

Analysis of delay, disruption and global claims in the context of statutory adjudication in Australia

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Abstract

There has been a fusion of delay, disruption and global claims in the context of statutory adjudication in Australia. These claims arise within a contractual setting or from principles of common law. The one thing that these claims have in common is that they arise due to an act, default, or omission by the principal, or where those matters are caused by a third person who is the responsibility of the principal. The courts have recognised that delay, disruption, and global claims are claimable and can be determined by an adjudicator under statutory adjudication. The purpose of this paper analyse delay, disruption and global claims in the context of statutory adjudication in Australia. A comparative 'black-letter' approach is adopted to analyse case law in various international jurisdiction dealing with delay, disruption and global claims in construction. The paper shows that delay, disruption, and global claims are frequently unappreciated within the framework of statutory adjudication. There are varying degrees of consideration to be taken into account where there can be compensable, non-compensable, and modified or apportioned claims. There is also causation, criticality, and concurrency to be considered. These are generally complicated factors that adjudicators are requested to consider in statutory adjudication. Those matters often lead to the unfortunate results that one of the parties on opposite sides' ends up aggrieved. The research may be of interest in international jurisdictions where statutory adjudication for the construction industry has been introduced or is being contemplated.

Keywords: Adjudication, Australia, delay claim, disruption claim, global claim

1. Introduction

This paper deals with the fusion of delay, disruption and global claims in the context of statutory adjudication in Australia.¹ A detailed overview of the problem giving rise to the need for statutory adjudication in the Australian building and construction industry as well as contemporary discussions on the topic is provided in Brand & Davenport (2012), Brand & Davenport (2011), Brand & Uher (2010) and Commonwealth of Australia (2002).

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¹ Statutory adjudication is adjudication which takes place under legislation. All Australian States and Territories have comparable legislation for the building and construction industry: see *Building and Construction Industry Security of Payment Act 1999* (NSW); *Building and Construction Industry Security of Payment Act 2002* (Vic); *Building and Construction Industry Payments Act 2004* (QLD); *Construction Contracts Act 2004* (WA); *Construction Contracts (Security of Payments) Act 2004* (NT); *Building and Construction Industry Security of Payment Act 2009* (Tas); *Building and Construction Industry (Security of Payment) Act 2009* (ACT); and *Building and Construction Industry Security of Payment Act 2009* (SA).

Delay, disruption and global claims often arise within a contractual setting or from principles of common law. The one thing that these claims have in common is that they arise due to an act, default, or omission by the principal, or a third person who is the responsibility of the principal.

The courts have recognised that delay, disruption, and global claims are claimable and can be determined by an adjudicator under statutory adjudication. The common law principles of those types of claims have been adopted by the courts, but the application of such claims remain inconsistent within the area of statutory adjudication. This is particularly where the accepted doctrines of such claims have not been fully appreciated by the courts and where there can be a regular theme that delay, disruption and global claims are categorised as claims in damages arising from a breach of contract.

This paper shows that delay, disruption, and global claims are frequently unappreciated within the framework of statutory adjudication. There are varying degrees of consideration to be taken into account where there can be compensable, non-compensable, and modified or apportioned claims. There is also causation, criticality, and concurrency to be considered. These are generally complicated factors that adjudicators are requested to consider in statutory adjudication. Those matters often lead to the unfortunate results that one of the parties on opposite sides' ends up aggrieved.

2. Delay and Disruption

It has been argued in the past that the recovery of costs on account of delay and disruption through statutory adjudication are excluded by the operation of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the NSW Act')² and the *Building and Construction Industry Payments Act 2004* (Qld) ('the Queensland Act').³ The *Building and Construction Industry Security of Payment Act 2002* (Vic) ('the Victorian Act')⁴ expressly prohibits the recovery of any time related costs⁵ that would conceivably extend to claims for delay and disruption costs.

