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Global Claims in Engineering and Construction Projects

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Abstract

In the UK over the last 50 years or so, legal developments in relation to extensions of time and/or monetary compensation for delays in construction projects, have been both cautious and incremental. In order to contend with the practical difficulties inherent in the construction industry, the courts have established various legal concepts and principles, not least those pertaining to claims which, given the often complex nature of construction projects, are evidentially difficult to prove; and where a myriad of events, which are both the employer and contractor responsibility, may have caused a composite loss and/or delay. The foregoing claims are commonly understood by the construction industry as being global in nature, the legal determination and assessment of which remains, to a degree intractable.

In the last 20 years or so, there has been a growing perception in the construction industry that the UK courts are becoming more sympathetic towards global claims. This perception is evidenced in a revision made between the 1st and 2nd Editions of the Society of Construction Law's Delay and Disruption Protocol, which has moved from global claims being *"rarely accepted by the courts"* to *"an apparent trend for the courts to take a more lenient approach towards global claims"*.

This thesis examines the foregoing proposition by adopting an exhaustive, historical case based analysis of the UK case law relevant to global claims from its origins in the 1960's, until the present day. The doctrinal approach, including an in-depth analysis of authoritative literature on the subject, reveals that aside from a softening of judicial language and certain clarifications; the UK courts are not, in fact, taking a more lenient approach to global claims. The thesis also provides an updated and fresh perspective on various legal principles germane to the phenomena of global claims, such as the burden of proof, causation, contributory negligence, the dominant cause and apportionment.

The research also identifies and explains certain jurisprudential disparities between the English and Scottish courts, in particular how causation is applied differently to global claims where competing causes are evident. In consequence, it is submitted that despite creative application of the law, the disparity in the judgements, north and south of the border may have inadvertently tightened the Gordian knot, the courts set out to untangle. In light of this complexity, the thesis also includes a framework with support diagrams,

in order to assist a claimant in navigating its way around the preconditions required in order to maximise its chances of successfully pleading a claim which may include an element of globality.

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CHAPTER 1: INTRODUCTION

1.1 Background

The construction industry is a highly significant proportion of the UK's economy. The Office of National Statistics released its Construction Statistics Report in August 2018, which identified that it had contributed 6% to the annual Gross Domestic Product in 2017, as well as having an influence on the UK's main economic indicators such as inflation and employment.[1]

Notwithstanding its marked influence on the nation as a whole, it would be reasonable to posit the notion that, despite the planning schedule being the top performance measure[2]; construction projects in the UK, are susceptible to delays[3]. Indeed, the UK Industry Performance Report 2017[4], based on the UK Construction Industry Key Performance Indicators, reported that construction projects as a whole were delivered on time or better, only 66% of the time[5]. For projects of greater complexity, the statistics appear to worsen significantly, the Chartered Institute of Building[6] conducted a survey of more than two thousand schemes and found that over two thirds of those, were delayed beyond the original completion date; with approximately a fifth of those projects being late by over 3 months.

Whatever the reasons for a significant percentage of construction projects in the UK being delayed[7], the list of which is interminable, a historical review of the UK Industry Performance Reports, among others, would suggest that the construction industry is systematically failing to deliver projects on time. The findings are somewhat at odds with the UK Government's

[1] The Office of National Statistics, Construction statistics: Number 19, 2018 Edition, p 13. The Office of National Statistics EMP 13: Employer by industry released on 14th August 2018 revealed that the industries 2.3 million workforce accounted for approximately 7% of the UK's total employment, excluding the peripheral service/supply businesses, who rely heavily on the industry

[2] KPMG Global Construction Survey 2017, "Make it or Break it – Reimagining governance, people and technology in the construction industry, Figure 5

[3] George Agyekum-Menash, Andrew David Knight "The Professional's Perspective on the causes of project delay in the construction industry" Engineering, Construction and Architectural Management, Vol. 24 no. 5 2017 p 828-841 and associated references at p 838 to 841. The UK Industry Performance Report 2017, compiled by Glenigan, CITB, Constructing Excellence, Department for Business, Innovation and Skills and BRE SMARTWaste, p 13.

[4] Ibid.

[5] Ibid, 8.

[6] Chartered Institute of Building Website: http://www.ciob.org/insight/timep-management.htm, based on the CIOB Report titled Managing the Risk of Delayed Completion in the 21st Century conducted between December 2007 and January 2008.

[7] The National Construction Contracts and Law Report 2018 found the following main reasons for project delays, in descending order: Employer Variations, Slow Pace of Construction, Provision of Employer Information, Scheduling and Construction Programmes, Contractor's Variations, Poor Specifications, Assessment of Delay and Extension of Time, Lateness of Payment and Testing and Quality of Materials.

2025 vision for the industry, which among other things, aims to achieve a *"50% reduction in the overall time, from inception to completion, for newbuild and refurbished assets"*.[8]

An inevitable corollary to the late delivery of construction projects, is that disputes arise between the parties as to whom bears contractual responsible for those delays and therefore, and perhaps more importantly, who is ultimately responsible for the associated damages and/or loss which, in general, flow from those delays.

Amid the apparent lack of coherence between the UK Government's aspirations and the industry's continued failure to deliver projects on time, third party determiners bound in the dispute resolution processes of construction law, both in the UK courts and the various alternative dispute resolution forums, are nonetheless, compelled to decide upon these matters however complex.

The most common cause which third party determiners must decide upon, relates to the failure of the parties to correctly administer the terms of the contract[9]. The consequences of this failure often create an environment where the contractor is compelled to make claims against the employer for either an extension of time to the contract duration, and/or the associated monetary compensation resulting from those delays. To claim successfully for compensation in Scotland, a contractor must satisfy on a balance of probability, the following judicial triptych set out by Lord Macfadyen, in the 2002 case of *John Doyle v Laing Management*:

i. The existence of one or more events which the employer is responsible;

ii. The existence of loss and expense is suffered by the contractor; and

iii. A causal link between the event or events and the loss and expense suffered by the contractor[10].

In 2012, Akenhead J confirmed the position is essentially the same in the English courts, in effect paraphrasing Lord Macfadyen's conclusions, whilst issuing his decision in the seminal case of *Walter Lilly v McKay*.[11]

[8] HM Government "Industrial Strategy: government and industry in partnership, Construction 2025. July 2013. Based on industry's performance in 2013.

[9] Arcadis, Global Construction Disputes Report, 'Don't Get Left Behind' [2016], National Construction Contracts and Law Report 2018.

[10] An outer house decision in the Court of Session - *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2002] ScotCS 110, para 35 and reaffirmed by Lord Drummond Young in the appeal to the inner house - *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2004] SC 173.

[11] *Walter Lilly & Company Limited v Giles Patrick Cyril McKay and DMW Developments Limited* [2012] EWHC 1773 (TCC). Mr Justice Akenhead [486], set out the principles of a global claim, including the following

Furthermore, in setting out the guidance above Lord Macfadyen went on to say:

"In some circumstances, relatively common 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 interact with each other in very complex ways, so that it becomes difficult, if not impossible, to identify what loss and expense each event has caused."[12]

The observation made by his Lordship above, can by inference, lend itself to the proposition that to establish contractual entitlement (point (i) above) and the quantification of damages and / or loss and expense (point (ii) above); are for the most part relatively straightforward to prove, more often than not however, it is the issue of causation (point (iii) above) where the contractor generally fails to successfully plead its case. Causally linking an event, perhaps a critical delaying event, to the damages and / or loss and expense associated with that event, often referred to as the *"causal nexus"*[13], is notoriously problematic to prove[14].

Indeed, even the most senior and well respected members of the judiciary have wrestled with the concept of causation generally, among those the now retired Lord Hoffman, had this to say:

"When I was taught the law of torts by the late Sir Rupert Cross in Hilary Term of 1955, quite a lot of it seemed fairly obscure but the subject of causation was more opaque than most." [15]

Stephen Furst QC and co-editor of Keating on Construction Contracts, required reading for any professional involved in construction law related matters, opens his article *"It's Not My Fault, A Consideration of Problems of Causation in Construction Cases"* with the following gambit:

"Thus, the Contractor has to 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 (or loss and damage as the case may be)."

[12] Supra note 10, [35]

[13] The Hon Sir Vivian Ramsey, Stephen Furst et al, *Keating on Construction Contracts* (10th Edition Sweet and Maxwell 2016) Chapter 9 Section 3 (d) paragraph 9-064.

[14] Anneliese Day QC and Jonathan Cope 'Lilly and Doyle: A Common-sense approach to Global claims' SCL Paper, May 2013, 7. Nicholas Baatz QC, 'Factual and Legal Causation in Construction and Infrastructure Law: A Thorny Subject' A paper based on talk given in London on 6th October 2015, Bristol on 15th October 2015 and Manchester on 22nd February 2016, Society of Construction Law [2016], 2.

[15] Leonard Hoffman, "Causation" [2005] LQR 592, 1.

"It is a curious fact that although problems of causation permeate the law and in particular construction law, it is an area which is often barely considered or, where considered, yields no consistent answers." [16]

A particularly acute problem which arises with causation in construction law relates to the concept of global claims. Definitions of what constitutes a global claim proliferate, which has, it could be argued, created legal uncertainty as to how contract administrators, adjudicators, arbitrators and judges articulate, decide and assess such matters.

