

## CORONAVIRUS AND CAUSATION: CONCORD AND CONFLICT

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#### Part 1. The global pitfalls

“The reason why courts get the wrong answer on questions of causation is not usually because they have misunderstood the facts or lack common sense but because they have misconstrued the proper scope of the rule; the rule which provides the context in which the question of causation is being asked”

Lord Hoffmann<sup>i</sup>

How many lawyers does it take to change a light bulb? Answer: what do you mean by “change”? That’s an old joke <sup>ii</sup>. How about this one. How many versions<sup>iii</sup> of the CLC’s Site Operating Procedures does it take to break causation? Not funny, but it does lead me to wonder how we might start to unravel the quagmire of causation that it is tempting to frame under the global umbrella of COVID-19.



At DGA, we have started to see many COVID-19-related claims and are becoming increasingly involved in assisting parties with unravelling their respective causative difficulties. Some of the claims we have seen are global where the approach to causation is to merely wrap losses around the generalities of the pandemic. It is likely that more is needed, and careful thought will be required to fully understand the fundamental nature of the causes of the delay and disruption that have been suffered.

i “Common Sense and Causing Loss”. Lecture to the Chancery Bar Association by The Rt. Hon. The Lord Hoffmann. 15 June 1999

ii Credited to Mr Edward Davies: “Pedantry or Precision”. 2008

iii “Construction leadership – Construction Sector – Site Operating Procedures”. Version 5 was issued on 4 July 2020

It has always been necessary to be thorough in the analysis of causation, even in the pre-pandemic Old World, but it is particularly relevant now as parties (and probably their legal representatives) begin the process of sifting through their underlying contracts to help them establish what parts of the causative chain entitles them to time and money. There are competing views as to the extent to which the various effects of the pandemic lead a

adopt collaborative approaches to resolving these difficulties with their contracting partners. Reassuringly, we are seeing common sense in abundance and are currently involved with several parties in assisting them with their attempts to adopt strategically prudent collaborative negotiations. However, to the extent that adequate records have and are being kept, we would urge our clients to particularise their claims with thoroughness in mind to ensure that the claims do not fall foul of the trap that is “global claims”.



Over the coming months we will be presenting various articles on how parties can better particularise their claims to ensure that all aspects of the causative chain are properly, albeit proportionately, dealt with. This will include various worked examples where we will explain how various typical COVID-19-related

contractor to recovery of losses. For example, I have heard several lawyers opine that the introduction of the Government guidelines might, in fact, constitute a change in legislation and, therefore, potentially comprise a compensable event, whilst others, as equally vociferously, argue that these changes merely compel contractors to comply with existing obligations. As Lord Hoffmann said, “the argument over causation is almost always an argument over the law”.

events might impact on time and productivity and how to unravel these to ensure that losses are appropriately linked to their causative origins. We will also investigate the extent to which losses resulting from compensable events might be recovered through the process of valuing variations. That said, we thought it was appropriate in this first article to revisit our old friend, “global claims”. This should be a timely reminder of what they are and what the courts have to say about them and whether these types of claims are supported by the law or should be avoided wherever possible.

This degree of uncertainty causes significant corporate stress and we all hope that parties

## THE GLOBAL CLAIM

“Advancing a claim for loss and expense in global form is a risky enterprise”

Lord Ordinary<sup>iv</sup>

But is it a risky business?

As defined by Akenhead J in *Water Lilly*<sup>v</sup>, 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 on ...”.

The court’s position in relation to global claim has developed over time. In *John Sisk v Carmel (2016)*<sup>vi</sup>, the courts revisited the decision in *Water Lilly* and reiterated that the claimant has to demonstrate on a balance of probabilities, as a matter of fact, that:

- a) First, events occurred which entitled it to loss and/or expense;
- b) Second, that those events caused delay and/or disruption; and
- c) Third, that such delay or disruption caused it to incur loss and/or expense.

Although the court did not suggest that there is anything wrong in principle with a total cost

or global claim, it is likely that there will be added evidential difficulties which a claimant contractor has to overcome, notably that the claimant will need to establish, on the balance of probabilities, that the loss which it has incurred would not have been incurred but for the events for which the defendant is responsible. In reality, this is not always the case nor is it easy to demonstrate. As the courts emphasised in *John Doyle v Laing*<sup>vii</sup>, events inter-react with each other with infinite complexity and it becomes incredibly difficult, if not impossible, to identify what loss each event has caused. However, these difficulties do not diminish the claimant’s primary obligation to separate the causal connections between the events for which it is responsible from those



iv John Doyle Construction Ltd. V Laing Management (Scotland) Ltd (2002) 85 Con LR 98. Para 37

v Walter Lilly & Company Ltd v Mackay and another [2012] EWHC 1773 (TCC)

vi John Sisk & Son Limited v Carmel Building Services Limited (In Administration) [2016] EWHC 806 (TCC)

vii John Doyle Construction Ltd v Laing Management (Scotland) Ltd [2004] ScotCS 141

that provide it with relief.

There is no prescribed approach to doing this. As the court said in *Walter Lilly*, “it is open to contractors to prove with whatever evidence will satisfy the tribunal and the requisite standard of proof... 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”.

The reliance on Expert opinion is also a likely ingredient in successfully demonstrating global claims. As Lord McFayden noted, “causation is largely a matter of inference, and each side in practice will put forward its own contentions as to what the appropriate inferences are”<sup>viii</sup>.

In summary, Julien Bailey reminds us that a global claim “will be unobjectionable if it can be established, to a level of persuasive satisfaction, that the events in question, being events for which the owner bears contractual responsibility, had the cumulative effect of causing the contractor to suffer a delay and/or a loss”<sup>ix</sup>. That said, it is highly likely that the combination of the multitude of complex events that have arisen from COVID-19 will reduce the chances of successfully advancing a global claim. The grim reality is that detailed particularisation identifying causation will be necessary in advancing COVID-19 claims. To do otherwise may well be a risky enterprise.

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viii John Doyle Construction Ltd v Laing Management (Scotland) Ltd [2004] ScotCS 141. Para 20

ix “Construction Law”. Julian Bailey. 2nd Ed.

## MORE INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at [DGAGroup@dga-group.com](mailto:DGAGroup@dga-group.com)

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