

Lilly and Doyle: A Common Sense Approach to Global Claims

Anneliese Day QC and Jonathan Cope

Introduction

1. Like all good detective pairings, the judiciary in England and Scotland have not always adopted an identical approach to solving the issues created by time and money claims. Whilst they continue to take diametrically opposed views of how to deal with delay, a “common sense” approach has now restored harmony in relation to dealing with global claims.
2. The current law in relation to global claims in Scotland was set out by Lord Macfadyen in the Outer House of the Court of Session in *John Doyle Construction Limited v Laing Management (Scotland) Limited* [2002] ScotCS 110. Lord Drummond Young further elaborated on the Scottish approach in the appeal to the Inner House in 2004¹.
3. In England², the law in relation to global claims has recently been authoritatively reconsidered by Mr Justice Akenhead, the current head of the Technology and Construction Court, in *Walter Lilly & Company Limited v (1) Giles Patrick Cyril Mackay (2) DMW Developments Limited* [2012] EWHC 1773 (TCC)³. In January 2013 the English Court of Appeal dismissed an application for permission to appeal, including a proposed appeal in relation to the global claims aspect of the judgment.
4. This paper will consider what differences, if any, exist in the law relating to global claims in the two jurisdictions. The practical implications for both parties and tribunals dealing with global claims will also be considered. In doing so we will attempt to answer the following questions:-
 - i. When can a global claim be brought?
 - ii. What are the most effective defences to a global claim?
 - iii. How should a tribunal determine the value of a global claim?

¹ *John Doyle Construction Limited v Laing Management (Scotland) Limited* [2004] ScotCS 141

² For the avoidance of doubt, the position in England is also applicable in Wales, however to assist the readability of the paper we have simply referred to ‘England’

³ Strictly speaking Mr Justice Akenhead concluded that Walter Lilly’s claim was not as a matter of fact a global claim (paragraph 491) and his seven propositions on global claims (paragraph 486) are therefore obiter. However, given the dearth of authority on this issue, they have nevertheless been generally treated as reflecting the current law in England.

iv. How can a contractor avoid having to make a global claim?

5. The backgrounds to the *John Doyle v Laing* and *Walter Lilly v Mackay & DMW* cases will no doubt be well known to readers and it is therefore unnecessary to re-rehearse the facts in this paper⁴. However, when considering the correct tactical approach to be adopted with global claims, it is important to bear in mind the crucial impact the facts are likely to have on the end result (something all too often forgotten in the heat of battle). For example, the facts in *Walter Lilly v Mackay & DMW* were, on any view, extreme and undoubtedly influenced not only the specific outcome but also the general approach adopted by Mr Justice Akenhead to dealing with the claims made.
6. This paper is also not intended to be a historical analysis of the development of the relevant law in England and Scotland prior to the *Lilly* and *Doyle* cases. Readers looking for such an analysis may wish to refer to two excellent Society of Construction Law papers⁵ together with Mr Justice Akenhead's summary of previous decisions at paragraphs 474 to 483 of his judgment⁶.
7. Before addressing the questions above, it is first necessary to define global claims and consider the objections to them.

What is a global claim?

8. Lord Drummond Young summarised what a contractor⁷ normally has to prove in order to succeed with a loss and expense claim under a construction contract, or damages as a result of a breach of contract⁸, in *John Doyle v Laing*:-

*“For a loss and expense claim to succeed, a claimant must aver and prove **three matters**: first, the existence of one or more **events for which the defendant is***

⁴ The full case reports can be found on the website of the British and Irish Legal Information Institute (www.bailii.org)

⁵ The following SCL papers were written some years before the judgment in *Walter Lilly v Mackay & DMW*. However, they still provide a useful commentary on the development of the law on global claims: Winter, J, *Global Claims and John Doyle v Laing Management – Good English Law? Good English Practice?*, Society of Construction Law paper 140, July 2007; and Lynden, J, *Global Claims in Common Law Jurisdictions*, Society of Construction Law paper D91, April 2008

⁶ *J. Crosby & Sons v Portland UDC* (1967) 5 BLR 121, *London Borough of Merton v Stanley Hugh Leach* (1985) 32 BLR 68, *Wharf Properties Limited v Eric Cumine Associates (No2)* (1991) 52 BLR 1, *John Holland Construction & Engineering Pty Limited v Kvaerner RJ Brown Pty Limited* (1996) 82 BLR 81, *Bernhard's Rugby Landscapes Limited v Stockley Park Consortium Limited* (1997) 82 BLR 39, *John Doyle v Laing* and *Petromec Inc v. Petroleo Brasileiro SA Petrobras* [2007] EWCA Civ 1371

⁷ The terms “contractor” and “employer” have been used throughout this paper. However, the principles equally apply to other contracting parties, for example subcontractors and contractors.

⁸ A contractor can rely on events under a construction contract in order to claim loss and expense, or alternatively rely on breaches of the contract in order to claim damages. For simplicity, in the remainder of this paper we only refer to the former situation, but readers should assume that the same principles apply to breaches of contract and damages unless stated otherwise.

responsible; secondly, the existence of loss and expense suffered by the claimant; and thirdly, a causal link between the event or events and the loss and expense."⁹

[emphasis added]

9. A global claim is a modification of this principle because a contractor cannot or will not adduce evidence to prove the third matter, i.e. the causal link. Instead, the contractor puts forward a collection of events and the total amount of loss incurred, and asserts that the collection of events together caused the loss.
10. There are numerous definitions of global claims, for example *The Society of Construction Law Delay and Disruption Protocol*¹⁰ uses the following definition:-

*"A global claim is one in which the Contractor seeks compensation for a group of Employer Risk Events but does not or cannot demonstrate a direct link between the loss incurred and the individual Employer Risk Events."*¹¹

11. However, whilst global claims are most often concerned with "loss", they can also concern delay. For the purposes of this paper we will therefore adopt the definition used by the learned authors of the 9th edition of *Keating on Construction Contracts*¹² at paragraph 9-041:-

"A global claim.....is one that provides an inadequate explanation of the causal nexus between the breaches of contract or relevant events/matters relied upon and the alleged loss and damage or delay that relief is claimed for" [emphasis added]

12. In our experience, the "relevant events/matters" referred to in *Keating* are most likely to be a combination of events that the contractor alleges caused both delay and disruption to the works. Events can include variations, late provision of design information, denial of access to parts of the site, interference by other contractors, etc. Supporters of global claims argue that, if an employer has caused such events to occur, a global claim may be the only way of compensating a contractor for its losses and of preventing the employer from benefiting from the complex situation it has created. They also suggest that the fact that the causal links are difficult to demonstrate should not prevent a contractor's claim succeeding.