To illustrate the point, it is helpful at this stage to provide a sample of definitions which may constitute a global claim:

i. Keating on Construction Contracts: *"A global claim, however, 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. Global claims are also sometimes referred to as composite claims. In such a claim the claimant does not seek to attribute specific loss or delay to a specific breach or event, but rather alleges a global or composite loss allegedly the result of the breaches or events relied upon."*[17]

ii. The 1st Edition of the SCL Delay and Disruption Protocol (2002): "*A global claim is one 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."*[18]

iii. Lord Macfadyen in the case of *John Doyle*: *"...a global claim might be made on the basis that the aggregate loss had been caused by the interaction of a number of events..."* [19]

iv. Mr Justice Akenhead in the case of *Walter Lilly v McKay*[20]: *"...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*

[16] Stephen Furst QC, "It's not my fault, a consideration of problems of causation in construction cases", Keating Chambers, [2007], 1.
[17] Supra note 13.
[18] The Society of Construction Law, Delay and Disruption Protocol, (October 2002), 56.
[19] Supra note 10, [15].
[20] Supra note 11, [485].

> *balance between costs and payment which is attributed without more and by inference to the causes of delay and disruption relied on."* [21]

There are inherent causative difficulties therefore, in proving that various events/causes have been responsible for the composite loss claimed, when claims are deemed global in nature. This is compounded by the myriad of different kinds of causes, prevalent on and particular to, construction projects. In November 2018, HKA (one of the world's leading advisory and expert services construction consultancies) issued a research report[22], which found that from 257 disputed projects analysed, an incredible 3,043 causes were identified, with an average of seven primary and six secondary causes per project.

Notwithstanding the evidential difficulties, there is also an industry wide perception that the term global claim has *"pejorative overtones"* as it succinctly set out by his Humphrey Lloyd J:

"…as it is usually intended to describe a claim where the causal connection between the matters complained of and their consequences, whether in terms of time or money, are not fully spelt out, but, implicitly, could and should be spelled out." [23]

Of significant importance is the growing perception that the UK courts may be relaxing their approach to the permissibility of global claims[24]. This apparent shift has been identified by the Society of Construction Law. In the 1st Edition of the Delay and Disruption Protocol released in October 2002, it stated the following:

[21] Ibid.

[22] Toby Hunt, Charlie Woodley, Crux Insight Claims and Dispute Causation – A Digital Perspective, November 2018 HKA Consulting

[23] *Bernhard's Rugby Landscapes Ltd v. Stockley Park Consortium Ltd* [1997] EWHC Technology 374 (7th February 1997), 24/30

[24] Ian Pennicott QC, 'Global claims' Keating Chambers Seminar to the Society of Construction Law', 8th June 2006, Jonathan Cope, MCMS Ltd Practical Law Construction Blog: http://constructionblog.practicallaw.com/globalclaimsafterwalterlillyvmackay/. In the Introduction to his book Global claims in Construction, Dr Ali D Haidar opines "*Historically, the courts had been reluctant to accept global claims. Recently, the situation has been shifting and the courts have been accepting these types of claims or a modified version of them. This is due to the distinctive characteristics of the newly constructed projects and the types of problems envisaged on the very large projects that are common nowadays. The complexity of the activities performed on a construction site, the great number of professionals and entities that are involved in the execution, the new types of contracts involving design, procurement and build and the procurement process, where much of the materials are supplied from different countries, make the process of individual claims, where each cause has a distinctive effect and a distinctive loss, almost impossible. "*

"The not uncommon practice of contractors making composite or global claims without substantiating cause and effect is discouraged by the Protocol and rarely accepted by the courts." [25] [emphasis added]

However, the 2nd Edition of the Delay and Disruption Protocol released in February 2017, sets out the following important amendment to its original proposition:

"The not uncommon practice of contractors making composite or global claims without attempting to substantiate cause and effect is discouraged by the Protocol, despite an apparent trend for the courts to take a more lenient approach towards global claims." [26] [emphasis added]

The intention of this research is to identify and analyse the development of the UK courts[27] attitude to global claims, and the apparent and relatively recent shift towards leniency, by providing a historical legal context and analysis on the matter. The analysis will be divided into three separate time periods; namely from the origin of global claims in the 1960's until the release of the 1st Edition of the SCL Protocol in 2002, then up until the seminal decision in *Walter Lilly* in 2012, and then up until the time of writing and submission of this thesis. In particular, focus will be given to the case law and legal commentary, throughout these three time periods selected. In doing so, certain preliminary legal considerations must be addressed, prior to a specific analysis and conclusions relating to global claims in construction contracts. It is also important to examine why there now appears to be a discernible tension between the SCL's attitude to global claims, and the courts increasing tolerance to same.

Furthermore, decisions in the English and Scottish courts over the last 6 years or so, arguably creates a disparity in how the requisite courts will decide upon claims plead, which appear global in nature.

1.2 Research Question and Outcomes

In light of the perceived change in attitude towards global claims as set out above, the main research question, can be distilled as follows:

[25] Supra note 18, para 1.14.1
[26] Society of Construction Law, Delay and Disruption Protocol: 2nd Edition February 2017, para 17.
[27] UK courts include a review of judgements from the Sheriff Courts, Inner and Outer House of the Court of Session in Scotland and the appellate courts in England including the TCC, the Court of Appeal and Supreme Courts.

"Has the UK courts apparent move towards a more lenient approach to global claims created a fairer system and/or created more legal uncertainty?"

The question is important, because the current literature available in this area, including court judgments, falls some way short of providing a unifying and workable understanding of how the concepts of causation in the law of contract and in particular global claims, is applied and decided upon. This has been recognised by Winter who asserts the following reasoning:

"…so few points of law now get to be decided in the English construction courts (as most disputes are finally resolved in adjudication…"[28]

Indeed, the foregoing lack of cohesion and clarity engenders the following proposition:

"The apparent trend for the UK courts to take a more lenient approach in their interpretation of global claims has established greater certainty in the UK legal system".

This thesis will consider whether greater certainty has been established or whether it has created further confusion as to how the construction industry defines and understands what constitutes a legitimate and successful global claim asserted by the contractor in relation to an extension of time and/or monetary compensation on projects, capable of being decided upon, even in part, and which is further complicated by the many and varied factual and contractual pre-conditions which have led to the dispute.

Furthermore, the industry's standard forms of contract which attempt to provide the parties with cohesive guidance and clear obligations with respect to the management of delays and/or monetary compensation, do not expressly mention the term global claim and are therefore unable to deal effectively with many of the inherent complexities which exist in construction and engineering projects of scale, which often include claims which may appear global in nature. In consequence, there have been various common law interventions, where the courts have been compelled to establish various dicta and principles and formulate decisions, which are necessitated by the limitations of the standard forms.

1.3 Objective of the Study

The objective of the research is firstly, to examine and expand upon imperative preliminary considerations, namely how the civil standard of proof and the applicable causative tests,

[28]Jeremy Winter, "How should delay be analysed – dominant cause and its relevance to concurrent delay", [2009] A paper presented to the Society of Construction Law International Conference held in London, 6th-7th October 2008.

apply to how a global claim may be admitted, plead and decided upon in the UK courts. This examination will provide an essential frame of reference to the thesis and provide the foundation upon which to then understand how the more particular legal principles and rules which arise, are applied in construction claims deemed global in nature which by their very nature are evidentially and causatively weak. Secondly, the thesis will examine, define and conceptualise how the law considers global claims, by undertaking a case based analysis, tracing their historical legal development within the context of extension of time and/or monetary claims from their origins in the 1960's up until 2018. Thirdly, the thesis will analyse and articulate the possible tension between the position of the Society of Construction Law, maintained in its 2nd Edition of the Delay and Disruption Protocol, and the UK courts decisions, in its apparent move towards leniency on global claims. Fourthly, based on the findings of the case based analysis, the thesis will identify, examine and evaluate the various legal principles which arise through the prism of both the Scottish and English courts. Finally, the thesis will make future suggestions on how the current legal landscape in particular could be improved in relation to global claims, as well as re-balancing risks between an employer and contractor, and how these matters can be influenced by the wider socio/legal landscape.

Sub-objectives, and research questions which are linked to the foregoing include:

i. Does recent case law, create a divergence between English and Scots Law in relation to global claims[29]?

ii. In Doyle, Lord Drummond Young has stated that the apportionment of a Global claim can be likened to Contributory Negligence – can it?[30]

iii. Does the Burden of Proof transfer from Claimant to Defendant in a global claims situation?[31]

iv. Is the assessment of competing causes the same in both England and Scotland?[32]

v. "Is the dominant cause test still appropriate?"[33]

vi. Are there ways to rebalance the contractual risks between employer and contractor?

vii.

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[29] Divergencies have been identified at Chapters 6 & 7.
[30] Section 6.9.
[31] Section 6.10.
[32] Section 6.6 and 6.7.
[33] Section 6.8.

1.4 Methodology and Research Method

1.4.1 Methodology

Since the aim of legal research is to *"contribute to the body of knowledge in a given field"*[34], a pre-requisite to achieving such an aim is to select an appropriate methodology (or methodologies) in support of such research. It has been suggested that legal scholarship has historically followed two traditions, the 'doctrinal analysis'[35] and since the 1960's, the 'law in context'[36]. A doctrinal form of methodology has been described as "*Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments"*[37]. In contrast, the starting point for the law in context is not the law *"…but problems in society which are likely to be generalised or generalisable."*[38]

Chynoweth is of the view that theoretical literature on the nature of legal scholarship is scarce,[39] however he references and expands upon, Arthurs[40] helpful classification of legal research methodologies, which is replicated as follows:

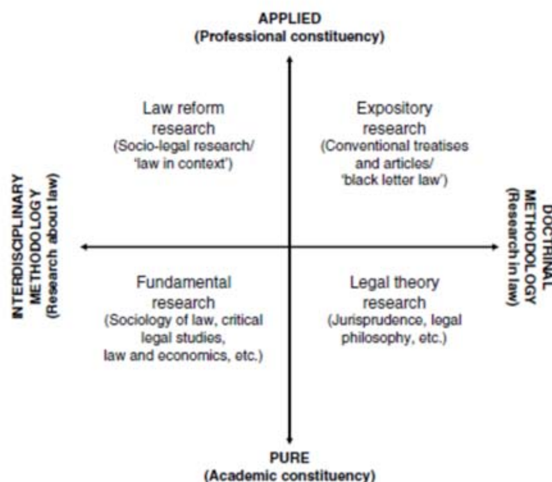

Figure 1 – Arthurs' Legal Research Methodologies

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[34] Dawn Watkins, Mandy Burton, *Research Methods in Law*, 2nd Edition, (Routledge 2017), 5
[35] Often called 'Black Letter Law'.
[36] Mike McConville and Win Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007), 1
[37] Pearce D, Campbell D and Harding D, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission 1987*.
[38] Supra note 36, 1
[39] Andrew Knight, Les Ruddock, *Advanced Research Methods in the Built Environment* (Wiley-Blackwell Oct 2008), Chapter Three, Legal Research, 1
[40] Arthurs, H.W. Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law, Information Division, Social Sciences and Humanities Research Council of Canada, Ottawa. (1983), 63-71.

