The Problems With Global Claims

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What is a Global Claim?

In the 11th edition of *Hudson's Building Contracts* at paragraph 8-200 Professor Duncan Wallace defines such claims as:

> *"...those where a global or composite sum, however computed, is put forward as the measure of damage 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."*

In *J. Crosby and Sons Ltd v Portland Urban District Council* (1967) 5 BLR 126, at 133 Donaldson J recited the arbitrator's findings of fact as follows:

> *"The result, in terms of delay and disorganisation, of each of the matters referred to above was a continuing one. As each matter occurred, its consequences were added to the cumulative consequences of the matters which had preceded it. The delay and disorganisation which ultimately resulted was cumulative and attributable to the combined effect of all these matters. It is therefore impracticable, if not impossible, to assess the additional expense caused by delay and disorganisation due to any one of these matters in isolation from the other matters."*

In essence, such claims exist where the connection between the matters complained of and their consequences, whether in terms of time or money, are not fully spelled out.

In *London Borough of Merton v Leach Ltd* (1985) 32 BLR at 102 Vinelott J held that the right of the tribunal to make such an award arises where:

(i) the loss and expense attributable to each head of claim cannot in reality be disentangled;

(ii) there is a complex interaction between the consequences of the events; and

(iii) the inability to disentangle the consequences of these events is not the result of delay on the part of the contractor in making a claim.

In *Crosby* at page 136, Donaldson J said:

> *"I can see no reason why (the tribunal) 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. This is what the Arbitrator has done ..."*

In one of the most recent attempts in South Australia to formulate a global claim, in *MBG Constructions Pty Ltd v Allco Newsteel Pty Ltd* (unreported, Supreme Court of South Australia, Matheson J, 22 November 1995) the claim was in part pleaded by saying:

(i) The plaintiff's workmen were not continuously employed, spent hours waiting for delivery of material, worked overtime, and equipment lay idle. The plaintiff used the material which had been delivered and the subcontract was delayed. The workmen so employed were occupied for 9,151.5 man hours.

(ii) The plaintiff cannot provide further particulars as to what workmen were waiting, what material was not delivered, what searching was undertaken, or what records were made, and can do no more than to say that by reference to contemporaneous records the plaintiff is capable of attributing 9,151.5 hours by cross referencing daily work reports, daily diaries, and weekly time sheets.

Such a plea alleged a complex interaction of events in respect of seven main areas of alleged breach. A claim was made that MBG needed to employ workmen for an additional 24,185 man hours. All claims were based upon an alleged inability to identify cause and effect more specifically.

The Total Cost Claim

One form in which a global claim may appear is the so called "*total cost claim*". In such claims it may be alleged that the claim is the difference between the total cost of performing the work, and the amounts paid pursuant to the contract for that work. Indeed this was

the approach taken in *MBG v Allco.*

The weakness in this approach is that it is necessarily predicated upon the assumption that the contract price was the fair cost of the work. This is often a dangerous assumption. In most cases there will be a margin for profit, but it is not uncommon for a contractor to bid low if it wishes to keep its workforce together for a particular reason, or if it is seeking to "*buy*" its way into a particular market, or for a variety of other reasons. In such a case the contract price may be far from right.

This approach also carries with it the evil that if it is successful, a fixed price contract is turned into a contract to perform the work on the basis of a quantum meruit, thereby eliminating the risk of tendering on a fixed price basis.

Pleadings

It is difficult to persuade a court to strike out a pleading. A pleading may be struck out if it does not disclose a cause of action. It may be contended that if the pleading does not show a "*causal link*" (i.e. a logical connection) between the alleged wrong and the damage said to have been suffered, then the pleading should be struck out.

The reason for the provision of pleadings is to enable the respondent to know what it is the claimant is seeking, that is the case which the respondent has to meet. In general, an arbitrator will only order the provision of further and better particulars of the claim. Under Section 18 of the *Commercial Arbitration Act,* these may be enforced by an order of the court. It is unlikely, however, that an appeal against a decision of an arbitrator on a question of particulars will succeed, despite the decision in *SASFIT v Leighton Contractors Pty Ltd* (1990) 55 SASR 327. See also *State Constructions Pty Ltd v Baulderstone Hornibrook & Easton* (unreported, Supreme Court of South Australia, Matheson J, 27 March 1997). There His Honour said:

> *"Anyone with any experience in drafting pleadings in complex building disputes arising out of complex building contracts knows how difficult a task it can be and how difficult, even oppressive, it often is to comply with requests to supply adequate particulars ... It really demands an intimate knowledge of the contracts, and sitting round a table with counsel and minutely examining each plea ..."*

It may be argued that even this relatively conservative approach is a major problem, which will encourage the production of global cost claims, because a claim can be made and pursued at least to the point where the principal has to spend a large amount of money and time trying to obtain sufficient details of the claim to enable it to be properly assessed. The real risk is that if the matter is allowed to proceed to hearing on the basis of inadequate particulars, the tribunal will receive such a mass of material that it will be persuaded that there is some merit in what is in reality an unmeritorious claim.