⁹ Paragraph 10 of [2004] ScotCS 141

¹⁰ Society of Construction Law, October 2002. It is understood that this is in the process of being re-drafted.

¹¹ Also refer to paragraph 6.28.1 of *Causation in Construction Law – Principles and Methods of Analysis* by Daniel Atkinson, page 41 of the judgment in *Bernhard's Rugby Landscapes Limited v Stockley Park Consortium Limited* (1997) 82 BLR 39 and paragraph 484 of Mr Justice Akenhead's judgment in *Walter Lilly v Mackay & DMW*

¹² Furst QC, S and Ramsey, Sir V, *Keating on Construction Contracts*, 9th edition, Sweet & Maxwell, 2012

Global claims also offer advantages to contractors; for example, there is no need to undertake a detailed analysis of the causal links, and this usually results in claims being quicker and cheaper to prepare (at least in the short term).

13. It is also worth noting that other terms are often mentioned alongside global claims, in particular “total cost claims”, “composite claims” and “rolled up claims”. The distinction between these terms is concisely summarised by Daniel Atkinson at paragraph 6.28 of *Causation in Construction Law – Principles and Methods of Analysis*¹³:-

*“The term “Total Cost Claim” is a claim where a single sum is claimed which is the difference between the total actual cost and the contract price or variation of the work.....*¹⁴

The terms “Composite Claim” and “Rolled-Up Claim” are claims where there are a number of events and only some are presented as a group in a Global Claim. In this type of claim, separate sums are claimed for particular events and a single sum is claimed for the remaining group of events that are not so particularised....”

14. In *John Doyle v Laing* Lord Drummond Young referred to a “composite claim” or “rolled-up claim” as a “modified total cost claim”:-

*“A modified total cost claim is more restrictive, and involves the contractor dividing up his additional costs and only claiming that certain parts of those costs are a result of events that are the employer’s responsibility. This terminology has the advantage of emphasising that **the technique involved in calculating a global claim need not be applied to the whole of the contractor’s claim**. Instead, the contractor can divide his loss and expense into discrete parts and use the global claim technique for only one, or a limited number, of such parts. In relation to the remaining parts of the loss and expense the contractor may seek to prove causation in a conventional manner.”*¹⁵
[emphasis added]

15. Mr Justice Akenhead sought to provide his own definition of global and total cost claims (which he somewhat controversially dealt with together):-

¹³ Atkinson, D, *Causation in Construction Law – Principles and Methods of Analysis*, Daniel Atkinson Limited, 2007

¹⁴ Mr Justice Akenhead’s definition of a global claim in paragraph 484 of the judgment in *Walter Lilly v Mackay & DMW* was referring to a “total cost claim”.

¹⁵ Paragraph 11 of [2004] ScotCS 141

*“One needs to be careful in using the expressions “global” or “total” cost claims. These are not terms of art or statutorily defined terms. Some of the cases, such as Wharf, were concerned with linking actual delay and alleged causes of delay. **Simply because a contractor claims all costs on a construction project which it has not yet been paid does not necessarily mean that the claim is a global or total cost claim, although it may be.** What is commonly referred to as a global claim is a contractor’s claim which identifies numerous potential or actual causes of delay and/or disruption, a total cost on the job, a net payment from the employer and a claim for the balance between costs and payment which is attributed without more and by inference to the causes of delay and disruption relied upon”¹⁶ [emphasis added]*

What are the objections to global claims?

16. The main objections to global claims can be summarised as follows:-

- i. Global claims offend the generally accepted legal position on what a contractor must prove in order to succeed with a claim, namely the causal link between the sums claimed and each individual event. As a result, a global claim can appear to have the effect of reversing the burden of proof so that it is the employer, rather than the contractor, who has to undertake a detailed analysis of the events and quantum to show why the global approach is not justified – *“the defendant or court should not have to do the claimant’s job for it”¹⁷*;
- ii. Global claims tend to ignore the many other explanations for the causes of additional costs that the employer is not responsible for but the contractor may be. For example, lack of supervision or cost control, unrealistically low tender price, weather, labour or materials shortages, etc;
- iii. Global claims can result in a lump sum or re-measurement contract being converted into a cost reimbursable contract¹⁸;
- iv. Global claims are *“almost invariably unfair and highly prejudicial to defendants, since they avoid indicating the precise case to be met and enable the plaintiff to*

¹⁶ Paragraph 484

¹⁷ Page 14 of Winter, J, *Global Claims and John Doyle v Laing Management – Good English Law? Good English Practice?*, Society of Construction Law paper 140, July 2007

¹⁸ Paragraph 6-080 of *Hudson’s Building and Engineering Contracts*, 12th edition, Sweet & Maxwell, 2010

“change course” during the evidence”¹⁹. As a result, employers will often contend that they cannot understand the case against them and the claim should therefore be struck out.

Question 1: When can a global claim be brought?

17. Whilst the law on global claims in England and Scotland is derived from different cases decided in the respective jurisdictions, in our view the requirements for bringing a global claim are substantially the same in both jurisdictions²⁰.

Requirement 1 – All contractual requirements for a valid claim must have been complied with

18. When dealing with global claims, the courts in England have repeatedly emphasised the need for contractors to satisfy the contractual pre-conditions to entitlement in respect of each of the events relied on²¹. Whilst these requirements are not referred to in either of the *John Doyle v Laing* judgments, they are equally applicable in Scotland²².
19. Although the need to satisfy contractual pre-conditions to entitlement applies to all claims and not just global claims, this requirement is all too often not given sufficient attention. Probably the most important contractual pre-condition that needs to be satisfied is the giving of notice by a contractor that an event has occurred which may delay the project and/or result in the contractor incurring loss.
20. For example,
- i. Under clause 4.23.1 of the *JCT Standard Form of Building Contract With Quantities 2011 Edition*²³, a contractor has to make its application for loss and expense “.....as soon as it has become, or should reasonably have become, apparent to him that the regular progress has been or is likely to be affected”.

