



LEGAL BULLETIN



Global claims – striking the balance between the competing interests of employers and contractors.

by
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The subject of global claims has recently been reviewed by the Inner House of the Scottish Court of Session in the case of *John Doyle Construction Limited v. Laing Management (Scotland) Limited*. The Court considered a number of related decisions made by courts in Scotland, England, the USA and Australia and established the approach the courts in Scotland will take when asked to consider a global claim.

It is likely that all forms of tribunal in England (adjudicators, arbitrators and the courts) will adopt the approach taken by the Scottish Court of Session when dealing with global claims. Contractors everywhere should therefore follow the guidance given by the Court upon the presentation of loss and/or expense claims and the evidence that should be provided to prove such claims.

Laing was the Management Contractor in the project for the construction of new corporate headquarters for Scottish Widows in Edinburgh. John Doyle was one of the Works Contractors. The superstructure works for which Doyle was responsible were delayed and were completed 22 weeks late. Doyle made an application for an extension of time and an application for loss and expense it allegedly incurred due to the delay and disruption caused to its works.

Doyle's loss and expense claim was made on a global basis due to its inability to identify causal links between each cause of delay/disruption and the individual consequences of these. The Court had to consider how to deal with a claim where the causes of delay and loss included matters which were not the fault of the employer – for instance, exceptionally adverse weather conditions or the contractor's own default. Unsurprisingly, and as is common in cases of this type, Laing argued that because Doyle's claim had been presented upon a global basis and it was unfair for it to be responsible for loss caused by matters for which Laing was not responsible, the entire claim should be dismissed.

The Court decided that, in principle, there is no problem with advancing a global claim if there a large number of interacting events and the loss and expense attributable to each event cannot be shown. Provided the contractor can specify the events, the responsibility of the employer for each of them, the employer's involvement in causing the global loss and the method by which the loss claimed has been calculated, the claim can succeed.

However, the Court agreed with the argument advanced by Laing that the logic of a global claim requires all the events that contributed to the global loss to be events for which the employer is responsible. If they are not, an unjustifiable liability would be imposed upon the employer if the global claim was allowed. Taking this logic one stage further, a global claim will fail if the employer can show he is not responsible for one or more of the events the contractor has alleged caused the global loss or there are other events that caused the loss, not advanced by the contractor, for which the employer is not responsible.

The Court did not, however, sound the death knell for global claims but gave contractors hope of being able to recover at least some elements of a global claim. Although a global claim might fail, this would not necessarily mean that no part of the claim would succeed.

The Court also considered the issue of concurrent delay. If the Court had accepted Laing's argument and it had become necessary for contractors to prove that all the events which had caused the loss were attributable to the employer, it would have been impossible for contractors to recover loss and expense where there are concurrent causes of delay – some the fault of the employer and some the fault of the contractor.

In dealing with the issue of concurrent delay, the Court drew a distinction between significant and insignificant causes of delay/disruption and confirmed that where there is a significant or dominant cause of delay/disruption for which the employer is not responsible, the global claim will fail. Conversely, if there are two causes of delay/disruption but one is more significant or dominant than the other, then provided the contractor can show that the employer is responsible for the dominant cause, the claim could still succeed.

Even in cases where events for which the employer is responsible are not found to be the dominant cause of the loss, it may be possible on the evidence presented by the contractor to apportion the loss between causes for which the employer is responsible and the other causes. Provided the contractor can show that the event for which the employer is responsible is the significant or dominant cause of the loss, an apportionment of the loss between different causes should be possible.

In defending global loss and expense claims, employers will invariably argue that unless the contractor can show that all the events of delay/disruption and all the causes of the loss are the employer's responsibility, the global claim must fail. If the contractor is unable to prove that there was no concurrent cause of the delay/disruption for which the employer was not responsible, it will be necessary for him to show that the causes of the delay/disruption for which the employer is responsible are the significant or dominant causes.

Contractors should therefore identify all the significant or dominant causes of the delay/disruption for which the employer is responsible and which have caused them to incur loss and then make a reasonable attempt to allocate sums of loss to these causes or events. If the contractor fails to provide evidence of this, for instance in the form of daily or weekly site costs/resources and their calculation and a detailed analysis showing when and how the significant or dominant causes made an impact upon the works, the adjudicator, court or arbitrator will be unable to make any apportionment of loss and the global claim will fail in its entirety.

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