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GENERAL: GLOBAL CLAIMS: Can global claims fly or are they stuck in the mud from the word "go"?

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Introduction

Generally, all cases regarding Global (or composite) claims have been fought over whether global claims are admissible. Employers like to label Contractors' claims as 'global', hoping that to attach this unwelcome nickname to a claim will result its failure. The reality is that a global claim will open a whole new kettle of fish for the Employer, who will have to show, in order for the Contractor's claim to fail, that a significant part of the claim is the responsibility of the Contractor. This is not the end of it! For the sticky truth…read on…

What makes a claim "global"?

A global claim is a claim against the Employer by the Contractor, and has been defined as a claim where "the causal connection between the matters complained of and their consequences, whether in terms of time or money, are not fully spelt out." [1]

In the past Contractors had to show to what extent delay, disruption and/or cost was caused by various events. As the onus is on Contractors to show this was not part of the claim assessment criteria, this was not always done, and consequently Contractors could disguise their own deficiencies or costs, attributable to them, in the overall claim. The general approach of the courts was to ascertain the overall net effect of multiple causes, without proper apportionment of effect to each cause.

Over the years there has been a shift in the courts attitudes towards global claims, the most noticeable shift being evidenced by the judgment in the case of *John Doyle Construction Limited v Laing Management (Scotland) Limited*[2], where the courts found that global claims would be allowed, but subject to certain criteria.

The Court was of the opinion that the most detailed description of global claims is found in the case of *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* [3]a decision of the Supreme Court of Victoria. In that case, Byrne J. stated (at 82 BLR 85-87):

"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 of the breaches alleged, or presumably as a result of such breaches as are ultimately proved. Such claim has been held to be permissible in the case where it is impractical to

[1] Holland Construction and Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd (1996) 82 B.L.R.

[2] (2004) Scots 141

[3](1997) 13 BCL 262

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 …"

The Court went on to say:

"For a loss and expense claim under a construction contract to succeed, the contractor must aver and prove three matters: first, the existence of one or more events for which the employer is responsible; secondly, the existence of loss and expense suffered by the contractor; and, thirdly, a causal link between the event or events and the loss and expense."

The Court held that a global claim can succeed if the claims events are shown to have led to a cumulative effect, on condition that the Contractor can show that all of the events claimed for are the responsibility of the Employer. A global claim can still succeed when the loss has been caused by events for which the Employer is responsible, AND by events for which the Contractor is responsible - if the events for which the Employer is responsible are the dominant cause of the loss. It follows that if the events for which the Contractor is responsible are the dominant cause of the loss, the global claim will fail.

Where it is not possible to identify a dominant cause of the loss, and the causes really are synchronized, a global claim may partially succeed – on the basis of an apportionment between the events for which the Employer is responsible, and those events which he isn't – hence awarding a partial amount of the Contractor's global claim.

In the United Kingdom case *London Underground Limited v Citylink Telecommunications (2007)*, the judgment in *Doyle v Laing* (supra) was endorsed by the TCC, in respect of global claims. Basically, where a global claim is presented and it can be shown that some of the events that caused loss were not the responsibility of the Employer, this does not necessarily mean that the entire claim should fail. It may be possible to apportion the loss between events that were the Employer's responsibility and those that were not.

Whereas ordinarily the Contractor would have the onus to prove a breach of contract, causing a loss, and quantifying such loss, a global claim will mean that the Contractor cannot produce evidence to prove such essential elements. If an Employer wants a global claim to fail in its entirety, it will have to show that the events for which the Contractor is responsible are the dominant cause of the loss.

What is the position in South Africa?

The attitude of South African Courts towards the topic of global claims has hardly been tested. The leading judgment in this regard dates back to the 1990's, a decision by the Appellate Division – *Imprefed (Pty) Ltd v National Transport Commission*[4]. The court a quo had dismissed a claim by a Contractor (the appellant for this purposes of the appeal) based on the fact that the claim was:

"a general one for delay and disruption caused by diverse circumstances, some of which are unrelated to the conduct or responsibility of the respondent, for example inclement weather and the appellant's own mistakes and misfortunes. Evidence was led on all the disparate causes for the delay but no real, and certainly no successful, attempt was made to assess how much of the loss of productivity could be attributed to each cause…."[5]

The Appeal Court found that the criticism by the Court *a quo* of the appellant's approach was fully justified.

"Neither in the pleadings nor in the evidence did the appellant even begin to isolate, estimate or quantify the effect of each separate cause contributing to the overall delay in completing the contract. The loss of productivity was calculated in respect

[4] 1993 (3) SA 94 (A)
[5] 1993 (3) SA 122

of each item of plant by taking its total hours of availability and deducting from this figure the time actually worked. The claim, thus based on non-productive units of the plant, failed to connect the global sum claimed to the various alleged delays and disruptions. And the appellant, in its evidence, failed to establish that the non-productive period in respect of each unit was due to a delay or disruption for which the respondent was responsible. Most, but not all of the causes mentioned, might have supported, at least notionally, a claim for payment either in terms of the contract or for damages for its breach; but then the losses related to each cause ought to have been separately pleaded, assessed and proved. That the appellant was unable to do so did not justify it in attributing the eventual delay to the combined effect of all these causes… Nor did it justify the appellant in consolidating sundry causes of fact into a single composite cause of action, whereas…. the different clauses of the contract dealing with different consequences prescribe different remedies for differing conditions."[6]

In 1999, in the case of *Group Five Building Ltd v Minister of Public Works and Land Affairs*[7] the Contractor attempted to argue that none of the clauses as contained in the contract precluded the Contractor from making a global claim for the 'overall' financial consequences of delays from orders in writing. Counsel for the Employer argued that the provisions of various clauses within the contract are not interchangeable, and that they deal with different situations and prescribe different procedures. It is hence important for a Contractor to stipulate on which clause he is relying. There is no room for an 'overall' or 'global approach as suggested by the Contractor. The Judge agreed with the Employer's Counsel.

In Conclusion

The South African courts take a hard line attitude with respect to global claims. This attitude, however, has not been tested since the more recent cases mentioned in the UK and Scotland, which can be extremely persuasive when it comes to construction law.

Until such time, Contractors take heed!!

- Keep and maintain accurate and complete records. At all times, be able to establish the causal link between an event that is the responsibility of an Employer and the resultant loss / expense.
- Be able to isolate and quantify the effect of each separate cause contributing to delays and/or disruptions.
- Be able to pick out any delays and/or disruptions that are caused by your own inefficiencies.
- Comply with the conditions of contract in all respects, especially when it comes to claims for extensions of time, or more money,

Because at the end of the day, this is what you will be required to prove and/or provide if you want to make (and succeed with) a global claim.

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[6] 1993 (3) SA 123
[7] 1997 (3) SA 150 (C)