Whilst the Victorian Act expressly bars the recovery of any time related costs, the same cannot be said for its New South Wales and Queensland counterparts. It has been claimed that delay and disruption costs amount to a claim in damages that is not claimable under the NSW and Queensland Acts. This is because damages are not referable to the performance of construction work and damages arise from a breach of contract. The exclusion of damages from the NSW Act was confirmed in *Quasar Construction v Demtech* [2004] NSWSC 116, wherein Barrett J said (at [34]):

The clear message throughout the Act is, in my opinion, that any "progress payment", including one within paragraph (a), (b) or (c) of the definition of "progress payment", can only have that

² New South Wales (abbreviated as 'NSW') is one of six states of the Commonwealth of Australia.

³ Queensland (abbreviated as 'Qld') is one of six states of the Commonwealth of Australia.

⁴ Victoria (abbreviated as 'Vic') is one of six states of the Commonwealth of Australia.

⁵ *Building and Construction Industry Security of Payment Act 2002* (Vic), s.10B(2)(b)(ii).

character if it is “for” work done or, where some element of advance payment has been agreed, “for” work undertaken to be done. The relevant concepts do not extend to damages for breach of contract, including damages for the loss of an opportunity to receive in full a contracted lump sum price. Compensation of that kind does not bear to actual work the relationship upon which the “progress payment” concept is founded.

The proposition was put that delay costs were claimable under the NSW Act where the contract sets out a mechanism for such amounts to be claimed in progress claims. In *Kembla Coal & Coke v Select Civil* [2004] NSWSC 628 (‘the *Kembla Coal* case’), McDougall J decided where the contract provides a mechanism for quantification of a progress payment, it is the mechanism that is to be adopted and where the contract provides for assessment of a progress payment, the effect of s 9(a) of the NSW Act is to be given.

Deciding whether an amount is actually damages for breach of contract or part of the consideration payable under the contract for the work, goods or services is not always easy to ascertain. Hodgson JA in *Coordinated Construction Co v JM Hargreaves* [2005] NSWCA 228 (‘the *Hargreaves* case’) (at [41]) says that any amount that a construction contract requires to be paid as part of the total contract price of construction work is generally an amount due for that construction work, even if the contract labels it as damages or interest.

Those matters were indeed taken further by the New South Wales Court of Appeal in the *Hargreaves* case (at [41]) and in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty. Ltd. & Ors* [2005] NSWCA 229 (‘the *Climatech* case’) (at [40]). Those decisions stood for the proposition that where a contract provides that progress payments include certain amounts; section 9(a) of the NSW Act strongly suggests that such amounts are to be included in a progress payment under the NSW Act.

In the *Climatech* case, Hodgson JA discussed the circumstances in which ‘damages’ may validly fall within the jurisdiction of the NSW Act. This is where the contract contains mechanisms for such amounts to be claimed, such that the requirement in section 9(a) of the NSW Act is engaged. His Honour said:⁶

In my opinion, the circumstance that a particular amount may be characterised by a contract as ‘damages’ or ‘interest’ cannot be conclusive as to whether or not such an amount is for construction work carried out or for related goods and services supplied. Rather, any amount that a construction contract requires to be paid as part of the total price of construction work is generally, in my opinion, an amount due for that construction work, even if the contract labels it as ‘damages’ or ‘interest’; while on the other hand, any amount which is truly payable as damages for breach of contract is generally not an amount due for that construction work.

Under the contract in this case, delay damages are payable only if an EOT is for a compensable cause, that is, in general some act or omission of the head contractor or the superintendent or the sub-contract superintendent; but nevertheless, they are not of their nature damages for

⁶ *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty. Ltd. & Ors* [2005] NSWCA 229 at [41] and [42].

breach but rather are additional amounts which may become due and payable under the contract...and which are then to be included in progress payments...They are therefore prima facie within section 9(a) of the Act.

It is now generally accepted that amounts on account of delay and disruption costs are claimable under the NSW Act providing there is a contractual right for the claimant⁷ to pursue such claim for costs of delay or disruption. However, intertwined with that entitlement to delay and disruption costs generally stems from an extension of time entitlement under the contract.

The above authority indicates that an entitlement to a delay cost claim only arises where there has been a positive determination under the contract for an extension of time claim. This is assuming the contract makes such a positive determination, which in most instances will be the case. Therefore, this creates the concept of an extension of time acting as a condition precedent to an entitlement to a delay cost claim under the NSW Act and this is not easily reconcilable with the claimant's entitlement to a delay cost claim in circumstances where an extension of time was not granted by a superintendent under a contract. Whilst this may be accepted, the Adjudicator is left with having to decide whether the claimant was entitled to an extension of time with respect to any delay or disruption.

