Global Claims: A Review

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In *Bernard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd* (1997) 82 BLR 39, Official Referee Judge Humphrey Lloyd QC had occasion to re-state the courts' attitude to global claims. He was assisted in this regard by the analysis of the relevant authorities provided by Byrne J of the Supreme Court of Victoria in *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 13 BCL 262 (also partially reported in Note, 82 BLR 81), a decision that had been handed down only some four months previously.

What Is A Global Claim?

A global claim is one where, in Byrne J's words:

> *"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 of the breaches alleged, or presumably as a result of such breaches as are ultimately proved."*

As Byrne J went on to observe, such a claim has been held in previous decisions to be permissible in the case where it is impractical to disentangle that part of the loss which is attributable to each head of claim, and this situation has not been brought about by delay or other conduct of the claimant.

Byrne J further observed that a global claim may be described as a *"total cost"* claim if the contractor, as the claimant, alleges against the proprietor a number of breaches of contract and quantifies its global loss as the actual cost of the work less the expected cost.

Facts

In the *Bernard's Rugby Landscapes* case, the plaintiff was a landscape contractor who entered into a contract with a developer for the construction of a golf course at a reclaimed landfill site. The developer retained a third party as its construction manager.

The contract incorporated conditions based upon the ICE Conditions, 5th Edition, and the construction manager had the powers usually given to the engineer under the ICE Conditions. Clause 66 of the ICE Conditions was not used. Instead, clause 68 was inserted. It provided for a dispute resolution mechanism, whereby disputes arising between the employer and the contractor were required to be referred to the construction manager for adjudication. Such adjudication was to be final as the clause did not permit ultimate recourse to arbitration. The clause also stipulated that the English courts were to have jurisdiction over any dispute between the employer, or the construction manager on its behalf, and the contractor.

Clause 68 did not state the period of time within which either the dispute was to be referred to the construction manager, or the construction manager was to give its decision.

The plaintiff started the work under the contract (known as contract number 3010) in September 1985. In 1987, and before this work was completed, the plaintiff entered into another contract with the developer (contract number 3160) for the modification of works previously carried out. In 1989, contract number 3010 was novated, whereby the rights and obligations of the developer were transferred to the defendant, which had not been incorporated in 1985. At the time of the novation, contract number 3160 had not been formally executed, so it was executed by the plaintiff and the defendant directly.

The works were delayed, and in May 1995 the plaintiff presented lengthy and detailed claims to the construction manager in relation to both contracts. On 25 October 1995, before the construction manager had given decisions under clause 68 in response to the claims, the plaintiff commenced the court proceedings. The plaintiff claimed sums in respect of variations, extensions of time, prolongation costs and damages for delay.

The statement of claim was described as being virtually no more than a vehicle for the re-presentation of the May 1995 claims submissions. As Judge Lloyd noted, its structure was fundamentally wrong in that:

> *"it left the reader to ferret in the enormous supporting schedules to find the heart and real nature of the plaintiff's case. The terms of the contract were not set out in the statement of claim; the nature of the breaches of these terms which were relied upon as founding claims for damages were not set out in the statement of claim; the basis upon which claims were advanced under express terms of the contract for the recovery of additional costs were not pleaded in the statement of claim ... In litigation a claim has to comply with procedural rules which should secure that the plaintiff's case is presented after careful analysis and in a matter [sic] which will enable the defendant to plead to it in such a way that the issues which have to be decided between the parties may be clearly identified."*

When the matter first came before the Court for directions, the judge indicated that he thought that the statement of claim was seriously deficient, and invited the plaintiff to reconsider it. The plaintiff subsequently applied for, and was given, leave to serve an amended statement of claim. The defendant thereafter applied for the statement of claim to be struck out and for the action to be dismissed or stayed on the ground that the action had been commenced prematurely since clause 68 of the contract had not been complied with.

Prior to the hearing of the defendant's application, the parties arranged for the plaintiff to meet with the construction manager to enable decisions to be given under clause 68. When the defendant's application was eventually heard, his Honour Judge Bowsher QC declined to dismiss or stay the action for non-compliance with the procedure set out in clause 68, as he found that in the circumstances the application was inappropriate for summary procedure and should have been brought by way of a preliminary issue.

Subsequently, and after the construction manager had issued final certificates under both contracts, which showed balances owing to the defendant, the plaintiff applied for leave to substitute a new statement of claim ("*Mark II*"). This application was opposed by the defendant on various grounds, one of them being that the action had been commenced prematurely since the proposed statement of claim included new claims which had not been submitted to, and resolved by, the construction manger under clause 68 of the contract. Another ground of objection was that the pleading relating to the effect of variations on the progress of the works was in the nature of a global delay or disruption claim, and that, as such, it did not clearly set out a causal nexus between each of the variations relied on and the delay or delays alleged. The defendant asserted that:

> "*it was not clear which variations or other causes of delay were relied upon as causing delay, how the variations correlated with those listed in schedule 1, what events (whether variations or not) justified an entitlement to an extension of time under the contract and how much time was claimed for each cause.*"

The defendant applied to strike out the pleading pursuant to order 18 r 19 of the Rules of the Supreme Court 1965 (England and Wales) and under the court's inherent jurisdiction. Both applications were heard together.

