

# Global Claims for Delay and Disruption: Causation and Apportionment

There is no strict method to prove causation. Whilst it is seen as the best approach, the courts do not always demand that loss is demonstrated on a cause-by-cause basis and this is often not even an option. In this article, we discuss demonstrating causation by inference and whether apportioning loss is an option.

It is sometimes not possible, and certainly less convenient, for a contractor to particularise its assessment of a claim for an extension of time and/or for the recovery of additional costs due to delay/disruption. As a result, a contractor may decide to claim the net difference between actual and planned costs and allege that the difference was caused by the cumulative effect of events for which the employer is liable.

## Are global claims permissible?

A court will not deny a claim for damages on the grounds that it is difficult to establish the exact amount. However, a contractor will have to establish how the loss was caused. Although calculating the amount of damages may be a difficult task, it is not one that impedes a claim. The real problem for the claimant contractor is demonstrating the causal link between an event and its related losses.

In *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers* (1994), the court expressed the view that it may be permissible to maintain a global claim, where it was impossible or impractical to identify a specific nexus between each of the alleged events and the particular delay/disruption caused.

However, in the subsequent case of *John Holland Construction & Engineering v Kvaerner RJ Brown* (1996), the court favoured a more “hardline” approach and said the decision in *Nauru* should not be taken as allowing for leniency. The court did, however, allow a “total cost” claim where it was impracticable to

disentangle that part of the loss which was attributable to each head of claim and that this situation was not created by the conduct of the contractor.

## Causation based on inference

The contractor, either deliberately or by default, is asking the employer or tribunal to assess the claim by inference rather than by direct evidence. This means without any other known cause of the contractor’s loss, the employer must therefore be liable.

## Proving a global claim

If all the events causing loss have been demonstrated by the contractor as being the liability of the employer, then the courts do not always demand the contractor demonstrates its additional costs/loss on a cause-by-cause basis.

There is no strict method to prove causation and a contractor may attempt this in a number of ways. For example, in *Walter Lilly & Co Ltd v DMW Developments* (2012), the English court said:

“It is open to contractors to prove [their claim] with whatever evidence will satisfy the tribunal and the requisite standard of proof. There is no set way for contractors to prove [their claim]. For instance, such a claim may be supported or even established by admission evidence or by factual evidence which precisely links reimbursable events with individual instances of disruption and which then demonstrates with precision to the nearest penny what the... disruption actually cost.”

In *John Doyle Construction v Laing Management (Scotland) (2002)*, the Scottish court said:

“In some circumstances, relatively commonly in the context of construction contracts, a whole series of events occur which individually would form the basis of a claim for loss and expense. These events may inter-react with each other in very complex ways, so that it becomes very difficult, if not impossible, to identify what loss and expense each event has caused. The emergence of such a difficulty does not, however, absolve [the contractor] from the need to aver and prove the causal connections between the events and the loss and expense. However, if all the events are events for which [the employer] is legally responsible, it is unnecessary to insist on proof of which loss has been caused by each event.”

It is therefore essential to establish that the contractor is not responsible for any of the alleged causes of loss. In reality, this may be difficult to prove. If the employer can prove that the contractor caused any of the loss claimed, then the global/total cost claim will almost certainly fail.

### Proof of causation

On some occasions, the effect of a delay or disruptive event may be self-evident and the inference easily drawn. However, where it is unclear what effect the alleged causes would have had, and how they may have caused delay and/or disruption encountered by the contractor, it will be necessary to better particularise the argument.

To increase the chances of establishing the inferred causal link between the delay and/or disruption acts on the one hand, and the delay and/or disruption effects on the progress of the works on the other, the contractor should try to find evidence at a micro level by way of packages of evidence, using as far as possible contemporaneous project documents. The contractor must also demonstrate that the scope and cost of the work not affected by the alleged breach were reasonable.

The contractor will then need to establish the actual reasonable cost to complete the delayed and/or disrupted work, and will subsequently contend that its loss is the additional work required.

At a more “macro” level, experts are often instructed to provide an additional level of evidence to support the causal link being

inferred. For example, in a loss of productivity claim an expert may carry out any one or a combination of a measured mile or baseline productivity analysis, make comparisons with similar projects and/or use industry standards.

### Apportionment

Apportionment in relation to a global claim involves apportioning part of the global loss claimed to the causative events for which the employer can be held responsible.

The issue of apportionment arose in the Scottish case of *John Doyle Construction v Laing Management (Scotland) (2004)*. The court considered that evidence adduced during proceedings could possibly lead to a basis for an award of a lesser sum than was being claimed on a global basis. The court drew on the law in relation to contributory negligence and contribution as an analogy to the apportionment of loss in relation to a global claim. The court also considered that a contractor should be able to recover part of its loss and expense in a situation where the employer or architect was culpable and considered that the practical difficulties of carrying out an apportionment exercise should not prevent this.

However, in *Astley v Austrust (1999)* the Australian High Court said:

“Rarely do contracts apportion responsibility for damage on the basis of the respective fault of the parties. Commercial people in particular prefer the certainty of fixed rules to the vagueness of concepts such as “just and equitable”.

### Obligation to prove causation

In *Mainteck Services v Stein Heurtey SA (2014)*, the New South Wales Court of Appeal confirmed that Australian courts require proof of causation in the context of a global claim. In *Mainteck* the court formed the view that it is unlikely a global claim will succeed if other causally significant events exist for which the defendant is not responsible. The court declined to follow the Scottish Inner House of Session’s decision in *Laing Management (Scotland) v John Doyle Construction (2004)*, in which the court held it may be possible in some cases to apportion the loss between the causes.

The Court of Appeal in *Mainteck* considered that a convenient



starting point was the decision in *John Holland v Kvaerner* (1996). In *John Holland* the court was dealing with an application to strike out a pleading which succeeded. The basis of the application was that there was no allegation of a causal link between breach and loss. The court said the mere difficulty of estimating the damages flowing from a breach was not sufficient to deny relief to a plaintiff, saying:

“But even in such a case, the plaintiff must identify the loss alleged to have been suffered and which cannot be quantified and how it is that this loss was caused by the breach.”

Further, the court in *Laing Management v John Doyle* (2004) emphasised:

“It is accordingly clear that if a global claim is to succeed, whether it is a total claim or not, the contractor must eliminate from the causes of his loss and expense all matters that are not the responsibility of the employer.”

## In Summary

In a common law jurisdiction, the principles of causation are generally applied in an “all-or-nothing” manner. Without any statutory obligation to apportion, common law courts have generally been inclined not to apportion damages between competing causes.

There is currently no Australian authority in relation to whether apportionment is available in a global claim for loss under the *John Doyle* principle.

Other than in Scotland, apportionment is generally unavailable unless the contract provides otherwise.

If a claim must be made on a global basis, it is wise if not necessary as far as is possible, to provide proof of causation on a cause-by-cause basis, and where this is not possible by inference. The contractor should also demonstrate that no other causally significant events exist for which they are responsible.

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