In *Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd and Ors* [2008] QSC 58, McMurdo J considered that it was open to the Adjudicator to decide what the superintendent should have done in response to the claims made and to conclude that the superintendent, acting fairly, would have granted the extensions which the Adjudicator found were justified. The decisions in the *Hargreaves* and *Climatech* cases demonstrate that a claimant does not have a right to include in a payment claim under the NSW Act a claim for costs of delay or disruption as part of the value of construction work carried out under the contract, in the absence of a contractual right for the claimant to pursue such claim for costs of delay or disruption.

The above authority with respect to delay and disruption claims made under the NSW Act commonly suggests that if the contract permits a claim for delay and disruption costs arising from an extension of time under the contract, the claimant will be entitled to such claims providing an extension of time has been granted, or the Adjudicator decides that an extension should have been granted in the circumstances of the claimant's claim for delay or disruption costs.

The position, however, is different if the contract does not deal with delay or disruption claims. This is particularly where a person, who the claimant is not responsible for, causes the claimant to incur additional cost from delay or disruption. On one view this could be a breach of contract or tort by the person that caused delay or disruption and the claimant's only remedy is in damages. On another view, this could not be a claim for damages of any kind, but rather, a claim for additional costs that the claimant incurred for, among other

⁷ The "claimant" is the person *by whom* a payment claim is served (e.g., see: *Building and Construction Industry Security of Payment Act 1999* (NSW) ss. 4, 13).

things, the provision of labour to carry out construction work, based on certain disruption. This proposition can lend support from the High Court decision in *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327, followed by *Council of the City of Sydney v Goldspar Australia Pty Limited* [2006] FCA 472 (3 May 2006), which highlights the meaning of damages as being distinct from cost of works. Either way, there is difficulty in reconciling the concepts, particularly where a claim for any delay or disruption by the claimant may be in connection with the work under the contract and for construction work done or related goods and services supplied under the NSW Act or the Queensland Act.

3. Global Claims

A global claim is where a claimant does not seek to attribute any specific delay, cost or loss to a specific breach of contract, variation or direction, but alleges a composite loss as a result of all the breaches, variations or directions where it is impractical to disentangle part of the loss which is attributable to each head of claim, and none of the delay, cost or loss has not been brought about by delay or other conduct of the claimant.⁸

The concept of global claims has previously been considered by the Supreme Court of New South Wales in the context of the NSW Act. For the purpose of this paper, it is apt to refer to global claims interchangeably with total cost claims.

In *Shell Refining (Australia) Pty Limited v A J Mayr Engineering Pty Limited* [2006] NSWSC 94 (‘the *Shell Refining* case’), Bergin J accepted that a global claim for disruption and delay can be made in a payment claim, valued and determined under the NSW Act. In the *Shell Refining* case, the claim was a global claim stemming from disruption, with quantification based on a modified total cost method. Bergin J upheld the Adjudicator’s determination in the *Shell Refining* case regarding the validity of a claim under the total cost method, where her Honour said:⁹

The defendant submitted that the type of claim put forward by it in its application is not a novel one. It was submitted that it was an extremely common, simple way of putting forward a claim for loss and expense in circumstances where it is difficult to link each item to a particular breach. It was submitted that what the defendant did was to add up all the hours it had spent on the job; compare that total with the hours allowed in the tender; deduct the latter from the former to represent the unrecovered number of hours and multiply that figure by the contract rate to obtain the unrecovered cost. In this regard the defendant submitted that the Contract envisaged that in respect of such costs, what was required to be done was the making of an “estimate” (see cl 2.3(2)(e) of the General Conditions). It does not seem to me that such description can assist the defendant. That was an estimate to be provided in the Notice to the Company of a claim for an “eligible delay”. What was claimed was not merely an estimate, but a figure that had been calculated pursuant to a specific methodology. In the claim made by the defendant the method used to calculate the amount or, perhaps put more accurately, to make a judgment of its worth, was clearly set out.

