Contractor's culpable delay event, was inapplicable in the English jurisdiction.

Walter Lilly's case seemed to have affirmed the recent English case of *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR 32, TCC* on concurrent delays, which held that, "If there are two concurrent causes of delay, one of which is a Relevant Event, and the other is not, then the Contractor is entitled to an extension of time for the period of delay caused by the Relevant Event notwithstanding the concurrent effect of the other event." The Court also emphasised that the contract proviso of allowing for a 'fair and reasonable' extension of time, does not mean entitlement to apportion concurrent delay.

2. Delay Analysis Approach

Unlike previously, it is no longer a requirement for contractors to prove that it is impossible or impractical to separate out the consequences of each delaying event.

However, it is now necessary for the Contractor to prove its claim on the 'balance of probabilities' and a global claim is not necessarily wrong when, "...it is impossible to plead and prove cause and effect in the normal way or that such impossibility is not the fault of the party seeking to advance the global claim." The success of such claims depends very much on the facts and evidence available.

Following the Walter Lilly's case, the proper delay analysis approach is, as follows:-

- A factual analysis as to what probably delayed the Works overall.
- If one is seeking to ascertain what is delaying a contractor at any one time, one should generally have regard to the item of work with the longest sequence.
- It is not necessarily the last item or area of work which is finished last which causes delay.
- 'Prospective' or 'Retrospective' approach to delay analysis.....if each approach was done correctly, they should produce the same result.

The Court proceeded with the analysis and assessment of what actually caused the overall delays in the project on a 'month by month assessment' because both delay experts accepted that it would be relevant and helpful and the Honourable Judge concurred with them.

3. Proof of Loss and/or Expense

The Walter Lilly's case affirmed that the Contractor has the burden of establishing that the loss which it has

incurred, "...would not have been incurred in any event." In particular, the learned Judge said that;

"...it will need to demonstrate that its accepted tender was sufficiently well priced that it would have made some net return... and that there are no other matters which actually occurred."

In any event, the Court commented that although Walter Lilly's claim was not really a global claim, the Court nevertheless proceeded on such basis because Walter Lilly was able to demonstrate that, "... its original prices (essentially for preliminaries) were realistic, sensible and at a level which, if the events complained of had not happened, no net loss would have arisen." Apparently, the contract provision on claim for loss and expense stated "...has incurred or is likely to incur...", and the Court found that the Architect need not be 'certain' about the claim, other than to review the details as required under the said provision.

It is also interesting to note the learned Judge commentary about Preliminaries valuation that "... loss and expense of the preliminaries could be valued by reference to the contract rates or prices for such preliminaries on the basis that those rates or prices represent the loss (if not expense) to the Contractor of having such staff or other preliminary activities on the project for longer than anticipated", in his rejection of the Employer's argument that the Architect and Quantity Surveyor could only 'ascertain' the loss and expense claim only when the Contractor produce all the necessary supporting documents to prove 'beyond reasonable doubt' instead of on a 'balance of probabilities'.

The above legal decision would auger well with BK Entrusty's earlier article on "What are Preliminaries and how to evaluate them", published in the MBAM Journal (MBJ Volume 1, 2009), in which the Author had stated an approach or method similar to the aforesaid judicial decision. Readers are encouraged to refer to the said article for further and detailed information of the methods of valuing Preliminaries.

4. Proof of the Employer is Responsible

Global claims may no longer be a dead approach when they include matters for which the Employer is not responsible. It was previously thought that if an Employer could demonstrate that at least part of the Contractor's loss had been caused by a significant event that was not caused by the Employer's faults, then the Contractor's global claim would a dead approach and fail in its entirety.

In the Walter Lilly case, the Court held that if a global claim contains elements relating to events for which the Employer is not responsible, this does not mean the claim will fail. Any such events, including any Contractor's culpable events should simply be omitted from the global claim and be apportioned, accordingly.

WHAT SHOULD CONTRACTORS DO?

There is no standard industry definition of global claims since such claims were often not clearly recognised as a legitimate or valid claims, until recently.

In order to improve the chance of making a successful global claim, it is important to have a proper understanding of the causation, factual necessity and the court/tribunal's attitude and approach to such claims. Essentially, contractors must at least provide and comply with the following:-

- a) To provide sufficient particulars so as to enable the Employer (and/or its consultant/representative) or court/tribunal to understand and appreciate in sufficient detail of the claim, otherwise it would be taken to have failed in discharging its burden of proof.
- b) To ensure the relevant contract provision/s for the respective entitlement for each of the events are followed and complied with, including any condition precedent and/or timely notice/s requirements with relevant particulars.