¹⁹ Paragraph 8.201 of Duncan Wallace QC, I, *Hudson’s Building and Engineering Contracts*, 11th edition, Sweet & Maxwell, 1995

²⁰ The requirements set out in this paper are an adaptation of the requirements first set out in a paper given by Jonathan Cope to the IBC’s 9th Annual Residential Construction Law Summer School at Fitzwilliam College, Cambridge, on Friday 4th September 2009

²¹ Pages 102 and 103 of *London Borough of Merton v Stanley Hugh Leach* (1985) 32 BLR 51, *Mid Glamorgan County Council v. Devonald Williams and Partners* (1992) 8 Constr LJ 61 and paragraphs 462 to 470 and 486(b) of *Walter Lilly & Company v Mackay & DMW*

²² *Education 4 Ayrshire Ltd v South Ayrshire Council* [2009] ScotCS CSOH 146

²³ Sweet and Maxwell Limited, 2011

ii. Clause 20.1 of the *FIDIC Conditions of Contract for Construction Multilateral Development Bank Harmonised Edition 2010*²⁴ states that “*If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim*”.

iii. Similarly, under clause 61.3 of *NEC3*²⁵, if the contractor does not notify the project manager of a compensation event within eight weeks of becoming aware of that event then “*he is not entitled to change the Price, Completion Date or a Key Date....*”.

21. The extent to which clauses such as these are conditions precedent to a claim is too large a subject to explore here, but readers are referred to the many excellent papers on the topic²⁶, as well as a number of recent English cases²⁷. However, the necessity for a contractor to endeavour to comply with these clauses in order to avoid allegations that it has failed to give notice of the events should not be forgotten.

Requirement 2 – The claim must be proved as a matter of fact

22. In *Walter Lilly v Mackay & DMW*, Mr Justice Akenhead confirmed that, as with any claim for loss and expense, in England a contractor must prove a global claim as a matter of fact. In particular, a contractor must “*...demonstrate on a balance of probabilities that, first, events occurred which entitle it to loss and expense, secondly, that those events caused delay and/or disruption and thirdly that such delay or disruption caused it to incur loss and/or expense...*”. Whilst such a statement was not made in either the first instance or appeal judgment in *John Doyle v Laing*, Lord Drummond Young did refer to the nature and scope of the pleadings required to demonstrate such matters²⁸. Furthermore, Mr Justice Akenhead was summarising the requirements applicable to all loss and expense claims made in common law jurisdictions, and his comments therefore seem to us to be equally applicable in Scotland.

²⁴ Federation Internationale Des Ingenieurs-Conseils, 2010

²⁵ ICE/Thomas Telford, 2005

²⁶ For example, Lal, H, *The Rise and Rise of Time-Bar Clauses for Contractor’s Claims: Issues for Construction Arbitrators*, Society of Construction Law paper 142, September 2007

²⁷ For example *Steria Limited v Sigma Wireless Communications Limited* [2008] BLR 79, *WW Gear Construction Limited v McGee Group Limited* [2010] EWHC 1460 (TCC) and *Walter Lilly & Company v Mackay and DMW*.

²⁸ Paragraph 20 of [2004] ScotCS 141

23. What a contractor therefore needs to demonstrate is that: (i) each of the events occurred, (ii) the employer bears the risk for these events, (iii) the events resulted in delay and/or disruption, and (iv) the delay and/or disruption caused it to incur loss and expense. Whilst it is the last of these requirements which is likely to be the most difficult to demonstrate with a global claim due to the lack of evidence of direct causal links, in our experience contractors also often fail to prove the third requirement, particularly in relation to disruption.

24. Disruption can be defined as:-

*“Disturbance, hindrance or interruption of a Contractor’s normal work progress, resulting in lower efficiency or lower productivity than would otherwise be achieved. Disruption does not necessarily result in a Delay to Progress or a Delay to Completion.”*²⁹

25. Global claims commonly include assertions that a contractor has been disrupted by a combination of the late provision of design information, variations, restricted access to site, etc. Whilst it might be relatively easy for contractors to demonstrate that such events occurred and are the employer’s responsibility, it does not automatically follow that they resulted in “...lower efficiency or lower productivity than would otherwise be achieved...”. All too often contractors ask tribunals to make a ‘leap of faith’ and conclude that multiple events caused disruption without giving any explanation or evidence of how the works were disrupted.

26. In order to prove that events resulted in delay and/or disruption contractors will need to provide:-

- i. An explanation of how the events resulted in delay and/or disruption. Whilst this is often most effectively communicated in written pleadings and submissions, it should be supported by witness evidence from site staff, contracts managers and the like. In anything other than simple delay claims, some form of delay analysis is also likely to be necessary in order to prove critical delay;
- ii. Contemporaneous evidence of the delay and/or disruption, for example site diary records detailing what work was undertaken on what days, in what areas and by whom, minutes of meetings and/or correspondence recording events on site, photographs (dated where possible), etc.

²⁹ *The Society of Construction Law Delay and Disruption Protocol* Society of Construction Law, October 2002

27. In order to demonstrate that the delay and/or disruption caused a contractor to incur loss and expense, the contractor will obviously need to provide detailed evidence to support the losses claimed. Evidence required to support the losses claimed may include:-
- i. Timesheets for each employee and/or subcontractor to demonstrate which employees and/or subcontractors were working and when;
 - ii. Daywork sheets, preferably signed by the contract administrator, project manager, etc.;
 - iii. Evidence of payments to employees (payslips, salary records, CIS payment certificates, etc.) and/or subcontractors, together with other relevant costs including company car allowances, pensions contributions, healthcare, etc.;
 - iv. Plant and materials invoices.
28. Due to the nature of global claims, a contractor will usually not be able to demonstrate direct causal links between the delay and/or disruption and the losses claimed³⁰. However, in our view contractors nevertheless need to provide as much explanation and evidence as possible, for example a description of what tasks particular labour and plant were undertaking on what days, the delay and/or disruption events which were affecting them, etc in order to prove the claim on the balance of probabilities. A contractor may also rely on expert evidence to support its case, although Mr Justice Akenhead went out of his way to stress in *Walter Lilly v Mackay & DMW* that there should not be overreliance on experts.
29. Mr Justice Akenhead was also keen to emphasise that a mechanistic or ritualistic approach should not be adopted to issues of proof:

*“It is open to contractors to prove these three elements with whatever evidence will satisfy the tribunal and the requisite standard of proof. **There is no set way for contractors to prove these three elements.** For instance, such a claim may be supported or even established by admission evidence or by detailed factual evidence which precisely links reimbursable events with individual days or weeks of delay or with individual instances of*

³⁰ Although Mr Justice Akenhead made clear at paragraph 486(a) of his judgment, contrary to what has often been previously assumed, that it does not have to be impossible to plead and prove cause and effect in the normal way or that such impossibility is the fault of the party seeking to advance the global claim before such a global claim can be advanced. The guiding principle is whether the claim has been proved on the balance of probabilities. See also paragraph 486(f) in which he again emphasised that a global claim should not be dismissed simply because a “direct linkage approach” was available but not deployed. This is discussed in further detail below.