⁸ *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 13 BCL 262 at [267].

⁹ *Shell Refining (Australia) Pty Limited v A J Mayr Engineering Pty Ltd* [2006] NSWSC 94 at [28].

In *Siemens v Tolco; Tolco v Siemens* [2007] NSWSC 257, Macready J, considered a claim based on a total global costs method made under the NSW Act, based on the allegation that Siemens had breached the contract, which caused Tolco loss.¹⁰ His Honour had occasion to consider Siemens' proposition that Tolco's claims were claims for damages which are not permitted under the NSW Act.¹¹ The Court did not ultimately decide the question in the context of the NSW Act on the validity of the total global costs method, nor whether such a claim amounted to damages.

In *Laing O'Rourke Australia Construction v H&M Engineering & Construction* [2010] NSWSC 818 ('the *Laing O'Rourke* case'), McDougall J considered in the context of the NSW Act claims for disruption that were characterised as global claims or total cost claims by Laing O'Rourke. H&M Engineering advanced in the adjudication as part of its overall claim that it had not sought to particularise the nexus between the individual alleged disruptive matters and the alleged consequences in terms of time and cost.¹²

H&M Engineering referred to the decision of Byrne J in *John Holland Construction Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 13 BCL 262 and to what his Honour, writing extra-curially, had said in *Total Costs and Global Claims* (1995) 11 BCL 397, together with other decisions and writings dealing with global claims or total cost claims. McDougall J outlined the premises of H&M Engineering's claims by saying:¹³

H&M denied, in its adjudication application, that claim 110 was a "global claim" (and, presumably, took the same position in relation to claims 115 and 122). It said that it had "provided more than sufficient evidence to demonstrate that as a result the [sic] vast number of breaches of the contract and acts of prevention caused solely by LORAC, H&M has incurred substantial additional work-related costs for which LORAC must reimburse H&M.

However, although H&M identified many of what it said were acts of disruption, delay or prevention, it did not seek to describe a connection between any individual act (or related groups of acts) and any particular loss of time. H&M's case was that, taken together, it was all those acts of LORAC that had caused H&M to incur the number of man hours of labour over and above those, in effect, budgeted. (Indeed, as I have noted, H&M appeared to recognise this in its adjudication application.) It is clear that H&M asserted, at least implicitly, that there were no other causes. That is because, as I have said, it claimed for each and every one of the hours in question.

McDougall J considered that it was unnecessary to exhaustively review all of the cases that dealt with global claims, or total cost claims, but considered that it was necessary to refer briefly to the decision of Byrne J in *John Holland Construction Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 13 BCL 262 and to Byrne J's paper *Total Costs and Global Claims* (1995) 11 BCL 397.¹⁴ This was because those materials were relied on by

¹⁰ *Siemens v Tolco; Tolco v Siemens* [2007] NSWSC 257 at [28].

¹¹ *Kembla Coal & Coke v Select Civil & Ors* [2004] NSWSC 628; *Quasar Construction v Demtech Pty Ltd* [2004] NSWSC 116).

¹² *Laing O'Rourke Australia Construction v H&M Engineering & Construction* [2010] NSWSC 818 at [42].

¹³ *Laing O'Rourke Australia Construction v H&M Engineering & Construction* [2010] NSWSC 818 at [44] and [45].

¹⁴ *Laing O'Rourke Australia Construction v H&M Engineering & Construction* [2010] NSWSC 818 at [74].

both parties in relation to the aspect of their debate in the *Laing O'Rourke* case. In that case, McDougall J did not ultimately consider the permissibility of a global or total cost claim in the context of the NSW Act, nor did his Honour consider that such claims amounted to damages.

The important theme in all of the above decisions¹⁵ is that the Supreme Court of New South Wales did not find that global or total cost claims were incapable of being claims made and determined under the NSW Act. It is more probable than not to conclude on the basis of those decisions that global or total cost claims are allowable under the NSW Act.