The Judgment

Judge Lloyd held that the defendant was entitled to rely upon clause 68 in opposing the plaintiff's application, since as a matter of public policy the court would enforce a clear provision to refer a dispute to a third party prior to litigation or arbitration. Nevertheless, he allowed the plaintiff to substitute the new statement of claim. He said:

> "*In my view the proper course is to allow the plaintiff to introduce any such new claims; for the defendant then to decide whether or not to raise, as a defence to such new claims, its arguments in relation to clause 68; and to see whether the plaintiff by way of reply might successfully dispose of those arguments, e.g. on the grounds that the contractual machinery has broken down, or that there are facts which might disentitle the defendant to rely upon clause 68 (assuming it were correct in its interpretation). Once these steps have been completed, a decision can then be taken as to whether or not the plaintiff's case justifies a preliminary issue if to do so might significantly reduce the area of enquiry that would otherwise have to take place.*"

Judge Lloyd also held that the defendant's complaint about the lack of clarity about the variations was justified, noting that the variations in two separate schedules could not apparently be reconciled, and that the pleading was, therefore, embarrassing. However, he noted that the objection may be met by the plaintiff providing, as it proposed to do, a table which would correlate the variations.

Judge Lloyd went on to expressly adopt "*the analyses and restatements of principle*" made by Byrne J in the *John Holland Construction* case, including the following:

(a) it is for the parties and not the Court, even in a judge-managed list, to determine how their case should be framed;

(b) the power of the Court to strike out a claim is very limited. It may be exercised where the claim is so evidently untenable that it would be a waste of the resources of the Court or the parties for the Court to permit this to be demonstrated only after a trial, or where the pleading is likely to prejudice, embarrass or delay the fair trial of the action. The former imposes a very heavy burden on the applicant;

(c) this case is being managed in a specialist list, which has the advantage that the judge, being familiar with the case, can encourage the parties to identify and formulate the issues so that the trial might be conducted in as economical and expeditious a manner as may be consistent with the just disposition of the dispute.

Byrne J had also extracted the following principles from the decided cases:

> "*The question whether in a given case a pleading based on a global claim, or even a total cost claim or some variant of this, is likely to or may prejudice, embarrass or delay the fair trial of a proceeding, must depend upon an examination of the pleading itself and the claim which it makes ... The fundamental concern of the court is that*

the dispute between the parties should be determined expeditiously and economically and, above all, fairly. Where the proceeding is being managed in a specialist list, the judge, whose task it is to steer the case through its interlocutory stages, might, and perhaps should, explore the claim to determine whether the form it takes is driven by its nature and complexity, or by a desire to conceal its bogus nature and by presenting it in a snowstorm of unrelated and insufficiently particularised allegations, or by a desire to disadvantage the defendant in some way. Relevant to this is an acknowledgement that a total cost claim puts a burden on the defendant. This burden may involve the defendant in extensive discovery of documents relating to the performance of the project: it may mean that at trial the defendant must cross-examine the plaintiff's witnesses to expose the flaws in a claim which assumes that the defendant is, itself, responsible for every item of the plaintiff's costs overrun; it may mean that the defendant must lead evidence to explain what, in fact, was the impact of each of the acts complained of on the project ... Litigation inevitably imposes burdens on the parties; the court must exercise it powers to ensure that, as far as possible, these burdens are not unreasonable and are not unnecessarily imposed.

In my opinion, the court should approach a total cost claim with a great deal of caution, even distrust. It would not, however, elevate this suspicion to the level of concluding that such a claim should be treated as prima facie bad ... Nevertheless, 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. I put to one side the straight-forward case where each aspect of the nexus is apparent from the nature of the breach and loss as alleged. In such a case the objectives of the pleading may be achieved by a short statement of the facts giving rise to the causal nexus. If it is necessary for the given case for this to be supported by particulars, this should be done. But in other cases, each aspect of the nexus must be fully set out in the pleading unless its probable existence 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. And it should not be overlooked that an important means of achieving the result that, once it starts, the trial should be conducted without undue prejudice, embarrassment and delay, is by ensuring that, when it begins, the issues between the parties including this nexus are defined with sufficient particularity to enable the trial judge to address the issues, to rule on relevance and generally to contain the parties to those issues. ... And if, in such a case, the plaintiff fails to demonstrate this causal nexus in sufficient detail because it is unable or unwilling to do so, then this may provide the occasion for the court to relieve the defendant of the unreasonable burden which the plaintiff would impose on it ..."

Judge Lloyd summed up the position in the following terms:

(1) 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.

(2) With this in mind a court may – indeed must – in order to ensure fairness and observance of the principles of natural justice – require a party to spell out with sufficient particularity its case, and where its case depends upon the causal effect of an interaction of events, to spell out the nexus in an intelligible form. A party will not be entitled to prove at trial a case which it is unable to plead having been given a reasonable opportunity to do so, since the other party would be faced at the trial with a case which it also did not have a reasonable and sufficient opportunity to meet.

(3) What is sufficient particularity is a matter of fact and degree in each case. A balance has to be struck between excessive particularity and basic information. The approach must also be cost effective. The information may already be in the possession of a party or readily available to it so it may not be necessary to go into great detail.

In conclusion, in relation to the issue of global claims, Judge Lloyd said:

"*In my judgment therefore the defendant's case is in principle well-founded but I do not consider that it would be right to refuse the plaintiff leave to amend the [relevant part] of the proposed statement of claim simply because at this stage the claim is open to such attack. Its current form is not so oppressive or abusive as to justify refusal of leave to amend. The deficiencies may, as [the plaintiff] submitted, be cured by the provision of particulars or in some other way. If however that is not done or if there is no reason for the plaintiff's inability to do so then the pleading will be susceptible to being struck out. I consider therefore that conditions should be attached to the grant of leave in respect of these paragraphs so as to elicit the plaintiff's case but not to require it to present a case other than the one that it wishes to put forward.*"

- Colin Biggers & Paisley's Construction Brief.