The point on timely notification for loss and/or expense is an important provision also commonly found in standard forms of building or construction contracts in Malaysia, under:-

- Clause 24 of PAM Contracts (1998 & 2006)
- Clause 44.1 of JKR/PWD Contracts (203/203A, 2007)
- Clause 43 of IEM Conditions of Contract
- Clause 32 of CIDB Form for Building Works (2000)

The above standard form clauses require the Contractor to give written notice to the Architect / Engineer / S.O of his loss and/or expense claim. However, there is no requirement to give notice to the Employer. If the Contractor fails to notify, it may result in the rejection of the Contractor's claim whether it is for delay, variation, loss and/or expense, including global claims.

- c) To demonstrate, where possible, that it is impossible or impractical to separate out each event consequences/implications for which the Employer is responsible and liable.
- d) Distinguish those claims which causal links can be proven from those which cannot be proven.
- e) To provide sufficient evidence to support the claims for additional time and/or cost, with adequate contemporaneous records. The types of documented evidence contractors may rely on to prove causation are, as follows:-
 - Statements by its employees, in particular site agent, supervisor or foreman;

- Payment records to sub-contractors, suppliers, etc.
- Site diary records detailing the works undertaken e.g. on what days, in what areas and by whom, preferably signed by the site agent or clerk of work;
- Material delivery orders/invoices;
- Dayworks sheets/records;
- Minutes of meetings and/or correspondence recording site events and discussions;
- Site instructions or memos;
- Photographs to demonstrate site constraints, disruptions, obstructions, etc.

A global claim will have a greater chance of being successful, either partially or wholly, if it can satisfy the above mentioned requirements. The best approach to increase the chance of success of such claims is for contractors to maintain adequate contemporaneous records of their site events and resources, including notifying the Employer of the consequences and implications at the time they arise.

CAN GLOBAL CLAIM BE CHALLENGED?

To defeat a contractor's global claim, an employer can raise several defences, which include:-

- Ability to demonstrate that the Contractor's tender was grossly under-priced, hence would have suffered loss irrespective of the Employer's risk events, or that the Contractor's risk events during work progress had caused the loss. For example, insufficient supervision, poor cost control, resource shortages, incompetent management, etc.
- Able to demonstrate that the global claim with a multitude of events were at the risk or fault of the Contractor, for which the claim cannot be readily identified or assessed.
- To strike out the claim altogether based on it being ambiguous, frivolous and/or baseless.

CONCLUSION

Global claims, which may involve claims for time extension, loss and expense and/or damages usually stem from a number of different causes, often interrelated and/or difficult to isolate or particularise into their respective cause and effect, a legal principle essential in the assessment of entitlement to time and/or monetary claims.

In the past, many decided legal cases on global claims failed because no or lack of causal linkages and/or were presented without any or proper particulars, justification or documentary evidence. The recent legal decision of *Walter Lilly*, which took a commercial and pragmatic approach, has provided a valuable guidance on a number of important issues in construction law, giving some comfort to contractors, particularly concerning the proper treatment of global claims, concurrent delay events and claims information and notification.

By the aforesaid case, it would appear that global claims are still very much alive and not a dead approach, and its success is very much dependent on the availability and extent of good particulars and/or contemporaneous documentation to support the causal linkage of the events concern. It is also not fatal if a contractor, in making such claim, did not use the causal link approach, even if it is possible to do so as long as the circumstances surrounding the events concern are considered and taken into account in making such claims.

In the preparation and submission of claims for additional time and/or money, unless there is no other better alternative or approach, global claims should be the last resort as the tribunals/courts are unlikely to allow such claims if the events concern can be easily established with causal linkages and supported with relevant documents.

Essentially, proper and contemporaneous record keeping, with relevant particulars or details of the event and their consequences/implications will certainly provide the basis for a justifiable claim. No doubt, compliance with timely contractual notice and any condition precedent requirements are crucial to the admission and entitlement of such claims. In short, there is no short cut in the preparation and submission of claims, as far as the tribunals/courts are concern.

In the next issue of the MBAM Journal, BK Entrusty article will deal with another pertinent contractual issue affecting the Malaysian construction industry on ***“The Impending Demise of Conditional Payment Clauses in the Malaysian Construction Industry”***

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