This paper advocates for the proposition that global or total cost claims are available remedies under the NSW Act and Queensland Act. This is especially where a contract between a claimant and respondent¹⁶ does not expressly recompense the claimant for delay or disruption caused by the respondent or by a person who is the responsibility of the respondent. This paper also puts forward the proposition that if a global or total cost claim is not an available remedy to a claimant due to principal factors, the notion of a modified total cost claim is open to a claimant and is an available remedy that can be pursued and determined under the NSW Act and Queensland Act.

The principles that underpin an entitlement to a global or total cost claim are supported by a number of authorities and have been derived for the purposes of this paper from English and Australian case law. It can be deduced from Smith J's decision in *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* [1994] 2 VR 386 ('the *Nauru* case') that there are four conditions that must be satisfied in order to maintain the validity of a total cost claim. These can be summarised as the following:

1. it is impossible or highly impracticable to determine the losses with any reasonable degree of accuracy;
2. the claimant's contract price must be shown to have been realistic;
3. the actual cost incurred must be reasonable; and
4. the claimant must be shown not to have contributed in any marked degree to added expense, or added to any other events for which the respondent is not responsible, subject to any of the qualifications outlined in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2002] Scot CS 110.

Smith J expressed the view that it may be permissible to maintain a composite delay/disruption claim (a 'global claim') where it was impossible and impractical to identify a specific nexus between each of the alleged events and the particular delay/disruption

¹⁵ *Shell Refining (Australia) Pty Limited v A J Mayr Engineering Pty Limited* [2006] NSWSC 94; *Siemens v Tolco; Tolco v Siemens* [2007] NSWSC 257; *Laing O'Rourke Australia Construction v H&M Engineering & Construction* [2010] NSWSC 818.

¹⁶ The "respondent" is the person on whom a payment claim is served (e.g., see: *Building and Construction Industry Security of Payment Act 1999* (NSW) ss. 4, 13).

caused. In considering the matter in the *Nauru* case, Smith J distinguished *Wharf Properties Ltd v Eric Cumine Associates No 2* (1991) 52 BLR 1, but followed *J Crosby & Sons Ltd v Portland Urban District Council* (1967) 5 BLR 121 ('the *Crosby* case')¹⁷, *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51, and *Mid Glamorgan County Council v J Devenald Williams & Partner* (unreported, Queens Bench Division decision of Official Recorder, Mr Tackaberry QC, 17 September 1991).

Smith J demonstrated in the *Nauru* case that it is permissible for a disruption claim to be framed globally where the claimant can demonstrate that it is not possible to identify the nexus between the interaction of events and their relationship to the quantum claimed.

In *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 8 VR 681 ('the *Kvaerner* case'), Byrne J said (at [11] and [12]):

Further, this global claim is in fact a total cost claim. In its simplest manifestation a contractor, as the maker of such claim, alleges against a proprietor a number of breaches of contract and quantifies its global loss as the actual cost of the work less the expected cost. The logic of such a claim is this: (a) the contractor might reasonably have expected to perform the work for a particular sum, usually the contract price; (b) the proprietor committed breaches of contract; (c) the actual reasonable cost of the work was a sum greater than the expected cost.

The logical consequence implicit in this is that the proprietor's breaches caused that extra cost or cost overrun. This implication is valid only so long as, and to the extent that, the three propositions are proved and a further unstated one is accepted: the proprietor's breaches represent the only causally significant factor responsible for the difference between the expected cost and the actual cost. In such a case the causal nexus is inferred rather than demonstrated. For present purposes, I ignore any adjustment that may have to be made for variations and extras. The unstated assumption underlying the inference may be further analysed. What is involved here is two things: first, the breaches of contract caused some extra cost; second, the proprietor's cost overrun is this extra cost. The first aspect will often cause little difficulty but it should not, for this reason, be ignored. The likelihood and nature of some extra cost flowing from the breaches of contract may be readily apparent from the nature of each of the breaches and a general understanding of its impact on the building project. It may also be apparent in what precise way this breach led to the extra cost. In most, if not all, cases, however, there is an intervening step relating the extra cost to the breach. For example, it may be that a breach means that work has to be redone, or that work takes longer to perform, or that its labour or material cost increases, or perhaps that there was extra cost due to disruption or loss of productivity. Again, in the given case this may be readily apparent but difficulties will arise for the parties and the tribunal of fact where the global nature of the claim involves the interaction of two or more of these intervening steps, particularly where they and their role are not, in terms, identified and explained. It is the second aspect of the unstated assumption, however, which is likely to cause the more obvious problem because it involves an allegation

