

## Global claims and apportionment

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In a large construction project it is often impossible for the claimant to ascribe an overrun in costs or time to a particular event. Then the claimant claims that the overrun is due to the cumulative effect of a number of events each of which is an event that under the contract entitles the claimant to extra costs or time. When a claim is framed that way it is called a ‘global claim’, a ‘total cost claim’, an ‘ambit claim’ or a ‘rolled up claim’. Sometimes the term is prefixed by ‘modified’. For present purposes the terms are synonymous.

In *Shell Refining (Australia) v A J Mayr Engineering* [2006] NSWSC 94 a global claim was wholly successful. In *Laing O’Rourke Australia Construction v H& M Engineering & Construction* [2011] NSWSC 818 an almost identical claim was wholly unsuccessful. Both cases concerned a challenge to the validity of a determination of an adjudicator (the writer) under the *Building and Construction Industry Security of Payment Act 1999* (NSW).

When faced with a global claim, the respondent usually runs the ‘all or nothing’ defence and, in support, cites *John Holland Construction & Engineering v Kvaerner* (1997) 13 BCL 262 and *Total Costs and Global Claims*, an article by Byrne J in [1995] *International Construction Law Review* at 531. A common misconception is that if the global claim fails, the claimant is entitled to nothing; the claimant gets ‘all or nothing’.

In *Laing O’Rourke* at [74] and following McDougall J considers *Kvaerner* and the journal article by Byrne J on global claims. McDougall J sets out his views on global claims and accepts the ‘all or nothing’ argument. At [83] he says:

In particular, his Honour said, a global claim must fail if any part of the extra cost or time is the responsibility of the contractor. Thus, “the claimant must show that the whole of the overrun is the consequence of the compensable events for which the proprietor is contractually responsible”.

In *Laing O’Rourke* the adjudicator did not accept that it had to be all or nothing and said that it would have been open to the respondent to contend that there should be an apportionment. The adjudicator said, ‘I don’t find it of assistance when a party cites one case as representing the law on an issue and does not do the research necessary to find whether that case truly represents the law at the moment or whether it has been overruled, not followed or distinguished in other cases’. McDougall J at [111] said:

If the adjudicator had read and understood the “authorities” cited by [the respondent], he must have understood that the case that was put to him was that no causal nexus could be shown between any individual delaying or disrupting event and any individual loss of hours. Thus, on the common basis on which the claims in question were advanced and met, it was not open to either party to say that some lesser amount of delay should be assessed if some other view of causation were taken.

At [84] McDougall J said that this is not the place to review all the authorities on the question of global claims. Consequently, he did not review *John Doyle Construction v Laing Management (Scotland)* [2004] ScotsCS 141. This is a leading case on global claims. The case was not cited to the adjudicator or McDougall J but it is the most relevant case on the issue of whether if some of the delay was shown to be the fault of the claimant the whole claim must fail.

The adjudicator found that it would have been open to the respondent to seek apportionment of the claim; it was not 'all or nothing'. This is what *John Doyle Construction v Laing Management (Scotland)* decides. The case was an appeal to the Extra Division, Inner House, Court of Session, Scotland. It concerned a claim for costs of delay or disruption where the claimant's costs were assessed on a global basis just as was done by the claimant in *Laing O'Rourke*. The Court cited *Kvaerner* with approval but decided that it is possible for there to be an apportionment. If part of the extra costs is shown to be the fault of the claimant, the whole claim does not necessarily fail.

The judge at first instance, the Lord Ordinary, at [36]-[37] of his judgment (cited at [7] of *John Doyle Construction*) refers to the all or nothing argument and says:

[38] The rigour of that analysis is in my view mitigated by two considerations. The first of these is that while, in the circumstances outlined, the global claim as such will fail, it does not follow that no claim will succeed. The fact that the pursuer has been driven (or chosen) to advance a global claim because of the difficulty of relating each causative event to an individual sum of loss or expense does not mean that after evidence has been led it will remain impossible to attribute individual sums of loss or expense to individual causative events. The point is illustrated in certain of the American cases. The global claim may fail, but there may be in the evidence a sufficient basis to find causal connections between individual losses and individual events, or to make a rational apportionment of part of the global loss to the causative events for which the defender has been held responsible.

[39] The second factor mitigating the rigour of the logic of global claims is that causation must be treated as a common sense matter ... That is particularly important, in my view, where averments are made attributing, for example, the same period of delay to more than one cause".

At [8] of *John Doyle Construction* the Court said:

On the foregoing basis, the Lord Ordinary held that the pursuers' averments in support of the claim for loss and expense were relevant. Part of the delay in completion was said to be the result of concurrent causes, namely the late issue of drawings and information, the delay in completion of WP 2010 and snow. Nevertheless, how each of those concurrent causes ought to be viewed in determining whether the causes for which the defenders had no liability played a material part in causing the global loss was a matter that should be left for consideration at the conclusion of a proof before answer. In addition, it

was possible that evidence properly lead at such a proof might afford a satisfactory basis for an award of some lesser sum than the full global sum.

At [17] the Court said that apportionment will frequently be possible and:

This procedure does not, however, seem to us to be fundamentally different in nature from that used in relation to contributory negligence or contribution among joint wrongdoers. Moreover, the alternative to such an approach is the strict view that, if a contractor sustains a loss caused partly by events for which the employer is responsible and partly by other events, he cannot recover anything because he cannot demonstrate that the whole of the loss is the responsibility of the employer. That would deny him a remedy even if the conduct of the employer or the architect is plainly culpable, as where an architect fails to produce instructions despite repeated requests and indications that work is being delayed. It seems to us that in such cases the contractor should be able to recover for part of his loss and expense, and we are not persuaded that the practical difficulties of carrying out the exercise should prevent him from doing so.

At [18] the Court points out that the Federal Courts in the United States are willing to undertake an apportionment exercise. It is time that Australian Courts accepted that where a claim is a global claim apportionment is possible and reasonable and it is not ‘all or nothing’.

In the adjudication in *Laing O’Rourke* the adjudicator said:

The respondent has not provided a submission on the extent of the delay which I should find occurred if I find that the claimant was delayed by the respondent. The respondent has not provided a submission on the amount at which I should assess the claimant’s costs if I accept that the claimant is entitled to the claimant’s extra costs, I am only left with the claimant’s assessment. It is the way the respondent has approached this matter that makes it so difficult for me to arrive at any amount to be included in the progress other than the amount claimed.

Respondents who rely solely on the ‘all or nothing’ argument run a serious risk. Both parties should consider making submissions on apportionment and providing sufficient particulars so that if the adjudicator finds that both parties were partly responsible for the overrun in cost or time, the adjudicator can apportion responsibility and quantum.<sup>1</sup>

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<sup>1</sup> An excellent paper on global claims is WE Lord, ‘Cost benefit analysis approach to global claims’ (2011) 3(3) *International Journal of Law in the Built Environment*, <[www.emeraldinsight.com/reprints](http://www.emeraldinsight.com/reprints)>.