disruption and which then demonstrates with precision to the nearest penny what that delay or disruption actually cost.”³¹ [emphasis added]

30. The most effective method for a contractor to demonstrate that the delay and/or disruption caused it to incur loss and expense will depend on the events included in the global claim, the evidence available, etc. However, the more explanation and evidence of causation, no matter how generalised, the more likely the global claim is to succeed.
31. Whilst Mr Justice Akenhead ultimately concluded that Walter Lilly’s loss and expense claim was not a global claim, it is nevertheless instructive to set out how Walter Lilly presented its preliminaries thickening claim. A similar model could be used and/or adapted when making a global claim:-

“Essentially what [Walter Lilly] did in the Voluntary Particulars was that, for each item of claim, it listed the relevant events relied upon and then sought in the back-up documentation, in prose form, to spell out what additional or extended resources were deployed and to seek to link them to the causes of delay or disruption relied upon. All these additional or extended resources were then costed in a document called the Detailed Analysis of Loss & Expense. This comprises about 80 mostly A3 sheets of detailed analysis which pick up on allocations of time for staff and resources at particular times and applies to such allocations costs obtained from [Walter Lilly’s] "COINS" computerised record keeping system. This was all supported by reliable evidence from [Walter Lilly’s] witnesses, particularly Mr McMorrow, much of which was not challenged.”³²

32. This is similar to the submissions and evidence that HHJ Humphrey LLoyd QC ordered the contractor to provide in *Bernhard’s Rugby Landscapes Limited v Stockley Park Consortium Limited* (1997) 82 BLR 39, namely a list of all of the alleged causes of delay other than variations, the relevant contract condition relied upon or any other special circumstance, in which case the nature of the cause or breach also had to be particularised³³.

³¹ Paragraph 486(c)

³² Paragraph 490

³³ Pages 42 and 77

Requirement 3 – Proof must be provided that the contractor would not have incurred the loss in any event

33. In *Walter Lilly v Mackay & DMW* Mr Justice Akenhead confirmed that, in England, a contractor has the burden of establishing that the loss which it has incurred would not have been incurred in any event. In particular, he emphasised that a contractor “...will need to demonstrate that its accepted tender was sufficiently well priced that it would have made some net return.....and that there are no other matters which actually occurred...”³⁴. Mr Justice Akenhead dismissed the contention that the burden transfers to the employer, although he acknowledged that it is open to the employer to:-

*“...raise issues or adduce evidence that suggest or even shows that the accepted tender was so low that the loss would have always occurred irrespective of the events relied upon by the claimant contractor or that other events.....occurred may have caused or did cause all or part of the loss.”*³⁵

34. There was no similar statement to this effect in *John Doyle v Laing*, but in our view this requirement is also likely to apply in Scotland. The nature of a global claim is that a contractor is claiming the difference between the sums it allowed in the contract and its costs incurred, and the contractor cannot be allowed to recover losses it would have incurred in any event. Given that it is the contractor that elects to present its claim in a global format, it follows that the burden must be on the contractor to demonstrate that it would not have incurred the loss in any event.
35. In *Walter Lilly v Mackay & DMW* the contractor provided witness evidence setting out why it considered its original tender allowances to have been reasonable and it compared them to similar projects. It is clear that Mr Justice Akenhead considered that this was the type of evidence that a contractor needs to provide to discharge its burden. He also considered it relevant that the employer’s quantity surveyor had not identified any under-pricing at tender stage³⁶.

³⁴ Paragraph 486(d)

³⁵ Paragraph 486(d)

³⁶ Paragraph 492

Requirement 4 – Any significant matters for which the employer is not responsible should be eliminated

36. Until *John Doyle v Laing* it was generally considered that, if an employer could prove that one of the causes of the delay or the contractor's loss was not the employer's responsibility under the contract, then the contractor's entire claim would fail. For example, in the 11th edition of *Hudson's Building and Engineering Contracts* the late Ian Duncan Wallace QC states:-

*".....even if [a global] claim is allowed to proceed, it should only be on the basis that, on proof of any not merely trivial damage or additional cost being established (or indeed any other cause of the additional cost, such as under-pricing) for which the owner is not contractually responsible, the entire claim will be dismissed."*³⁷

37. Therefore, if an employer could demonstrate that at least part of the contractor's loss had been caused by a "not merely trivial" event that was not the employer's responsibility, then the contractor's global claim would fail in its entirety. This was described by some commentators as the "exocet" defence³⁸.

38. In *John Doyle v Laing* Lord Drummond Young clarified that this was not the law in Scotland when he stated that the event the employer was not responsible for had to be "significant":-

*"Where, however, it appears that a **significant** cause of the delay and disruption has been a matter for which the employer is not responsible, a claim presented in this manner **must necessarily fail**. If, for example, the loss and expense has been caused in part by bad weather, for which neither party is responsible, or by inefficient working on the part of the contractor, which is his responsibility, such a claim must fail...."*³⁹ [emphasis added]

39. It is likely to be a more onerous task for an employer to demonstrate a "significant" cause than one which is only "not merely trivial".

40. Despite Lord Drummond Young's references to global claims failing, he went on to acknowledge that "...In some cases it may be possible to separate out the effects of matters

³⁷ Paragraph 8.204 of Wallace QC, I, *Hudson's Building and Engineering Contracts*, 11th edition, Sweet & Maxwell, 1995

³⁸ Pennicott I, *Global Claims*, 8th June 2006, Keating Chambers website (www.keatingchambers.co.uk)

³⁹ Paragraph 10 of [2004] ScotCS 141. Also refer to paragraph 36 of [2002] ScotCS 110

for which the employer is not responsible....”⁴⁰, and that “...It is accordingly clear that if a global claim is to succeed....., the contractor must eliminate from the causes of his loss and expense all matters that are not the responsibility of the employer...”⁴¹. Lord Drummond Young therefore acknowledged that, if a “significant” cause could be eliminated, the global claim would not fail.