¹⁷ In the *Crosby* Case, reliance on that method is justified in cases where the claim depends on an extremely complex interaction of events and where it may well be difficult or even impossible to make an accurate apportionment of the total extra cost between several causative events.

that the breaches of contract were the material cause of all of the contractor's cost overrun. This involves an assertion that, given that the breaches of contract caused some extra cost, they must have caused the whole of the extra cost because no other relevant cause was responsible for any part of it.

Based on the above extract, it can be seen that Byrne J set out four elements that are required in order to succeed in a global claim, which are not dissimilar to the four set out in the *Nauru* case. The four elements can be identified as the following:

1. the claimant might reasonably have expected to perform the work for a particular sum, usually the contract price;
2. the respondent committed breaches of contract;
3. the actual reasonable cost of the work was a sum greater than the expected cost; and
4. the respondent's breaches represent the only causally significant factor responsible for the difference between the expected cost and the actual cost.

The concepts of the total cost method have been well illustrated by the extra judicial writings of Byrne J in two articles named *Total Cost & Global Claims* (1995) 11 BCL 397 and *Global Claims: Maze or Way Forward* (1996) 15 ACLR 113.

Byrne J's decision in the *Kvaerner* case indicates that a global claim may be relied upon where it is impractical to disentangle 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, and the proprietor's breaches represent the only causally significant factor responsible for the difference between the expected cost and the actual cost. In fact, Byrne J was of the view that where it is found to be impossible or impractical to identify each aspect of the nexus, a demonstration of its probable existence is sufficient.

It can be accepted that the total cost method can be used in claims relating to disruption where the claimant has had difficulty in assessing the impact of individual acts or omissions in financial terms. Where a respondent caused disruption and loss of productivity, it was found: (a) that it was permissible to establish the threshold nexus between the alleged breach and the alleged disruption by establishing that there is no other explanation for the disruption¹⁸; and (b) that the capacity of the events that caused disruption may be inferred.¹⁹

Furthermore, where a respondent has been responsible for interruptions beyond the control of a claimant and for acts or omissions by the respondent's agents, this may support a global claim.

¹⁸ *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* (1992) 10 BCL 179 at [192]; *Ralph M Lee Pty Ltd v Gardner & Naylor Industries Pty Ltd* SC Qld, Moynihan J, 1753/1991, 11 February 1993, unreported, BC9302590 at [5].

¹⁹ *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* (1992) 10 BCL 179 at [192].

Those propositions were demonstrated in the *Crosby* case, whereby Wilcox J said:²⁰

...In the manner of pointing a blunderbuss at a target it is maintained that there were many RFI's, and there was considerable delay. The delay in part can be explained by other causes but a balance is left which must be caused by the volume of RFI's. In addition, by reason of the volume of them negligence must be concluded. It is termed a global claim. It can properly be described as a global claim in the sense that it is the antithesis of a claim where the causal nexus between the alleged wrongful act or omission of the defendant and the loss of the plaintiff has already been clearly spelt out...

In other words, a total cost claim is a claim in which the nexuses between cause and effect in individual cases is 'globally' and not on an item-by-item basis. It is not necessary to prove that all the matters, which formed part of the total cost claim, were the responsibility of the respondent. However, it is necessary for the claimant to demonstrate that any liability for disruption, which falls on the claimant, has no material effect. This was considered in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2002] Scot CS 110, where Lord McFadyen said (at [37]):

...Failure to prove that a particular event for which the defender was liable played a part in causing the global loss will not have any adverse effect on the claim, provided the remaining events for which the defender was liable are proved to have caused the global loss...

The claimant is not required to demonstrate causation, the nexus of the facts with causation and the adequacy of the information relied upon as the basis for the total cost claim. This was addressed in *John Holland Pty Ltd v Hunter Valley Earthmoving Co Pty Limited* [2002] NSWSC 131, whereby McClellan J said:²¹

The description of a claim as a "global claim" is familiar to those involved in the construction industry. Generally, it is used as a "short-hand" method of describing a claim, which does not readily permit of the individual identification of each of its component parts.