In order to examine the development of the law in the UK in relation to global claims in construction and engineering projects, various legal research methodologies/styles were considered. This is important, as identified by Cryer et al, *"Every legal research project begins from a theoretical basis or bases, whether such bases are articulated or not. The theoretical basis of a project will inform how law is conceptualised in the project, which in turn will determine what kinds of research questions are deemed meaningful or useful, what data is examined and how it is analysed (the method)."*[41]

Since the sources of this research[42] are grounded in precedent, statute and authoritative texts, the research is less reliant and/or supported by empirical data, lending itself to a more qualitative approach. This is recognised by Chynoweth, who opines that legal research is more generally concerned with *"…deductive and inductive logic, the use of analogical reasoning and policy analysis…"*[43]. In practise, and to varying degrees, the thesis has considered multiple methodologies when addressing the research question(s) and proposition set out above[44]. In conclusion, the predominant methodology adopted has been a doctrinal approach, including case-based reasoning, as the methodology most appropriate to this research.

This approach is appropriate as the research will benefit from a focused and specific analysis, comparison and explanation of the case law, identification of the relevant legal principles and rules and authoritative legal texts relating to extension of time and or monetary compensation in construction projects, where causation and evidence is problematic. The thesis will then identify difficulties within the current legal landscape in this area and make constructive suggestions as to how they may be made more consistent in the future, bringing further clarification and a fresh perspective to what could be considered a rather opaque and uncertain area of construction law.

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[41] Cryer et al, *Research Methodologies in EU and International Law*, Bloomsbury 2011, 5
[42] Disputes relating to evidential difficulties with time and money matters on construction projects.
[43] Supra note 39, 37.
[44] Caroline Morris, Cian Murphy, *Getting a PhD in Law,* Hart Publishing 2011, Douglas Wood, Paul Chynoweth, Julie Adshead, Jim Mason, *Law and the Built Environment, Wiley-Blackwell*, 2011, Chapter 3. Alan Watson, Legal Transplants, Scottish Academic Press 1974. BS Markesinis, *Foreign law & Comparative Methodology,* Hart Publishing, 1997. Presentation by Dr Terry Hutchinson and Nigel Duncan, Doctrinal Legal Research, City University London. Mike McConville and Wing Hong Chui, Research Methods for Law, Edinburgh University Press 2007. G. Holburn, *Butterworths Legal Research (2nd Edition)*, London: Butterworths, 2001. W.H. Putman*, Legal Research, Analysis, and Writing*, Clifton Park NY: Thomson/Delmar Learning, 2005.

This expository 'black letter law' approach which is *"concerned with the systematic presentation and explanation of particular legal doctrines*" [45] and/or legal principles, will evaluate the current application of concepts such as indivisible damage, sine qua non i.e. the "but for test", novus actus interveniens, dominance and various other causative tests, all of which are relevant to the subject of global claims.

Chynoweth notes that *"…there is no fundamental distinction between the process of academic doctrinal analysis and the legal analysis undertaken by the practicing lawyers or judges"*[46] and it is precisely because of this notion that a doctrinal methodology is appropriate for this thesis. A central objective of this research is to provide construction professionals and lawyers with an anthology and analysis of how the concept of causation interplays in the distilled environment of extension of time and or monetary compensation claims which could be defined as being global in nature, made by a contractor in projects of varying size and complexity. It will also identify anomalies or divergences between the Scottish and English courts and provide clarification to circumstances or principles which remain unsettled. To address the research questions and objectives above, the research must be carried out doctrinally, i.e. concerned with matters 'in law' as opposed to being interdisciplinary[47] i.e. concerned with matters 'about law'[48].

The thesis also sets out a general framework and decision making flowchart which could facilitate a claimants chances of success in pleading parts of its claim, considered to be global in nature. Given the framework is centred upon guiding a claimant for court proceedings, it is vital therefore that such guidance is based upon the case law which has developed around global claims. In this regard, it is evident that upon analysis of the findings from the case law set out Chapters 3 to 5; the absence of any sizable data concerning how global claims are quantified suggests that any quantitative methodology would be inappropriate, and unreliable.

Notwithstanding the foregoing, in addition to a doctrinal approach, since the thesis compares the legal development of global claims in both the Scottish and English jurisdictions, a form of comparative methodology must also be considered. Importantly, the thesis does not intend to carry out a macro comparison[49] of the laws of Scotland and England, but instead a micro

[45] Douglas Wood, Paul Chynoweth, Julie Adshead, Jim Mason, *Law and the Built Environment, Wiley-Blackwell*, 2011, Chapter 3, 31.
[46] Ibid, 32.
[47] Akin to the law in context.
[48] Supra note 45, 29, and as identified in Figure 1 – Arthurs' Legal Research Methodologies above.
[49] Macro comparisons: *"…take place between legal systems or even legal families/cultures"* - Jaakko Husa, *A New Introduction to Comparative Law* (Hart Publishing 2015), 102.

comparison[50] is adopted, to specifically identify the similarities and divergences between how the foregoing jurisdictions understand and decide upon matters pertaining to global claims. This methodology adopts the research methods, set out at section 1.4.2 below. In taking such approach, divergences in particular legal principles between the jurisdictions are identified, which are then analysed, contrasted and their efficacy or otherwise commented upon, which should make an identifiable contribution to knowledge on the subject.

The socio-legal impact relating to disputes in construction and engineering projects is only briefly and tangentially discussed at section 7.5 (i.e. in relation to how the insistence of liquidated damages by the employer can adversely affect the contractors productivity and therefore profit, which may then have societal impacts); therefore any consideration of interdisciplinary methodologies such as socio-legal research is only considered, at a rudimental level. Socio-Legal has been characterised as *"…looking beyond legal doctrine to understand law as a social phenomenon or social experience"*[51] and whilst it is recommended as an area of future research as set out at section 8.3, the purpose of this thesis as set out in the introductory chapter, is limited to analysing the legal rules pertinent to global claims.

1.4.2 **Research Method**

Once an appropriate methodology (or methodologies) are chosen, they must be underpinned by a robust research method or strategy. Watkins and Burton differentiate 'method' from 'methodology' in legal research as *"…what you actually do to enhance your knowledge, test your thesis, or answer your research question",* which is to be contrasted with methodology which is *"…(more generally) a method or body* of methods used in a particular field of study or activity". [52]

In this regard, various research techniques were applied, to ensure that the conclusions were based upon a comprehensive review of the available case law and literature germane to global claims. Post dedicated meetings with my supervisors, the following method(s) were undertaken:

[50] Macro comparisons *"…aimed at legal rules (also individual legal concepts), which regulate broadly the same thing and are compared with each other."* Supra note 49, 101.
[51] Caroline Morris, Cian Murphy, *Getting a PhD in Law,* Hart Publishing 2011, 35. See also Chapter 2 titled *Socio-Legal studies a challenge to the doctrinal approach,* written by Fiona Cownie and Anthony Bradley, which forms part of Dawn Watkins and Mandy Burton, *Research Methods in Law*, 2nd Edition, (Routledge 2017).
[52] Supra note 34, 2.

i. Identification of the most appropriate sources Legal Research Databases, to access the relevant case law and statutes.[53]

ii. Identification of the most appropriate sources to access authoritative texts. This was initially carried out on a hierarchical basis, which was then expanded upon by adopting the techniques set out below. [54]

iii. Upon identification of the appropriate legal and text sources, a dynamic excel spreadsheet was created in order to systematically record and connect the relevant materials.

iv. Initially a range of string searches were established, such as 'global claims in construction', concurrent delay in construction', 'delay and disruption', 'the standard of proof in construction'. The string searches were continually modified to take into consideration the nuances of the various databases. Often this meant reducing the string permutations to single word searches.

v. Once the cases/articles/sources were collated, the abstracts were duly reviewed and where relevant, the articles/sources were filed into various categorisations, which aligned with either the thesis chapters, or specific principles, such as dominance, concurrency, causation and the standard of proof.

vi. Once a detailed review of the most relevant and importance sources was completed, I was then able to carry out the process of 'foot note mining/surfing' in order to locate further citations, relied upon in the primary texts. In relation to cases, I was able to connect the various references by the judges to the case law, relied upon in their judgements.

vii. After various revisions at progressive stages of the research, it eventually became apparent that there were no new sources available. I continued to carry out the exercise(s) up until the later stages of the research, to ensure there was no new case law and/or material, which should be taken into consideration.

[53] Sources included, Westlaw, LexisNexis, HeinOnline, JSTOR, Bailii and the University of Strathclyde Library.