41. In *Walter Lilly v Mackay & DMW* Mr Justice Akenhead confirmed that, just because a global claim has been contributed to by events for which the employer is not responsible, it does not follow that the entire global claim fails. Rather, the global claim would simply be reduced by the loss resulting from that event:-

*“...The fact that one or a series of events or factors (unpleaded or which are the risk or fault of the claimant contractor) caused or contributed (or cannot be proved not to have caused or contributed) to the total or global loss **does not necessarily mean that the claimant contractor can recover nothing**. An example would be where, say, a contractor's global loss is £1 million and it can prove that but for one overlooked and unpriced £50,000 item in its accepted tender it would probably have made a net return; the global loss claim does not fail simply because the tender was underpriced by £50,000; the consequence would simply be that the global loss is reduced by £50,000 because the claimant contractor has not been able to prove that £50,000 of the global loss would not have been incurred in any event. Similarly, taking the same example but there being events during the course of the contract which are the fault or risk of the claimant contractor which caused or cannot be demonstrated not to cause some loss, the overall claim will not be rejected save to the extent that those events caused some loss. An example might be (as in this case) time spent by WLC's management in dealing with some of the lift problems (in particular the over-cladding); assuming that this time can be quantified either precisely or at least by way of assessment, that amount would be deducted from the global loss.....”⁴²*
[emphasis added]

42. The words emphasised above appear to us to indicate that Mr Justice Akenhead was not ruling out the possibility of a global claim failing where, unlike the examples he gave, the losses for which the employer is not responsible cannot be readily identified and omitted.

⁴⁰ Paragraph 10 of [2004] ScotCS 141

⁴¹ Paragraph 14 of [2004] ScotCS 141

⁴² Paragraph 486(e) of *Walter Lilly v Mackay & DMW*

This appears consistent with Lord Drummond Young's opinion. It will all be a matter of degree.

43. We consider that the position in both jurisdictions can be summarised as follows:-
- i. Where there are events for which the employer is not responsible, and the losses arising from those events can be readily identified, the losses should be omitted from the global claim. The remainder of the global claim can still be sustained;
 - ii. Where there are "*significant*" events for which the employer is not responsible, and the losses arising from these events cannot be readily identified and omitted, the global claim will fail. Determining whether an event is "*significant*" will turn on the facts of each case. We acknowledge that Mr Justice Akenhead did not refer to "*significant*" causes as Lord Drummond Young had, but we are of the view that an English court is unlikely to find that a global claim would fail unless the event for which the employer was not responsible was "*significant*", as evidenced by the example given by Mr Justice Akenhead.

Requirement 5 – All parts of the claim where a causal link can be demonstrated should be pleaded separately

44. The need to separate out those parts of the claim where a causal link can be demonstrated originally arose because it was thought that a global claim could only be sustained where it was impossible or impractical to separate out the consequences of each of the events. For example, in *London Borough of Merton v Stanley Hugh Leach* (1985) 32 BLR 68 Mr Justice Vinelott stated that "...a rolled up award can only be made in the case where the loss and expense attributable to each head of claim cannot in reality be separated..."⁴³.
45. In *Mid Glamorgan County Council v Devonald Williams and Partners* (1992) 8 Constr LJ 61 Recorder Tackaberry QC reviewed the authorities on global claims and stated:-

*"Where, however, a claim is made for extra costs incurred through delay as a result of various events whose consequences have a complex interaction that renders specific relation between event and time/money consequence impossible or impractical, it is permissible [sic] to maintain a composite claim."*⁴⁴

⁴³ Page 102

⁴⁴ Page 69

46. However, in *Walter Lilly v Mackay & DMW* Mr Justice Akenhead stated that, as a matter of principle, he did not accept that it is necessary for a contractor to prove that “...it is impossible to plead and prove cause and effect in the normal way or that such impossibility is not the fault of the party seeking to advance the global claim...”⁴⁵. Rather, in the absence of any contractual restrictions on global claims, in England there is no set way for a contractor to prove its case.
47. Whilst the position in Scotland is somewhat less clear, on balance we consider that it is likely to be the same as England. Whilst there were references to impossibility in both the first instance and appeal judgments in *John Doyle v Laing*, neither court ultimately appears to have decided the matter. At first instance Lord Macfadyen reserved his opinion as to whether it was essential to the success of a global claim that it be impossible to separate out the consequences of each of the events, the evidence required to prove that it is impossible and the consequence of failing to prove it⁴⁶. Lord Drummond Young merely noted Lord Macfadyen’s reservation, and did not address the matter directly.
48. However, despite what was said in *Walter Lilly v Mackay & DMW*, we consider that there remain a number of compelling reasons why a contractor should still separate out those parts of the claim where the causal link can be demonstrated:-
- i. Mr Justice Akenhead acknowledged that a tribunal might be “...more sceptical about the global cost claim if the direct linkage approach is readily available but is not deployed...”⁴⁷;
 - ii. The different heads of claim may have different legal or contractual bases, and consequently different methods of valuation. For example, a variation will usually be valued by reference to existing rates and prices in the contract; a claim for unforeseen ground conditions will be valued in accordance with the specific provisions of the relevant clause in the contract, as will loss and expense; and damages for breach of contract will have to be assessed in accordance with the relevant law. Some of these remedies may allow profit, some may not. Most will be cost based, but not variations⁴⁸;

⁴⁵ Paragraph 486(a)

⁴⁶ Paragraph 33 of [2002] ScotCS 110

⁴⁷ Paragraph 486(f)

⁴⁸ Page 14 of Winter, J, *Global Claims and John Doyle v Laing Management – Good English Law? Good English Practice?*, Society of Construction Law paper 140, July 2007

iii. The contractor may not be able to reopen matters that have already been agreed, for example the value of variations.

49. As set out in the *Construction Law Reports* when reporting on *Walter Lilly v Mackay & DMW*:-

*“...it is the editor’s view that a well advised contractor would still, if possible, prepare and submit a claim where every possible attempt was made to link specific losses with specific events – there is no really satisfactory substitute for a proper ‘cause and effect’ analysis and the contractor should only consider going down the ‘global path’ if what is regarded as the more conventional (and safer) path to recovery really cannot be achieved.”*⁴⁹ [emphasis added]

50. A contractor should evaluate the following when considering which events it can establish a causal link for:-

Variations

51. Differences in the unit cost of activities should normally be capable of identification, and, where possible, contractors should separate out variations from the remainder of the claim and value them under the relevant provisions in the contract. However, one of the reasons a contractor might have brought a global claim is because simply substituting labour and material rates will not account for the full amount of the increased costs that may result from, or be connected to, the variation. A contractor could incorporate the remainder of the increased costs in its global claim, but another alternative would be to incorporate the remainder of the increased costs in the valuation of the variation.