The consequence from the above is that the burden of proof effectively passes to the respondent to produce evidence of non-compensatory events, which caused or contributed to the overrun.²² This places a considerable tactical burden on the Respondent.²³

In the event that the respondent can demonstrate that the claimant caused or contributed to the overrun of the costs claimed on a global basis, the question arises whether the claimant's whole global claim should fail. The answer must be no because the figures forming part of the global claim can be adjusted under the principle of a 'modified total cost claim' in order to provide a just measure of extra cost. This proposition would arise if an allocation of responsibility were attributable to the claimant, whereby the Adjudicator should

²⁰ *London Underground Ltd. v Kenchington Ford plc and others* (1999) CILL 1452.

²¹ *John Holland Pty Ltd v Hunter Valley Earthmoving Co Pty Limited* [2002] NSWSC 131 at [12].

²² See *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* (1992) 10 BCL 179 and Byrne J, *Total Costs and Global Claims* (1995) 11 BCL 397.

²³ *Saccharin Corp Ltd v Wild* [1903] 1 Ch 410.

apply a 'modified total cost' approach to the task of assessment. Such an approach was accepted in the *Crosby* case, where Donaldson J said:²⁴

I can see no reason why (the arbitrator) should not recognise the realities of the situation and make individual awards in respect of those parts of individual items of the claim which can be dealt with in isolation and a supplementary award in respect of the remainder of these claims as a composite whole.

The concept in the *Crosby* case was somewhat expanded in *John Doyle Construction v Laing Management (Scotland) Ltd* [2004] Scots CS 141 (11 June 2004), whereby Lord Drummond Young LJ said (at [16]):

...if it cannot be said that events for which the employer is responsible are the dominant cause of the loss, it may be possible to apportion the loss between the causes for which the employer is responsible and other causes. ...Where the consequence is delay as against disruption, that can be done fairly readily on the basis of the time during which each of the causes was operative. During [that period] each should normally be treated as contributing to the loss, with the result that the employer is responsible for only part of the delay during that period. Unless there are special reasons to the contrary, responsibility during that period should probably be divided on an equal basis...

Where disruption to the contractor's work is involved, matters become more complex. Nevertheless, we are of opinion that apportionment will frequently be possible in such cases, according to the relative importance of the various causative events in producing the loss. ... It may be said that such an approach produces a somewhat rough and ready result. This procedure does not, however, seem to us to be fundamentally different in nature from that used in relation to contributory negligence or contribution among joint wrongdoers.

The concept of apportionment in *John Doyle Construction v Laing Management (Scotland)* [2004] Scots CS 141 has not been entirely appreciated within the context of the NSW Act and Queensland Act. The present authority in Australia within the confines of statutory adjudication has only gone so far as supporting global or total cost claims on the dictum in *John Holland Construction Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 13 BCL 262.

4. Conclusion

It is implicit that delay, disruption and global claims can be permissibly made by a claimant and determined by an Adjudicator under the NSW Act. The Supreme Court of New South Wales considered such claims within the context of the NSW Act and generally supported their application. Whilst the authority in New South Wales is not binding on the Supreme Court of Queensland it is submitted that the available remedy for delay, disruption and global

²⁴ *J Crosby & Sons Ltd v Portland Urban District Council* (1967) 5 BLR 121 at 136.

claims within the context of the Queensland Act is persuasively supported by the dicta of New South Wales.

The contract is the genesis to support the right for a claim on account of delay or disruption costs arising from an extension of time granted under the contract, or where an Adjudicator decides that an extension of time ought to have been granted under the contract. The remedy of global or total cost claim concepts under the NSW Act and the Queensland Act are not curtailed in the absence of a contractual right to claim for delay or disruption costs. This is especially where it is not possible to identify the nexus between the interaction of events and their relationship to the quantum claimed. This is however subject to common law precedent that encapsulates the elements that are required to be made out to support global or total cost claims and the concept of apportionment.

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