[54] The initial identification of authoritative texts, commenced with the following example journal sources, The Construction Law Journal, Construction Law, Law Quarterly Review, The Society of Construction Law, Oxford Journal of Legal Studies, Cambridge Law Journal, International Journal of Law in the Built Environment. The following books also facilitated the initial search, Emden Construction Law, Causation in Construction Law, McGregor on Damages, Keating on Construction Contracts and Hudson's Building and Engineering Contracts.

viii. From this analysis, it became apparent that there were certain key authors who may be fruitful sources of information and accordingly, searches were carried out online to source the various articles which they had published, and where they have been cited.

From this considerable body of material and research, I was then able to discard various sources along the way, as the thesis was rationalised and subsequently edited.

1.5 Significance of the Study

Examining the concept of causation and how it relates to global claims in such a focused area of the law of contract is important, because current academic literature, including court judgments, falls some way short of providing any unifying and workable definitions and/or reliable and coherent direction to construction and legal professionals, which would allow sufficient legal certainty. The thesis attempts to frame, identify and analyse these difficulties and also to provide pragmatic suggestions as to how current causative tests and principles may be understood more clearly.

Indeed, regular discussions with construction and legal professionals (including third party decision makers), reveals that their understanding of causation either in fact or in law, the relevant tests and the associated principles in this area of contract law (and in particular global claims), varies widely. Furthermore, their opinions tend to be influenced by an expansive and varied number of factors, which can only contribute to the overall uncertainty as to how global claims are to be dealt with by third party decision makers.

It is envisaged therefore, that this research will be of interest to all key members of the construction and engineering industry including Public Bodies, Private Employers, Engineers, Surveyors, Contractors, Third Party Decision Makers and Construction Lawyers among others.

1.6 Original Contribution to Knowledge

The research provides an exhaustive historical anthology and analysis of the UK case law germane to global claims from its origins in the 1960's, up until time of writing. A doctrinal analysis of this kind, provides an opportunity to critically examine the current position of global claims in both English and Scottish courts, based on judicial authority. As this thesis combines case law with the most pertinent UK literature on the subject, the analysis and conclusion set out in Chapters 6,7 and 8 are therefore based on current and credible legal thinking on the subject.

The thesis addresses some of the more complex legal principles and rules which arise in cases where claims are deemed to be global in nature, and categorises these into headings which are readily digestible, with the intent of allowing the reader a compendium of where these principles sit and/or overlap in a construction context, which can often be difficult to compartmentalise. It is submitted that to the author's knowledge, such anthological detail has not been carried out in previous works.

In particular, the following headings are considered to be a fresh perspective on global claims, and it is submitted, when the findings are combined, provide an appropriate contribution to knowledge:

i. **No Composite Awards issued by the UK Courts:** The thesis concludes, among other things, that despite a softening of the judicial language, and global claims being allowed to proceed to trial in principle, there are no recorded UK cases of a claimant expressly making a claim on a global basis, nor does there appear to be a UK court decision, which has allowed a composite award to be made in this regard.

   To the authors knowledge, this express conclusion, has not been articulated previously, when based upon a review of the literature and case law, up until time of writing. Such a position could have a wide reaching effect on the construction industry, and its key stakeholders. There is therefore, every chance a claimant may be allowed to proceed to either the Scottish or English courts, with at least a proportion of its claim being global in nature, however, it must be realistic in considering its chances of receiving a positive award for such a pleading and build this into its risks versus returns analysis, when informing key stakeholders, prior to pursing a court action of this nature.

   Despite the various literature and case law on the subject, there are no special principles or legal waivers[55] attaching to global claims, and a claimant must be alive to such conclusions.

ii. **No move towards leniency:** It would be reasonable to submit there is therefore no move towards leniency when pursuing a global claim, and that claimants must weigh up the risks of succeeding, based on its ability to articulate entitlement, the existence of a loss and the causal link between the losses and events identified.

[55] Such as relaxing the principles relating to the standard of proof, or causation.

iii. **Apportionment in England**: Whilst apportionment is clearly applicable in Scotland, the thesis concludes that upon analysis of the case law in England, there is no reason why rational apportionment may not be available for competing causes which are not time related see section 6.7.3 below. Existing literature on the subject of competing or concurrent causes referred to in subsequent sections of this thesis, either agrees or disagrees that rational apportionment is available in the English courts in relation to matters of delay only. This thesis finds that apportionment for loss and expense only, is allowable.

iv. **Apportionment is akin to contributory negligence:** Section 6.9 below finds that, in the author's view, and for reasons not previously considered, there are no sustainable arguments to confute Lord Drummond Young's position that rational apportionment is not fundamentally different to parties share of damage in contributory negligence cases.

v. **Concurrency – a hybrid solution:** Section 7.6.2 iii advances the novel position that upon analysis, if there is an express clause in a construction contract which allows loss and expense for delays associated with Relevant Events (as per the JCT Suite of Contracts used in *City Inn* or *Walter Lilly*), then, in the absence of terms to the contrary, there is no reason, why the contractor should not also be entitled to the loss and expense, associated with extension of time granted due to and employers Relevant Event, even for matters of concurrency. This hybrid and original position expands upon the eminent Lord Carloway's insightful opinion in the appellate *City Inn* decision and has not been considered by either the UK Courts (at least not expressly) or academic commentary. It is the authors position that adopting such an approach is more equitable, consistent, legally sustainable and may go some way to rebalancing an element of the contractual risks, which as explained at Chapter 6 of this thesis, can inherently favour the employer in construction contracts.

vi. **Burden of proof does not transfer:** Section 6.10 below, updates and reaffirms that at time of writing, it is incorrect to suggest that the burden of proof transfers to the defending party, when a claimant asserts a claim which may be global in nature.

vii. **Areas of uncertainty identified:** Section 7.3 identifies elements within the law that appear contradictory in nature and provides a fresh perspective as to where the law remains uncertain in relation to global claims.

viii. **Correct application of causation:** The thesis investigates causation in relation to global claims, for example, as set out at Section 6.8, it is submitted that the dominant cause test still applies equally in both Scottish and English jurisdictions. Perhaps the most significant and original finding in relation to causation, is that the thesis challenges the Scottish courts approach in *City Inn* as to how causation is considered in cases when concurrent causes of delay are present and argues that the English approach in *Royal Brompton* is to be preferred, Section 7.3.3 refers. The same section of the thesis also highlights potential difficulties with the proof of materiality, not previously considered in the current literature.

ix. **Divergencies identified:** The thesis identifies divergencies in how the English and Scottish courts determine and assess global claims[56] and anthologises these findings, into a single corporeal body of work.

x. **Framework:** Given the complexity of construction claims in relation to both time and/or monetary compensation, it is inevitable that claimants will continue to incur losses which are difficult to articulate and may therefore contain elements of their claim which have a global element. Circumstances may arise, where a claimant is compelled to submit such global claims, and in doing so it must ensure that it maximises its chances of success. The crux of its success will rest upon the quality of its case, both pre and during the trial process. In particular, the claimant will have to persuade an experienced judge that it's position, on balance, merits a positive award i.e. one which is above zero. In consequence, section 7.4 sets out a framework which followed by a claimant to ensure that the global elements of its claim, can be credibly plead based on precedent. This framework can be read in conjunction with the framework checklist diagram at Appendix 1 and the decision making flow chart found at Appendix 2.

xi. **Re-balancing contractual risks:** Importantly, given the meagre profit margins of the UK's contractor's, the thesis also makes unique suggestions to positively re-balance certain contract provisions, which are currently of greater benefit to the employer. In doing so, the author argues that unliquidated damages may be more equitable and provides a model clause in this regard.

[56] The findings of this case based analysis have been presented in a flowchart at Appendix 2, which provides a visual aide as to where the potential differences between the English and Scottish courts may lie in relation to global claims.

xii. **Future suggestions**: A detailed analysis of the case law has revealed further gaps in knowledge and makes further suggestions as to research topics which may address such matters.

Finally, it is submitted that originality is also validated as the thesis has been written, based upon the personal perspective of 25 years of contract / legal experience as a Chartered Quantity Surveyor, who has worked in Private Practise, Contracting, Claims Consultancies, as Quantum Expert and is a proven Expert Witness; involved in over 60 disputes on Building, Infrastructure, Process and Energy and Utilities Projects, in countries such as Australia, South Africa, Dubai, Sri Lanka, Abu Dhabi, Saudi Arabia, Russia, Vietnam, Kurdistan, Oman, Pakistan, Germany, Turkey, Qatar, Turkey, USA, Thailand and the UK.

1.7 Structure of Thesis

The structure of this thesis is divided into the following sections:

i. Chapter 1: Introduction;

ii. Chapter 2: Preliminary Considerations;

iii. Chapter 3: The Rise of the Global Claim;

iv. Chapter 4: Post the Delay and Disruption Protocol 2002;

v. Chapter 5: Post Walter Lilly to Present Day;

vi. Chapter 6: Analysis and Discussions;

vii. Chapter 7: Further Considerations and Suggestions; and

viii. Chapter 8: Conclusions.

CHAPTER 2: PRELIMINARY CONSIDERATIONS

2.1 Introduction

As evidenced in Chapter 1, for a construction claim relating to an extension of time and/or monetary compensation to succeed in the UK courts, the asserting party must prove on the balance of probability, that the event entitles it to claim, that a loss has occurred because of the event, and that there has been a causal link between the event and the loss.

The difficulty of establishing the foregoing pre-conditions is amplified when the construction claimed is argued on a global basis because to do so risks providing "…*an inadequate explanation of the causal nexus between the breaches of contract or relevant events/matters relied upon…"*[57].

However, prior to delving immediately into the specific legal principles which govern and are directly related to global claims; in the first instance, there is merit in considering a more general legal context upon which a tribunal[58] must apply those principles. A meaningful starting point would be to set out the relevancy of the standard of proof to be applied in such cases and the key role that causation plays in assisting decision-makers apply the specific legal principles, which will be identified and analysed later in the thesis.

