

A global claim

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Charles Blamire-Brown looks at a classic example of a global claim

My architect has given my contractor a 6-week extension of time as a result of 50 small variations. The contractor is now claiming loss and expense for the delay but says it cannot provide any details of the individual effects and has grouped it all together. My architect tells me that the contractor has failed to prove any loss so no money is due. Who is correct?

On the face of it, this is a classic example of a global claim: the contractor has failed to particularise which losses have been caused by which variations. In my experience, global claims tend to spark rather extreme reactions.

On the one hand, there is the temptation for the employer/contract administrator to dismiss a claim outright at the mere hint that it is global in nature. The allegation is made that such a claim offends the principle that the contractor must establish that the losses claimed were caused by the employer risk events (the variations in this instance).

In failing to do so, the contractor is effectively reversing the burden of proof. Such a claim also ignores other explanations for the cause of the claimed costs, for example shortcomings in the contractor's tender or performance and/or events which are the contractor's risk.

On the other hand, the contractor protests that the employer should not be allowed to benefit from its inability to demonstrate the causal link between the employer risk events and the losses arising where this complexity has been of the employer's own making.

Middle ground

There is a middle ground: just because a claim is global in nature does not of itself mean that it can be dismissed outright.

In [Walter Lilly & Company Ltd v Giles Patrick Cyril Mackay and another \[2012\] EWHC 1773 \(TCC\)](#), the court held that the contractor needs to prove, on a balance of probabilities that:

- events occurred that entitle it to loss and expense
- those events caused delay and/or disruption
- such delay or disruption caused it to incur loss and/or expense.

In our scenario, the contractor will need to establish firstly that the variations entitle it to recover loss and expense. Let us assume that the contractor is operating under a JCT Design and Build Contract (2011). Clause 4.20 entitles the contractor to recover loss and/or expense in circumstances where the regular progress of the works has been/is likely to be materially affected by a relevant matter, which includes a change (or 'variation'). However, there are a

number of condition precedents to being entitled to make a claim. For example:

- the regular progress of the works must be 'materially' affected by the variations
- the contractor must make its application as soon as it has become, or should reasonably have become, apparent that regular progress has been/is likely to be affected
- the contractor must also provide information and details to support its claim as the employer reasonably requires.

If these requirements are not met, there may be grounds for dismissing the claim outright.

Delay or disruption

The contract administrator has already awarded a 6-week extension of time in respect of the variations, and thus the contractor is likely to be entitled to certain prolongation costs relating to this delay. It is not clear however whether the variations caused, and/or the contractor is claiming for, any disruption costs or other loss and expense. Indeed, a claim for loss and expense might include a number of costs, for example:

- prolongation costs, including site as well as off-site overheads (head office costs)
- disruption costs arising from a disturbance, hindrance or interruption of a contractor's work progress resulting in lower efficiency or lower productivity than would otherwise be achieved
- loss of profit
- finance charges
- interest.

The problem comes in establishing that the losses claimed were caused by the events in question.

In terms of prolongation costs, albeit an extension of time may have been awarded of 6 weeks, it will be necessary to establish when the prolongation costs were actually incurred. Also just because a contractor is entitled to an extension of time for an employer risk event notwithstanding that it is concurrent with a contractor risk event, the same is not generally true in respect of its entitlement to recover loss and expense.

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Further information

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