52. For example, the *JCT Standard Form of Building Contract With Quantities 2011 Edition*⁵⁰ provides in clause 5.6.1.2:-

“where the additional or substituted work is of similar character to work set out in Contract Bills but is not executed under similar conditions thereto and/or significantly changes its quantity, the rates and prices for the work so set out shall be the basis for determining the valuation and the Valuation shall include a fair allowance for such difference in conditions and/or quantity;”

⁴⁹ *Walter Lilly & Company Limited v (1) Giles Patrick Cyril Mackay (2) DMW Developments Limited* [2012] 143 ConLR 79 at page 95

⁵⁰ Sweet and Maxwell Limited, 2011

53. The contractor could therefore make an adjustment to a rate to account for such a “*difference in conditions*”, arguing that, considering the complexity of the events connected with the variation, this is “*a fair allowance*”⁵¹. The contractor could incorporate all of its loss into variations, dispensing with the need for a global claim altogether. However, contractors should be cautious about making such claims because percentage adjustments will be very difficult to justify and it may be viewed by employers and tribunals as a global claim via the “back door”.

Prolongation Costs

54. It should be possible for the contractor to identify the costs associated with any prolongation and claim them under the loss and expense provisions in the contract. This could include site costs such as site agents and foremen, labourers, site huts, small plant, scaffolding, etc. A claim for head office overheads could also be made as part of the prolongation costs.

Disruption Costs

55. Whilst disruption sometimes forms part of a claim for prolongation, a contractor should attempt to separate the disruption costs. A contractor can normally claim these costs under the loss and expense provisions in the contract. One of the most effective means of measuring disruption is the “measured mile” technique⁵². This compares productivity achieved on an undisrupted part of the works with productivity achieved on the disrupted part. The comparison can be made on a location or time period basis, and the comparative periods are usually converted to units for comparison purposes.
56. If there is no undisrupted part of the works to create the “measured mile” then it may be possible to compare productivity on other contracts undertaken by the contractor, or to refer to productivity information produced by professional or trade bodies. Failing this, a contractor may have to compare the resources it anticipated using in its tender.

Question 2: What are the most effective defences to a global claim?

57. In our view the most effective defences an employer can raise to defeat or limit a global claim in both England and Scotland will involve demonstrating that:-

⁵¹ The Technology and Construction Court confirmed in *WW Gear Construction Limited v McGee Group Limited* [2012] EWHC 1509 (TCC) that loss and expense can be claimed under such provisions, albeit the case did not concern a global claim.

⁵²For an analysis of this and other techniques, refer to Ennis, C, *Evaluating Disruption Costs on Major Construction Projects*, Society of Construction Law paper D125, July 2011

- i. Global claims are not permitted under the contract. Mr Justice Akenhead emphasised this as an essential requirement: *“One needs to see of course what the contractual clause relied upon says to see if there are contractual restrictions on global cost or loss claims.”*⁵³
- ii. The contractor has failed to comply with any specific contractual requirements for making a valid claim. This could apply to all or part of the claim;
- iii. The contractor has failed to prove all or part of the claim as a matter of fact, for example because the contractor has not proved that it was disrupted or has provided insufficient evidence of the losses claimed;
- iv. The contractor has failed to establish that the loss would not have been incurred in any event. For example, the employer might adduce evidence that the contractor’s tender was so low that it would have suffered the loss irrespective of the employer risk events.
- v. The employer was not responsible for a significant cause/s of the contractor’s loss, and the costs arising from this cause/s cannot be readily identified and omitted from the global claim;
- vi. If an employer is seeking to argue that the value of the claim is nil, there is likely to be little point in it attempting to exploit Mr Justice Akenhead’s comments that a tribunal *“...will be more sceptical about the global cost claim if the direct linkage approach is readily available but is not deployed...”* because the employer will then have to acknowledge that the contractor is owed something. However, it is often the case that an employer acknowledges that a contractor is entitled to some loss and expense, but argues that it is considerably less than that claimed in the global claim. In these circumstances proving a direct link between events and losses may assist the employer to demonstrate that the global claim is inflated and that the tribunal should therefore be *“...sceptical...”* about accepting it.

58. When the global claim is in front of a tribunal, an employer may attempt to strike-out the claim altogether. The main argument is that the global claim is hopelessly vague and unclear, and is prejudicial to its defence. Such a course of action was envisaged by the late

⁵³ Paragraph 486(a)

Mr Duncan Wallace QC in paragraph 8.204 of *Hudson's Building and Engineering Contracts*⁵⁴:-

*“It is submitted that, in English and related Commonwealth jurisdictions, claims on a total cost basis, a fortiori if in respect of a number of disparate claims, will prima facie be embarrassing and an abuse of the process of the court, **justifying their being struck out and the action dismissed at an interlocutory stage.**”* [emphasis added]

59. Much of the case law on global claims, including *John Doyle v Laing*, has resulted from applications to strike out global claims. One application which succeeded in front of the Privy Council was *Wharf Properties Limited v Eric Cumine Associates (No2)* (1991) 52 BLR 1, but most commentators see this case as an exception because it was eventually struck-out as an abuse of process after the claimant refused to supply particulars in the face of orders and agreements to do so. In most of the other cases applications to strike-out global claims have failed, with the courts instead preferring to order amendments to the claim⁵⁵. Indeed it is noteworthy that although the end result in *Walter Lilly v Mackay & DMW* appears a foregone conclusion, there were a number of hard fought interlocutory battles in relation to the pleading of the contractor's claim.

Question 3: How should a tribunal determine the value of a global claim?

60. In the event that a tribunal is persuaded that a contractor has complied with the requirements for bringing a global claim, the tribunal will then need to determine the value of the claim.
61. In the first instance, the tribunal will need to determine the extent of the contractor's loss by reference to the evidence provided. After reviewing the evidence, it may be that the tribunal is not persuaded that the contractor has incurred all of the losses claimed, and therefore deductions will need to be made. Deductions may also have to be made for any matters for which the employer was not responsible, such as the examples referred to by Mr Justice Akenhead and set out above in paragraph 41 above.
62. Alternatively, it may be the case that part or all of the global claim fails, for example because the tribunal is not persuaded that the contractor has proved their claim as a matter

⁵⁴ Duncan Wallace QC, I, *Hudson's Building and Engineering Contracts*, 11th edition, Sweet & Maxwell, 1995

⁵⁵ Applications to strike-out failed in *Mid Glamorgan County Council v. Devonald Williams and Partners* (1992) 8 Constr LJ 61, *Imperial Chemical Industries Plc v Bovis Construction Limited* (1992) 32 ConLR 90, *British Airways Pensions Trustees Limited v Sir Robert McAlpine & Sons Limited* (1994) 72 BLR 26, *John Holland Construction and Engineering Pty Limited v Kvaerner RJ Brown Pty Limited* (1996) 82 BLR 83, *Bernhard's Rugby Landscapes Limited v Stockley Park Consortium Limited* (1997) 82 BLR 39 and *John Doyle Construction Limited v Laing Management (Scotland) Limited* [2004] ScotCS 141

of fact, the tribunal considers that the employer is not responsible for a significant cause of the contractor's loss and the costs arising from this cause cannot be readily identified and omitted, etc.