2.2 The Standard of Proof

2.2.1 General Background

The difficulty in defining what constitutes a legitimate construction claim for an extension of time and/or monetary compensation, capable of being decided upon, even in part, is compounded by the many and varied factual, contractual and legal pre-conditions which has led to the averment.

In the course of a construction case of this nature, the parties will often dispute:

i. A rule which has (or appears to have) been broken;

ii. The facts that surround the case in point;

iii. If the facts are agreed, the amount of time and/or money which is to be awarded; and/or

[57] Supra note 17.
[58] In this context a tribunal may relate to any third party decision maker, such as a Judge, Arbitrator, Adjudicator, Expert Determiner and the like.

iv. If the facts are agreed, a point of law and or contractual entitlement surrounding those facts. When a party requires that a tribunal must decide upon either of point's (a-d) above and its consequences, it must do so in adherence to the appropriate standard or degree of proof to be met, taking into consideration the evidence adduced. The evidence adduced may be in oral, documentary or physical (real) form.

Therefore, for a party to succeed, it must meet the appropriate standard of proof required of it. But what does this actually mean in practice? To contextualize that question, it is important to, in the first instance, provide a brief commentary on how the UK courts and legal commentators have defined the standard of proof in general terms, and how this is then interpreted in a construction and engineering context.

The general common law standard of proof in the UK has been defined as follows:

"The standard of proof, in essence, can be loosely defined as the quantum of evidence that must be presented before a Court before a fact can be said to exist or not to exist"[59]

And

"…degree of persuasion which the tribunal must feel before it decides that the fact in issue did happen".[60]

And

"…the degree of the fact-finder's belief or confidence in the truth of a disputed proposition or, more broadly, factual hypothesis (p) after she has examined and weighed the evidence."[61]

Therefore, if the tribunal believes that the evidence adduced is persuasive enough to arrive at a positive finding, then the burden of proof has been discharged by the claimant[62] and his case is deemed to have been proven in fact. This approach was affirmed by Lord Hoffman in *re B (Children) (FC):*

"If a legal rule requires a fact to be proved…, a judge or jury must decide whether or not it happened. …The law operates a binary system in which the only values are 0 and 1. The fact

[59] Law Teacher Internet Article, www.lawteacher.net/freelawessays/criminallaw/criminalorcivilstandardofprooflawessays .php, 1
[60] *Re B (Children) (FC)* [2008] EWCA Civ 282 [4]
[61] Ho Hock Lai, A philosophy of Evidence Law: Justice in the Search for Truth (first published 2008), published to Oxford Scholarship Online January 2009, Standard of Proof Chapter Page 2 of 63.
[62] For convenience, this thesis will adopt "claimant" as the pursuer/asserter of a position raised to a court and/or tribunal except where referring to specific cases where "pursuer" or "plaintiff" may be adopted where appropriate.

either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened. "[63]

Arriving at a satisfactory standard of proof is problematic, indeed *"absolute accuracy in judicial fact finding is unattainable"*[64] and that *"in settling the standard of proof we are deciding the shortfall which is tolerable"*[65]. The realisation that evidence adduced, and the standard of proof to bear is not absolute, has influenced the jurisprudential developments of the UK courts to settle upon two standards of proof which are to be satisfied for civil and criminal proceedings.

2.2.2 The Standard of Proof in Civil Proceedings

The common law in the UK courts promulgates that there are two standards of proof which are required to be met separately, depending on whether the case in point, relates to either criminal or civil proceedings.

It is well established that in criminal proceedings, the claimant must prove its case, *"beyond reasonable doubt"*, and in civil proceedings, the claimant must prove its case on *a "preponderance of evidence,* or *balance of probability"*. These standards were distinguished by Denning LJ, in the well-known case of *Miller v Minister of Pensions*, where in relation to the standard of proof required for criminal proceedings, he elucidated as follows:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice." [66]

In relation to the standard of proof required for civil proceedings, Denning LJ had this to say:

[63] *Re B (Children) (FC)* [2008] EWCA Civ 282, para 2.
[64] Rosemary Pattenden, "The risk of non-persuasion in civil trials: the case against a floating standard of proof" [1988] CJQ 1998 Vol 7 P220-233
[65] Ibid
[66] *Miller v Minister of Pensio*ns [1947] 2 All ER 372, 372F.

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not", the burden is discharged but, if the probabilities are equal it is not." [67]

The definition *"more probable than not"*, seems prima facie, to be relatively straightforward to understand, however in practice it can be a notoriously complex and difficult legal hurdle to overcome[68]. Indeed, in *Bater v Bater*, a subsequent case post his comments in *Miller v Minister of Pensions*, Denning LJ went on to say:

"It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification <u>that there is no absolute standard in either case."</u> and that the degree of probability should be "*…commensurate with the occasion."*[69] [emphasis added]

The aforementioned quotation and indeed subsequent commentary in more recent case decisions has not helped to settle how the courts define the civil standard of proof. In the case of *Hornal v Neuberger Products Ltd*[70] at the court of appeal, Denning LJ, Hodson LJ and Morris LJ were asked to decide upon a case of breach of contractual warranty or alternatively misrepresentation, as to whether the defendant had sold a lathe which was soag re-conditioned. The question was appealed from a judgement by Leon J, where he had decided that, were the case to be found on the civil standard, then the misrepresentation had been made, however if the case were to be found on the criminal standard then it would have not. Whilst all three appeal judges agreed that the civil standard would apply, it is their observations on the civil standard of proof itself, which have sparked further academic debate.

Whilst Denning LJ, reverted to his views on the subject given in *Bater*, where he stated that there is no absolute standard, and the degree of probability should be commensurate with the occasion; it is in the judgements of Hobson LJ and Morris LJ, which in the view of Professor Redmayne, carried a different interpretation[71]. Redmayne suggests that Hobson LJ's opinion that *"the balance of probability may be more readily tilted in one case than in another"*[72], and Morris LJ's opinion that *"the very elements of gravity become a part of the whole range*

[67] Ibid.
[68] Mike Redmayne, 'Standards of Proof in Civil Litigation' 62 Modern Law Review (1999) 167.
[69] *Bater v Bater* [1950] 2 All ER 458 at p 459.
[70] *Hornal v Neuberger Products Ltd* [1956] 3 All ER.
[71] Supra note 68, 176.
[72] Ibid.

of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities"[73], is akin to saying *"that more evidence is required to prove more serious allegations"*[74]. That dicta does not advocate a different standard cited by Denning LJ above, but instead supposes that more evidence is required for matters of a graver nature.

In his comparison of *Bater* and *Hornal*, Redmayne identified what he describes as "*two main deviations*" from the civil standard of proof, namely the "*flexible standard*" and the *"prior probability standard"*.[75]

The flexible standard of proof which was borne out of Denning LJ's comments in *Bater* suggests that the standard of proof varies according to the seriousness of the issues, while the prior probability standard, borne out of Morris LJ's and Hobson LJ's comments in *Hornal*, suggests that *"the standard of proof remains fixed but the degree of evidence needed to satisfy it varies because more serious events are said to be less probable"*[76]

Academic and legal opinion on this issue was mooted until the matter was finally laid to rest in the case of *re B (Children)*[77]. In this House of Lords decision concerning cross allegations of child abuse, Lord Hoffman took the opportunity to clarify the courts presupposition on how the standard of proof should be understood:

"I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."

And

"There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.[78]

In effect this judgment reinforced Denning LJ's dicta set out in *Miller*, defining the civil standard of proof as being satisfied when the evidence adduced revealed a set of facts as having occurred being *"more probable than not*"[79].

[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] *Re B (Children)* [2008] UKHL 35.
[78] Supra note 29, 13 and 15
[79] Supra note 34

In the same judgement, Baroness Hale provided an exemplar judicial review of preceding case judgements, explaining in great detail how the civil standard of proof may have been construed as promoting a "*heightened standard*" and her reasoning for disagreeing with this premise. At paragraph 62 of her judgement, she concurs with Lord Nichols in *re H and others (Minors)*[80] as follows:

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."[81] [emphasis added by Baroness Hale]

In the same judgement she went on to say:

"Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies"[82].

In this opinion, Baroness Hale could scarcely be more explicit in condemning the possibility that a heightened civil standard of proof exists. She then went onto to say*, "As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability"*. Baroness Hale therefore expressly negates the rationale that there is indeed any connection between the seriousness of an allegation and the balance of probability of it occurring, not least a *"heightened"* probability.

Reiterating Lord Birkenhead's allusion to a creature walking in Regents Park in *re H (Minors)*, Baroness Hale went onto to say:

"Consider the famous case of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward used for walking dogs, then of course it is more likely to be a dog

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[80] *In re H and others (Minors)* [1996] AC 563, 586

[81] Notwithstanding that she disagreed with the section of Lord Nicholls judgement where he stated *"This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters"*, Baroness Hale felt that the "more sure" wording could be construed as suggesting a higher standard than the simple preponderance of probabilities.

[82] Supra note 77 [70]

than a lion. If it is seen in the zoo next to the lion's enclosure when the door is open, then it may well be more likely to be a lion than a dog". [83]

Lord Birkenhead's judgement was also alluded to previously by Lord Hoffman in *Secretary of State for the Home Department v Rehman*, where he stated that:

"*It would need more cogent evidence to satisfy one that the creature seen walking in Regents Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian."* [84] [emphasis added]

It would appear therefore, that the judge's commentary in *re B* relating to how the civil standard of proof is to be understood and applied, is more consistent with what Professor Redmayne, categorises as the prior probability standard, in this analysis the standard of proof remains fixed. Where it differs from Baroness Hale's judgement is that the prior probability standard assumes *"more serious events to be less probable"*, in this regard and to reiterate the aforementioned, Baroness Hale is of the opinion that "*there is no logical or necessary connection between seriousness and probability",* however at paragraph 62, she did appear to agree with Lord Nichol in Re H where*, inter alia*, he had stated *"the more serious the allegation the less likely it is that the event occurred".*

Taking the foregoing into consideration, it would be reasonable to conclude that the civil standard of proof is fixed, with the courts adopting a common-sense approach to the evidence adduced determining on the balance of probability, if the occurrence of fact is more probable than not. The courts will also take into consideration, the cogency of the evidence, relative to the seriousness of the allegation.