The obligation in Court proceedings is to provide proper particulars so that a respondent may know what loss is alleged to flow from each compensable event. While this is often quite obvious, the amount of detail required to be provided will depend upon the circumstances of each case. It may be that a late instruction leads to disruption with work being done out of sequence, or at overtime rates. It may be that some parts of the labour force will be underutilised, or that acceleration leading to extra costs is required in consequence.

It is important that the impact of each of the compensable events, in terms of producing delay and/or extra costs, should be demonstrated.

It may be that if the claimant is unable to provide particularity that this is due to a failure to maintain proper records. This is no answer to a request for particulars. See *Allco v MBG* where Matheson J said:

> *"I agree with Mr Nosworthy that it is not an adequate answer to the problem to say, as His Honour did 'If the basis pleaded does not entitle the plaintiff to the relief sought then obviously the plaintiff's claim will fail'. The rule requiring 'sufficient particulars' cannot be ignored. If the respondent made a commercial decision not to keep proper records, that is not an answer to a proper request by the appellant who asked, for example, how the claim is calculated".*

Relevant Experience

The kinds of circumstances which may lead to disruption, inviting the production of a global or total cost claim include:

1. Inadequate documentation provided initially.
2. Evolving software development projects or other forms of "*fast track*" projects.
3. Problems in project management on both sides.
4. The number and timing of separate contract change proposals may be significant.
5. Late supply of inconsistent documents.

This is by no means exhaustive, but these are prominent warning signs.

Judicial Trends

In *John Holland Constructions & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (unreported, Supreme Court Victoria, 11 October 1996) Byrne J declined to strike out a global claim at the interlocutory level.

US experience has tended to require the claimant to prove that it is not responsible for any of the added costs.

The decisions of Matheson J indicate a reasonably conservative line in South Australia, requiring the provision of detailed particulars.

The Supreme Court in South Australia has, however, been mindful of the abuse of the request for further particulars procedure provided by Rule 46.20 of our Supreme Court Rules. Lander J has recently been exploring the possibility of minimising the pleading obligation, which would have the effect of transferring the time for addressing the issue from the pleading stage

to the trial stage.

If this trend continues it may safely be anticipated that there will be an increase in the number of occasions when global or total cost claims are presented, because the claim will not be subject to close scrutiny until a much later stage in the proceedings.

The Hearing - Change in onus of proof

It goes almost without saying that by the time of the hearing it is likely to be possible for the claimant to prove that:

1. things went wrong on the job; and
2. the claimant suffered a loss.

While some inventive claimants may seek to pursue claims without these criteria being established, once they are present there is always a risk that a tribunal will allow some recovery. More importantly from the point of view of the respondent, even if it substantially succeeds in resisting a global claim, it is likely to be very much out of pocket even if it recovers and collects an award of costs.

When a global claim is pleaded and proceeds to hearing, the real vice is that it produces a de facto change in the onus of proof. This is because the focus inevitably arising from the respondent's defence will be whether or not there were concurrent non-compensable causes, for example, defective workmanship or bad administration by the contractor. The ability of a contractor on site to resist such a claim by a subcontractor may be all very well, but a principal relying on a one-step-removed superintendent or project office may have a much reduced ability to challenge such claims, because it does not have detailed evidence dealing with the day to day failures on the project. The claimant has access to witnesses who can speak about the alleged disruption on site without major fear of contradiction. In this area a principal resisting such claims is heavily dependent on the skills of its defence team to identify where the weaknesses lie.

Appeal

Because decisions on the effects of causation are questions of fact, it is unlikely that an appeal from an adverse arbitral award will succeed. Similar considerations apply to court proceedings.

Lessons from Global Claims

If one is a claimant, then so far as is possible one should plead the nexus and logical connection between the damage and the loss sustained, but provide an alternative back up plea, alleging a global claim or total cost claim in the alternative.

If, however, one is a respondent receiving such a claim, then it is imperative to seek particulars, and to keep on doing so until appropriate particularity showing the causal nexus is produced.

Hopefully damage control will emerge much earlier during the course of projects, so that warning signs are picked up, and addressed whether one is a potential claimant or potential respondent. These fall under the heading "*relevant recent experience*" discussed above, but are of course not limited to those items. Many construction and engineering projects have a "*complex factual matrix*", and the potential for such claims is probably expanding rather than diminishing.

* Mr Nosworthy was solicitor and counsel for Allco Newsteel Pty Ltd throughout the Myer Centre and MBG litigation in Adelaide.