63. In *John Doyle v Laing* both houses of the Court of Session made it clear that, in the event of a global claim failing, it does not necessarily follow that no other claim will succeed. In particular, Lord Macfadyen stated that:-

*“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.”*⁵⁶

64. We consider that the first of Lord Macfadyen's alternatives, identifying causal connections between individual losses and individual events, is also available in England. Indeed, this is what occurred in the case of *London Underground Limited v Citylink Telecommunications Limited* [2007] EWHC 1749 (TCC). Citylink made a global claim for an extension of time which was referred to arbitration. The arbitrator rejected the global claim, but granted Citylink an extension of time of 48 weeks for one individual event. Both parties challenged the arbitrator's award in court. LUL submitted that the arbitrator was correct in finding that the global claim should fail, but argued that he had determined the remaining extension of time on a basis that had not been addressed or argued by the parties and fairness therefore dictated that LUL should be given the opportunity to deal with the new case.

65. The parties' challenges failed because Mr Justice Ramsey decided that the arbitrator's award was based on the primary facts that had been in issue in the proceedings and he had therefore not been required to seek further submissions by the parties. Mr Justice Ramsey recognised that tribunals will often have to deal with cases where there has been only partial success, and the parties do not have an opportunity to deal with the tribunal's findings. He stated:-

“Tribunals frequently have to deal with cases where a claim or a defence has not wholly succeeded and it is necessary to determine what result flows from the partial success or failure. Provided that the result is based on primary facts which have been in issue in the proceedings, there can in principle be no objection to a tribunal taking such a course. There will, though, be limits and it will be a matter of fact or degree in

⁵⁶ Paragraph 38 of [2002] ScotCS 110

*a particular case whether the findings made by the Arbitrator fall outside the limits and fairness requires the Arbitrator to seek further submissions from the parties.”*⁵⁷

66. Tribunals should note Mr Justice Ramsey’s comment about “*limits*” and take care when deciding the surviving part of a claim without giving the parties the opportunity to make further submissions. This is particularly the case considering the wealth of case law in both arbitration⁵⁸ and domestic UK adjudication⁵⁹ which highlights the dangers of tribunals using their own expertise and failing to disclose it to the parties.
67. However, in our view, the second of Lord Macfadyen’s alternatives, rational apportionment, is only arguable in Scotland and is not available in England.
68. The availability of apportionment in Scotland has received further judicial support from the Inner House of the Court of Session in *City Inn Limited v Shepherd Construction Limited* [2010] CSIH 68. Whilst this case concerned issues of concurrency in extension of time claims rather than global claims, Lord Osborne stated that “...it appears to me that the possibility of apportionment as between different causative factors, contemplated as legitimate in [the *John Doyle v Laing*] case tend to support the approach taken by the Lord Ordinary in the present one”.
69. However, the authors of the 12th edition of *Hudson’s Building and Engineering Contracts*⁶⁰ submit that Lord Osborne’s approach is wrong and the English courts have also rejected the Scottish court’s apportionment approach in extension of time claims, for example:-
- i. *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm), where the Commercial Court stated that *City Inn* did not reflect English law in all respects, for example with regard to apportionment;
 - ii. Mr Justice Akenhead’s judgment in *Walter Lilly v Mackay & DMW*, where he said that *City Inn* was inapplicable in England (paragraphs 362-370, judgment).
70. We consider that this would apply equally to global claims. Indeed, Mr Justice Akenhead did not contemplate apportioning a global claim in his seven propositions set out at paragraph 486 of the judgment.

⁵⁷ Paragraph 145

⁵⁸ For example, *Fox v PG Welfair Limited* [1981] 2 Lloyds Rep 514

⁵⁹ For example, *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] EWHC 597 (TCC)

⁶⁰ Atkin Chambers, *Hudson’s Building and Engineering Contracts*, 12th edition, Sweet & Maxwell, 2010

71. Even though apportionment might be available in Scotland, it is not without its difficulties. In his SCL paper on global claims, Jeremy Winter raises the question of what information a court will use to carry out its apportionment exercise, in particular because a contractor is likely to have asserted that it is impossible to allocate costs to particular causes and so will not have provided data that will allow any apportionment to be easily done. He also questions when the apportionment exercise will be undertaken, and whether the tribunal will need to give the parties the opportunity to comment on the apportionment.
72. In summary, in the event that a tribunal is persuaded that a contractor has complied with the requirements necessary for bringing a global claim, the tribunal will need to determine the value of the claim by reference to the evidence presented and by making deductions where appropriate. In the event that a global claim fails, it does not follow that no other claim will succeed. In both England and Scotland a tribunal may find a causal link between an individual loss and an individual event (as happened in *LUL v Citylink*). However, it is only in Scotland that a tribunal may be entitled to make a rational apportionment of part of the global claim to the causative events it finds the employer liable for (as suggested in *John Doyle v Laing*), and even then it may face practical difficulties in carrying this out.

Question 4: How can a contractor avoid having to make a global claim?

73. Whilst a global claim may be successful if a contractor can satisfy the five requirements summarised above and despite Mr Justice Akenhead's attempts to rehabilitate global claims, it is clearly preferable if a contractor can avoid making a global claim altogether.
74. The most effective way of achieving this is for the contractor to maintain accurate records of events on site. The importance of records was eloquently explained by Max Abrahamson in 1979⁶¹:-

"It is grossly unfair both to employers and contractors that the mechanism to determine the actual full costs of disruption to a contractor, and to divide them from the costs due to his own inefficiency, is lacking more often than not. To improve the mechanism it is necessary to have better arbitration procedure.....and better records.

A party to a dispute, particularly if there is arbitration, will learn three lessons (often too late): the importance of records, the importance of records and the importance of

⁶¹ Page 442 of Abrahamson, M, *Engineering Law and the ICE Contracts*, 4th edition, Elsevier Applied Science, 1979, cited by Winter, J, *Global Claims and John Doyle v Laing Management – Good English Law? Good English Practice?*, Society of Construction Law paper 140, July 2007

records. It is impossible to exaggerate the extent to which lawyers can find unexpected grounds, often quite real, on which to cast doubt on evidence if it is not backed by meticulously established records. It must also be remembered that the arbitrator will know nothing about the history of the works, which must be reconstructed for him with all its complexities and nuances, from the records available.”