The adjective "cogent" is defined in the Oxford English Dictionary as in the case of an argument as one which is *"having power to compel assent or belief; argumentatively forcible, convincing."* [85] Its etymology originates in the 14th century from the Latin cogent-em, the present participle of cogere meaning to drive together, compel, constrain, co -together and agree to drive.

Put another way, when deciding upon civil proceedings, the courts will require a more compelling and convincing argument dependent on the nature of the allegations. It is difficult and probably distracting to attempt to articulate how the courts will apply this approach, in

[83] Supra note 77 [72]
[84] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 [55]
[85] Oxford English Dictionary: http://www.oed.com/view/Entry/35831?redirectedFrom=cogent#eid

terms of what a more compelling argument depending on the gravity of the allegation might mean in practice, but it would be reasonable to conclude that the evidence has to be on balance, more cogent for a case relating to fraud than one relating to a claim for an extension of time and/or money.

2.2.3 **Balance of Probability**

As has been demonstrated, it would now be correct to say that the civil standard of proof is fixed, and the courts will determine the existence of a fact on the balance of probability i.e. its existence is more probable than not.

The reliance on the noun "probability" provokes mathematical connotations, indeed at a TECBAR conference in 2009, Davies J stated[86]:

"Expressing that in percentage terms, if a judge concludes that it is 50% likely that the claimant's case is right, then the claimant will lose. By contrast, if the judge concludes that it is 51% likely that the claimant's case is right then the claimant will win. One may well ask how the judge is expected to measure the probabilities of a case to 1%."

This view is supported by case law, in *Davies v Taylor*[87], in an appeal concerning a recently separated widow's claim that, prior to her estranged husband's death in a road accident, a reconciliation was more probable than not. If it was probable, she would have been entitled to claim damages from the driver of the other car, who had admitted that his negligence has caused the death of her husband. Lord Simon provided the following commentary:

"Beneath the legal concept of probability lies the mathematical theory of probability. Only occasionally does this break surface – apart from the concept of proof on balance of probabilities, which can be stated as the burden of showing odds of at least 51 to 49 that such-and-such has taken place or will do so" [88]

This mathematical approach has been attempted in the courts by forensic scientists utilising a statistical analysis known as Bayes' theorem. In essence, the theory is *"an algorithm for combining prior experience with current evidence"*[89] to arrive at the probability of an event. However, the courts have been reluctant in adopting a formulaic approach in determining the

[86] HHJ Stephen Davies, TeCSA/TECBAR Conference 22 October 2009 titled "What proof on the balance of probabilities means in theory".
[87] *Davies v Taylor* [1974] AC 207
[88] Ibid, 219
[89] Bradley Afron, "Bayes Theorem in the 21st Century" Science 3 June 2013, Vol 340 no 6137 p1177-1178.

probability of a fact being established, for example in *Nulty v Milton Keynes Council*[90] an appeal decision to establish on balance, how and by whom a fire had started at a recycling centre near Milton Keynes, Toulson LJ had this to say:

"Sometimes the "balance of probability" standard is expressed mathematically as "50 + % probability", but this can carry with it a danger of pseudo-mathematics, as the argument in this case demonstrated. When judging whether a case for believing that an event was caused in a particular way is stronger that the case for not so believing, the process is not scientific (although it may obviously include evaluation of scientific evidence) and to express the probability of some event having happened in percentage terms is illusory."

The reasoning that such a formulaic approach may have been rejected, is because statistical analysis is merely one facet of the judge's decision making process, furthermore, Bayesian theory is also subjected to challenges such as an element of subjectivity being required in its formulation, and the myriad computational possibilities, much to the frustration of eminent members of the mathematical community[91]. It is suggested that, on a more elemental level, much like delay analysis, judges are reluctant to rely too heavily on technically sophisticated approaches, which are outside their own competences. Of course, where appropriate they will rely on court experts for clarification.

In deciding upon whether the court is satisfied on a balance of probability, it must be borne in mind that it will not simply select one of a series of possibilities, even if one of those possibilities is more likely than the others. Akenhead J in a paper to the Society of Construction Law provides clarity on this matter stating that:

"The Tribunal must look at the evidence and decide not what is most or more probable but what probably happened or was said: there is a difference".[92]

He explains this opinion by using the case of *Fosse Motor Engineers v Conde Nast Magazine*[93], where the evidence adduced suggested five possible causes of fire:

i. *"A cigarette carelessly discarded by one of the agency workers;*

[90] *Michael Nulty Deceased, Wing Bat Security Limited (formally known as DBI Support Services Limited), National Insurance and Guarantee Corporation Limited v Milton Keynes Borough Council* [2013] EWCA Civ 15, para 35.
[91] Angela Saini "A formula for justice" The Guardian 2 October 2011.
[92] The Honourable Mr Justice Akenhead, "Causation, Loss and Damage: The Challenge of Chance" (December 2010) SCL D118 p2.
[93] *Fosse Motor Engineers Ltd v Conde Nast & National Magazine Distributors Ltd* [2008] EWHC 2037 (TCC)

ii. *A cigarette carelessly discarded prior to 6 p.m. by a non-Comag employee;*

iii. *An intruder (bent on arson) securing entry to the warehouse before 6 p.m.;*

iv. *An intruder (bent on arson) entering the premises after 6 p.m.; and*

v. *Electrical equipment left by the heating contractors.”*[94]

The expert evidence in this case did not point to one particular potential cause, on balance, as being the most probable. And whilst not ruling out any of the five alternative causes of fire as impossible, Akenhead J arrived at the opinion that the claimant had not satisfied, on a balance of probability, that the fire was most probably started by any of the scenarios.

In his address to the SCL audience in this regard, Akenhead J relayed the case concerning *Rhesa Shipping v Edmunds*[95]. The case concerned a ship called the Popi M which sank in calm Mediterranean seas, due to the sudden entry of water at its port side. The competing causes responsible for sinking the ship were either wear and tear or that the vessel was struck by a moving submerged object (i.e. a submarine). The case originated in the commercial courts, where Bingham J had felt compelled to decide upon either of the two possibilities, and thus accepting on a balance of probability that the vessel was struck by a submerged object. The decision was appealed and eventually found itself in the House of Lords, where it was decided that since the proximate causes were *“virtually impossible”* and the other *“extremely improbable”*, the correct conclusion was the true cause of the loss could not be established, on balance, and the claimant had therefore failed to discharge the burden of proof in this instance. In the leading judgement Lord Brandon stated:

“…the legal concept of proof of a case on the balance of probabilities must be applied with common sense. …If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving the event occurred lies has therefore failed to discharge such burden.”[96]

[94] Ibid, [69].
[95] *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948 (HL); also [1985] 2 All ER 712, [1985] 2 Lloyd’s Rep 1.
[96] Ibid, 11.

Akenhead J agreed with the House of Lords decision and reiterated that Bingham J should not have been compelled to choose between two possible theories, which were both "*virtually impossible*" and the other *"extremely improbable"*. He concluded that Bingham J, should have remembered the third option open to him, i.e. *"that the shipowners had failed to discharge the burden of proof which was on them"*[97], and subsequently decide against the claimant.

It is also important to note, that if there are several possible options, which may be the cause of matter averred, the courts will not rank those options. In *Fosse Motors*, Akenhead J stated:

"What is not acceptable, at the very least in a case like the current one, is to identify that there are, say, (as here) five possible causes, rank them each in percentage terms as possibilities and then select the possibility with the highest percentage as the probable cause. The only circumstances in which it would be legitimate would be if the highest ranked cause was the one which on all the evidence the judge was satisfied was the probable cause of the incident or loss in question. This proposition was, I believe, accepted ultimately by Counsel for both parties. I consider that it is dangerous and generally a fruitless occupation to seek to rank possibilities or probabilities in percentage terms in any event."[98] [emphasis added].

Notwithstanding that the courts are able to decide that a claimant has failed to discharge the burden of proof, a judge should not be tempted to adopt this position by way of default if he/she is actually able to decide on balance, one way or the other. In his paper presented to the teCSA/TECBAR Conference in 2009, Davies J sent out a note of caution to his learned colleagues drawing from Baroness Hale's comments in *re B*[99]:

"My Lords, if the judiciary in this country regularly found themselves in this state of mind, our civil and family justice systems would rapidly grind to a halt…

In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did.

[97] Ibid.
[98] Supra note 93, [67].
[99] Supra note 77, [31-32].

But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof." [100]

The above guidance is helpful, because it is maintaining the prerogative that either a tribunal or a judge must ultimately decide; therefore, if a decision maker finds it more likely than not that something did take place, then it is treated as having taken place, and a decision is made accordingly.

It is established that the civil standard of proof is fixed, and the courts will determine the existence of a fact on the balance of probability i.e. is it more probable than not. In doing so, the courts will be reluctant to adopt a formulaic approach, but will use common sense, taking into consideration all of the evidence adduced.

In terms of how courts will apply common sense, in his SCL lecture, Akenhead J refers to the case of *Humber Oil v Sivand*, where Lord Justice Evans stated:

"The reference to common sense must be accompanied by a reminder that it is not a subjective test, which would be an unreliable guide. It implies full knowledge of the material facts and that the question is answered in accordance with the thinking process of a normal person. The reference to "material" facts means that some mental process of selection is required. It is not enough in my judgement, to specify "common sense" standards without identifying the reasons involved." [101]

The foregoing explanation of the jurisprudential development of the civil standard of proof in such general terms is important, because it provides an essential context as to how a tribunal will or should specifically approach and decide upon, matters relating to a contractor's claim for and extension of time, and/or money, plead or deemed to have been plead on a global basis.

2.2.4 <u>The Civil Standard of Proof in relation to Global Claims</u>

This section of the thesis will examine how the current consensus concomitant with the general civil standard of proof described above, functions in specific relation to extension of time, and/or monetary compensation, averred by a claimant on a global basis. Although on the face of it, those unfamiliar with construction law, may perceive this examination to be

[100] Supra note 86, 3. Davis J had this to say as a warning shot across the bows of judges in the lower Courts, who are reticent to make a decision - *"…any judge who does not want to risk a similar admonition from the appeal court is unlikely to go down that path, tempting though it may be on occasions."*
[101] *Humber Oil Terminal Trustee Ltd v Owners of Ship Sivand* [1998] EWCA Civ 100, note 12

relatively straightforward, a detailed analysis will show that due to particular distinctions in construction and engineering projects, the courts have been compelled to develop and apply various legal principles/techniques[102] to a number of complex issues raised, by both claimant and defendant. The complexity is particularly evident in claims deemed global in nature, because by definition, there will be an assertion that multiple events have combined in some way to cause various effects on the project, such as delays and/or additional costs, which may be plead on an unparticularised, composite basis.

The previous section of the thesis centred on the general civil standard of proof to be applied as to whether on a balance of probability facts/events existed or otherwise and then it had to be established as to whether they could be said to have caused the damage. It is important to set out the general standard of proof in this way, because it provides the legal foundation as to how this standard is more specifically interpreted and applied in relation to global claims. In a claim for an extension of time, and or monetary compensation which may be global in nature, it is generally not the existence of the event/facts that are in dispute, site records are ordinarily available to prove such events existed, for example late release of design information, equipment damage, scaffolding delays and/or additional steelwork will be recorded in site diaries, photographs, subcontract records, progress reports and project schedules. It is more commonly the case that the dispute centres upon whether the events caused the delay to the project or caused the claimant to incur additional costs. Matters of causation will be considered later in the thesis.

It has been established that the standard of proof in civil proceedings is fixed; therefore, to successfully plead a global claim to a tribunal on a construction and engineering project, the claimant must be able to provide the decision maker with a satisfactory level of evidence with sufficient quality as to enable him/her, on a balance or probability, to *"discharge the burden of proof"*[103].

Given that the purpose of this section is deliberately limited to setting out more preliminary and general legal considerations, in order to provide a context to the historical case based analysis set out in Chapters 6 to 8 below, the remainder of this section will examine the current judicial thinking in relation to the standard of proof in global claims.

[102] The principles, which include the dominant cause / concurrency / apportionment and how the standard of proof translates into practical examples accepted by the courts, will be dealt with in the subsequent chapters.
[103] Ibid.

Perhaps the most influential case in recent years to articulate how the court understands the standard of proof in relation to global claims in construction contracts, is set out in *Walter Lilly v Mackay & DMW Developments*[104]. The case was brought before the TCC in July 2012, and in many ways, it is an example of what could be regarded as a classic, traditional construction project, in that a contractor Walter Lilley & Company Limited ("WLC"), was engaged by an employer, DMW Developments Ltd ("DMW") to build three substantial residences in the city centre of London[105]. The project overran and WLC claimed for an extension of time and the associated delay and disruption costs, which DMW argued comprised of a global claim.

In setting out his judgement Akenhead J took the opportunity to clarify what information must be provided by the contractor (in terms of the amount and quality) to allow the architect or quantity surveyor to ascertain the amount due.

In relation to the proof required to successfully plead an extension of time, Akenhead J had this to say:

"The Court or arbitrator must decide on a balance of probabilities what delay has actually been caused by such Relevant Events as have been found to exist.... How the court or arbitrator makes that decision must be based on the evidence, both actual and expert."[106]

Much of what Akenhead J opined upon in relation to delay, correctly made specific reference to the rights and obligations set out in the contract between the parties[107], namely the JCT Standard Form of Building Contract 1998 Edition Private Without Quantities, incorporating various specific amendments, as modified by the Contractors Designed Portion Supplement Without Quantities 1998 edition (revised November 2003), as amended by the Schedule of Amendments dated 26 May 2004. However, it is submitted that the following could be applied

[104] Supra note 11.
[105] A detailed chronology of the case is provided at section 5.2 below.
[106] Supra note11 [362].
[107] In analysing case law in relation to construction law matters, one has to be careful to presume, what at first read may appear to be legal opinion that can be applied generally. A tribunal will first look to the wording of the contract, which sets out the intention of the parties at its formation. This view is succinctly articulated by John Marrin QC, in the conclusion to his paper titled "Concurrent Delay Revisited" and presented to the Society of Construction Law at a meeting held in London on 4th December 2012, where he states: *"...there is one truth which can scarcely be over-emphasised. The answers to the questions raised will depend on the terms of the contract which governs the relationship between the parties."*

generally in relation to proof of delay[108], absent express contract terminology to the contrary[109]:

i. It is imperative that the experts are objective in their approach[110];

ii. Expert's should avoid relying on *"theoretical possibilities*"[111];

iii. Where possible, it is favourable to consider proving delays *"on a month by month basis what in each month was probably delaying overall completion"*[112] based on a factual analysis;

iv. In terms of delay and opinion *"the Court should be very cautious about giving significant weight to the supposedly contemporaneous views of persons who did not give evidence."*[113]

v. The courts will also be cautious in relation to how *"one treats what the parties were saying at the time in relation to issues which later were resolved"*. [114] Therefore a matter which is in actuality found to be unjustified, and therefore *"irrelevant in any analysis of what caused the delay."*[115]

In relation to proof required to prove a loss and expense claim[116], Akenhead J considered that it was *"difficult and undesirable to lay down any general rule as to what in every case needs to be provided"*[117]and that it is important to bear in mind what information and knowledge the architect already has on the project, and who may already have *"a very substantial amount of information at its fingertips"*[118]. With this in mind, the contractor's obligation[119] in terms of the level of evidence to support his claim, must allow the architect to form an opinion that *"direct loss and/or expense has been incurred or is likely to be incurred…because the regular*

[108] Supra note 11 [384], Akenhead J stated: *"The areas of caution highlighted above* (i.e. points i – v above) *are important generally"*. The general legal principles are differentiated from the "types" of proof, and delay and loss and expense methodologies, which are to be expected by the courts.
[109] The guidance on proof was predicated on what the courts expect from the experts in relation to delay.
[110] Supra note 11 [375].
[111] Supra note 11 [376].
[112] Supra note 11 [381].
[113] Supra note 11 [382]
[114] Supra note 11 [385].
[115] Ibid.
[116] Loss and Expense is a term found in JCT Contracts; however the wording could just as easily be replaced with "loss" only or "damage". It is submitted that the Contractor's obligation in this regard would be applicable to cases which are not part of the JCT Suite.
[117] Supra note 11 [464].
[118] Ibid.
[119] In this instance pursuant to clause 26.

progress of the Works has been materially affected"[120], which may not necessarily include all the *"back up accountancy information which might support such detail"*.[121]

Akenhead J further considered that the contract should not be viewed in a particularly strict way against the contractor, in doing so he disagreed somewhat with the claimant's quantum expert who had reported that he would expect the contractor to provide a long list of prerequisites, including:

> *"a) Staff allocations and actual costs.*
>
> *b) Labour allocations and actual costs.*
>
> *c) Scaffold, utilities, expense and other materials/sundry expenses scheduled with copy invoices and explanations for the items in question.*
>
> *d) Subcontract accounts having already discounted, if appropriate, the matters which were not the Employer's responsibility.*
>
> *e) Such other data as is necessary to enable the actual costs incurred to be vouched as correct and relevant to the matter(s) the subject of the notice."*[122]

He felt that what the claimant's expert was, in effect, saying was that *"every conceivable detail and back up documentation which may or may not be needed must be provided and all evidence required to prove the claim as correct needs be deployed"*[123]. However, all that clause 26.1.3 of the JCT form requires is the contractor to provide all that is *"reasonably necessary"* for the architect to ascertain the loss and expense. Referring to the case of *London Borough of Merton v Leach*[124], Akenhead J took preliminaries, a well-known head of claim as an example[125], to provide a context to his judgement, and importantly suggested that for a loss and expense claim, it may be valid to use contract rates to represent the loss (if not the expense). This is significant because it is often the case that the architect / contract administrator will insist on detailed accounts, evidencing actual loss, as opposed to allowing the contractor the opportunity to adopt pre-agreed rates normally detailed in either a bill of quantities or schedule of rates.

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[120] Supra note 11 [464].
[121] Ibid.
[122] Ibid [466].
[123] Ibid [467].
[124] *London Borough of Merton v Hugh Stanley Leach* (1985) 32 BLR 68
[125] Preliminary costs include: site staffing, temporary accommodation, telephones, site labour, temporary services and the like.

Given the civil standard of proof requires the claimant pleading a global claim to prove its loss on a balance of probabilities, how does this accord with the mind of the architect, or contract administrator, who is obligated to decide upon such a claim. Prior to considering the foregoing, in more general terms, if there is any general rule which can be applied when a decision maker is considering an appropriate standard of proof, it is derived from Sir William Scott's dictum in *Loveden v Loveden*:

"The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion…"[126]

Denning LJ felt compelled to reiterate this sage guidance in the *Bater* case, and went further by saying:

"The degree of probability which a reasonable and just man would require to come to a conclusion – and likewise the degree of doubt which would prevent him from coming to it – depends on the conclusion which he is required to come."[127]

The foregoing may appear obvious, however the setting of such a judicial platform is critically important because, first and foremost, notwithstanding that an architect/contractor administrator may possess specialist knowledge about the global claim being decided upon, coupled with commercial relationships with the employer, he is obligated always, to arrive at his/her decision, acting reasonably and justly. The rule set out in 1822, by Sir William Scott in *Loveden*, remains consistent with the requirements and wording of the JCT Standard Forms and should be regarded as being the stalwart rule which is to be abided by all persons administering construction and engineering contracts, unless there are express terms in the contract to the contrary.