75. This is reinforced by paragraph 1.14.2 of the *SCL Protocol*⁶² which states, in effect, that if accurate and complete records are maintained, the contractor should be able to establish the causal link between an employer risk event and the resultant loss suffered, thereby disposing of the need to make a global claim.
76. The *SCL Protocol* provides a model clause that can be included in a contract, and sets out what records a contractor should maintain. Whether it is a mandatory requirement for a contractor to maintain such records under the contract or not, we would recommend keeping them in any event. Whilst it would be naïve to suggest that maintaining records will avoid global claims altogether, it would certainly reduce the need to rely on them.
77. The model clause in the *SCL Protocol* is as follows:-

“Records clause for medium to high value or medium to highly complex projects

- 2.1 The Contractor shall maintain and submit current records of activities, including the work of sub-contractors and suppliers.*
- 2.2 The records shall be in a form as agreed between the parties and shall include:*
- 2.2.1 identification of contractor/sub-contractor working and their area of responsibility;*
 - 2.2.2 operating plant/equipment with hours worked, idle or down for repair;*
 - 2.2.3 work performed to date giving the location, description and by whom, and reference to the contract programme;*
 - 2.2.4 test results and references to specification requirements. List deficiencies identified, together with the corrective action;*
 - 2.2.5 material received with statement as to its acceptability and storage;*

⁶² Society of Construction Law, October 2002

- 2.2.6 *information or drawings reviewed with reference to the contract job specifications, by whom, and action taken;*
 - 2.2.7 *job safety evaluations;*
 - 2.2.8 *progress photographs;*
 - 2.2.9 *a list of instructions given and received and any conflicts in plans and/or specifications;*
 - 2.2.10 *weather conditions encountered;*
 - 2.2.12 *the number of persons working on-site by trade, activity and location;*
 - 2.2.13 *information required from and by the Employer/CA;*
 - 2.2.14 *any delays encountered.*
- 2.3 *The parties should agree the intervals at which each of these types of records should be delivered to the CA.*
- 2.4 *The daily reports shall be delivered to the CA at the end of the working week to which they relate (or as otherwise agreed).*
- 2.5 *A report shall be submitted for each day of work performed and shall be numbered sequentially.*
- 2.6 *The report shall be signed and dated by the CA.*
- 2.7 *Any deficiency in the work shall be identified. As deficiencies are corrected, such corrections shall be acknowledged on the daily report.*
- 2.8 *The CA shall notify the Contractor of any non-compliance with the reporting requirements. All the deficiencies cited and verbal instructions given to the Contractor by the Employer/CA shall be entered on the daily report.*
- 2.9 *A weekly report shall be delivered by the contractor to the Employer/CA within 2 workings days of the end of the week to which it relates (or as otherwise agreed). The weekly report shall be in a form as agreed between the parties and shall include:*
- 2.9.1 *summary of the work performed;*

2.9.2 *summary of the works performed as referenced on the agreed programme;*

2.9.3 *summary of the list of deficiencies;*

2.9.4 *summary of any delays encountered.*

2.10 *A monthly report shall be delivered by the Contractor to the Employer/CA within 5 days of the end of each agreed monthly period (or as otherwise agreed). The monthly report shall be in a form as agreed between the parties and shall include;*

2.10.1 *summary of the work performed;*

2.10.2 *summary of the works performed as referenced on the agreed programme;*

2.10.3 *summary of the list of deficiencies;*

2.10.4 *summary of any delays encountered.”*

Conclusion

78. The concept of global claims will always provoke controversy, and balancing the rights of the parties will continue to vex tribunals in both England and Scotland. The competing tensions were succinctly explained by HHJ Humphrey LLOYD QC at paragraph 136.1 of *Bernhard's Rugby Landscapes Limited v Stockley Park Consortium Limited* (1997) 82 BLR 39:-

“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.”

79. It is clear from both *Walter Lilly v Mackay & DMW* and *John Doyle v Laing* that the judiciary is intent on doing justice in both England and Scotland. Whilst the learned judges approached global claims differently in these cases, we are of the view that the requirements ultimately necessary to bring a global claim are substantially the same both north and south of the border. The only real difference between the jurisdictions appears to be the potential ability of tribunals in Scotland to make a rational apportionment of the losses in the event of a global claim failing, although precisely how this will work in practice remains to be seen. It should not be forgotten that ultimately truth underlies each case and tribunals are reasonably adept at getting at it.

80. A summary of our conclusions is as follows:-

Question 1: When can a global claim be brought?

Answer: The five requirements are the same in England and Scotland, and are as follows:-

- i. All contractual requirements for a valid claim must have been complied with;
- ii. The claim must be proved as a matter of fact;
- iii. Proof must be provided that the contractor would not have incurred the loss in any event;
- iv. Any significant matters for which the employer is not responsible should be eliminated;

- v. All parts of the claim where a causal link can be demonstrated should be pleaded separately.

Question 2: How can a global claim be defeated?

Answer: the most effective defences an employer can raise to defeat or limit a global claim in both England and Scotland are likely to involve demonstrating that:-

- i. Global claims are not permitted under the contract;
- ii. The contractor has failed to comply with the contractual requirements for a valid claim;
- iii. The contractor has failed to prove all or part of the claim as a matter of fact;
- iv. The contractor has failed to establish that the loss would not have been incurred in any event;
- v. The employer was not responsible for a significant cause/s of the contractor's loss, and that the costs arising from this cause/s cannot be readily identified and omitted from the global claim;
- vi. That there is a direct link between events and losses.

Question 3: How should a tribunal determine the value of a global claim?

Answer: In the event that a tribunal is persuaded that a contractor has complied with the requirements necessary for bringing a global claim, the tribunal will need to determine the value of the claim by reference to the evidence presented and by making deductions where appropriate. In the event that a global claim fails, it does not follow that no other claim will succeed. In both England and Scotland a tribunal may find a causal link between an individual loss and an individual event. However, it is only in Scotland that a tribunal is potentially able to make a rational apportionment of part of the global claim to the causative events it finds the employer liable for.

Question 4: How can a contractor avoid having to make a global claim?

Answer: By maintaining adequate records.

Anneliese Day QC, Barrister, 4 New Square (www.4newsquare.com) and part of the Counsel team for the successful contractor in *Walter Lilly v Mackay & DMW*

Jonathan Cope, Director, MCMS Limited (www.mcms.co.uk), and Chairman, RICS Dispute Resolution Professional Group

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