More recently, Akenhead J's analysis, based upon the wording of a JCT Standard Form of Contract, nonetheless provides a helpful insight into how the courts consider the mindset of how an architect/contract administrator should approach a claim pleaded on a global basis. In doing so, Akenhead J reviewed the loss and expense clause 26.1 (as amended) in *Walter Lilly*, which is activated once the regular progress of the Works is likely to be materially affected:

[126] *Loveden v Loveden* [1803-13] All ER Rep 339.
[127] Supra note 69, 459.

"…the Architect from time to time thereafter shall ascertain, or shall instruct the Quantity Surveyor to ascertain, the amount of such loss and/or expense which has been or is being incurred by the Contractor"[128] [emphasis added]

Further sub-clauses indicate the level of detail to be submitted by the contractor:

"26.1.2 the Contractor shall in support of his application submit to the Architect such information as should reasonably enable the Architect to form an opinion as aforesaid; and

26.1.3 the Contractor shall submit to the Architect or to the Quantity Surveyor such details of such loss and/or expense as are reasonably necessary for such ascertainment as aforesaid."[129] [emphasis added]

Before Akenhead J's judgement on the foregoing, it is useful to consider that in recent years, case law has taken, what may be considered a hard and literal view in how the "ascertainment" of loss and expense (particularly in relation to JCT Contracts) is to be calculated. Ennis[130] cites the cases of *Paddington Churches v Technical and General Guarantee*[131] and in particular *Property and Land Contractors v McAlpine Homes*[132], where Lloyd J stated in relation to the consideration of formulae in calculating overheads:

"The requirements that the loss or expense shall be 'direct', that it should not be 'reimbursed by a payment under any other provision in [the] contract' and that the architect or quantity surveyor is 'to ascertain the amount of such loss and/or expense', all suggest strongly that the amount of 'direct loss and/or expense' will not exceed what might have been recoverable as damages… Furthermore 'to ascertain' means to 'find out for certain' … and it does not therefore connote as much use of judgment [sic] or the formation of an opinion as had 'assess' or 'evaluate' been used. It thus appears to preclude making general assessments as have at times to be done in quantifying damages recoverable for breach of contract."[133] [emphasis added]

As clarified by Ennis, this obiter commentary by Lloyd J, is in relation to head office overheads, which were, of course particular to the case in point. When deciding on loss and

[128] Supra note 11 [462].
[129] Ibid.
[130] Christopher Ennis 'What degree of proof is required in the ascertainment of loss and/or expense' Construction Law Journal (2009) Vol 25 No 7
[131] *Paddington Churches Housing Association v Technical and General Guarantee Co Ltd* [1999] B.L.R. 244
[132] *Property & Land Contractors Ltd v Alfred McAlpine Homes (North) Ltd* (1995) 47 Con. L.R. 74.
[133] Supra note 131, 98.

expense for plant items (where the arbitrator has decided to use RICS hire rates, notwithstanding that the contractor owned the plant), the judge stated the following:

"That in ascertaining direct loss or expense under clause 26 of the JCT conditions in respect of plant owned by the contractor the actual loss or expense incurred by the contractor must be ascertained and not any hypothetical loss or expense that might have been incurred whether by way of assumed or typical hire chargers or otherwise."[134]

Ennis also pointed out, that in the more recent case of *How Engineering Services Ltd v Lindner Ceilings*[135], it would be fair to say that the courts moved to somewhat soften Lloyd J's interpretation of ascertainment and it is useful to reiterate Dyson J's judgement from that case, below:

"…I do not understand Judge Lloyd to be saying that there is no room for the exercise of judgment in the process of ascertainment. I respectfully suggest that the phrase 'find out for certain' might be misunderstood as implying that what is required is absolute certainty.

In my view it is unhelpful to distinguish between the degree of judgment permissible in an ascertainment of loss from that which may properly be brought to bear in an assessment of damages. A judge or arbitrator who assesses damages for breach of contract will endeavour to calculate a figure as precisely as it is possible to do on the material before him or her…I would hold, therefore, that, in ascertaining loss or expense, an arbitrator may, and indeed should, exercise judgment where the facts are not sufficiently clear, and that there is no warrant for saying that his approach should differ from that which may properly be followed when assessing damages for breach of contract.

Thus, in cases such as the present, the arbitrator must decide inter alia whether the costs built into the tender rates were realistic on the footing that the contract proceeded without delay or disruption…There is no place for pure speculation in the ascertainment of loss or expense, any more than there is in the assessment of damages. Moreover, I think that an arbitrator should not readily use typical or hypothetical figures, but it would be wrong to say that they can never be used. This is a difficult area, and in my view, the court should be slow to interfere with an arbitrator's ascertainment of loss." [136]

[134] Ibid, 104.
[135] *How Engineering Services Ltd v Lindner Ceilings Floors Partitions Plc* [1999] 2 All E.R. (Comm) 374; 64 Con. L.R. 67.
[136] Supra note 135, 6.

The risk of potential ambiguity in how "ascertainment" is understood by the courts and how this relates to a contractor's claim for loss and expense, was finally clarified in *Walter Lilly*, where Akenhead J stated in general terms:

"… The word "ascertain" means to determine or discover definitely or, more archaically, with certainty. It is argued by DMW's Counsel that the Architect or the Quantity Surveyor cannot ascertain unless a massive amount of detail and supporting documentation is provided. This is almost akin to saying that the Contractor must produce all conceivable material evidence such as is necessary to prove its claim beyond reasonable doubt. In my judgement, it is necessary to construe the words in a sensible and commercial way that would resonate with commercial parties in the real world. The Architect or the Quantity Surveyor must be put in the position in which they can be satisfied that all or some of the loss and expense claimed is likely to be or has been incurred. They do not have to be "certain". One has to bear in mind that the ultimate dispute resolution tribunal will decide any litigation or arbitration on a balance of probabilities and at that stage that tribunal will (only) have to be satisfied that the Contractor probably incurred loss or expense…. Bearing in mind that one of the exercises which the Architect or Quantity Surveyor may do is allow loss and expense, which has not yet been incurred but which is merely "likely to be incurred"; in the absence of crystal ball gazing, they cannot be certain precisely what will happen in the future but they need only to be satisfied that the loss or expense will probably be incurred." [emphasis added]

On analysis, Akenhead J's logic is sound, if ascertainment of a loss, such as that stated in clause 26.1 is still *"to be incurred"*, then all the architect and/ or quantity surveyor can do in real time, is on balance, make a reasoned evaluation of the loss and expense incurred. Put another way, Dyson J concurred with the arbitrators view in *How Engineering* when he had said:

"…with the strongest proviso that every attempt is to have been made by Lindner toward certainty, but where this is impractical, I will use my discretion as to what is reasonable." [137]

This opinion appears to be consistent with the civil standard of proof, to be decided on balance of probabilities, that position, *ipso facto*, is uncertain, although when judged as such, then becomes immovable. Indeed, it could be argued that "certainty" may be viewed as being even stricter than the heightened criminal standard, i.e. beyond reasonable doubt, which would not apply to loss and expense claims made by a contractor. It is submitted therefore, that the

[137] Ibid.

arbitrator's approach in *How Engineering*, would appear to be as reasonable and succinct a view as any, in terms of how a decision maker should approach a claim for loss and expense, or extensions of time for that matter.

To provide further guidance on how loss and expense claims will be dealt with by the courts, Akenhead J stated:

"...It is linking the loss and expense claim to the particular factors relied upon to a specific extension of time claim; it is identifying each head of loss or expense, spelling out the precise period for which it is claimed and the precise cost or loss which is put forward. It is not necessary that the details provided are actually correct, but they need to be what the Contractor is putting forward. The fact that what is put forward is not accepted by the Quantity Surveyor or Architect or even that it does not provide all the details absolutely necessary to prove beyond doubt every penny's or pound's worth of loss or expense does not mean that the condition precedent is not achieved at least in respect of what is reasonably capable of being established."[138]

To summate his judgement how the civil standard of proof relates to loss and expense claims, Akenhead J had this to say:

"One has to bear in mind that the ultimate dispute resolution tribunal will decide any litigation or arbitration on a balance of probability and at that stage that tribunal will (only) have to be satisfied that the Contractor probably incurred loss or expense…"[139]

That the contractor *"probably incurred loss or expense"* will be an anathema to clients, contract administrators and private quantity surveyors, who regularly require a much stricter evidential approach is adopted by contractor's claiming for extensions of time and/or monetary compensation. As echoed by Akenhead J, it is very often the case in construction disputes that the contractor is required to produce "*a massive amount of detail and supporting documentation"*[140]

It would appear therefore that through various obiter judgements related to contractors claims for extensions of time and/or money, the English courts have made a significant effort to clarify the general standard of proof and how it translates into claims pleaded on a global basis. An historical analysis of Scottish case law, as set out in Chapters 3 to 5 offers nothing

[138] Supra note 11 [470].
[139] Supra note 11 [468].
[140] Supra note 11 [468].

to suggest that the Scottish courts would depart from the foregoing opinions of the English courts, in relation to how the standard of proof is understood in the pleading of a global claim.

2.2.5 <u>**The Evidential Hurdles**</u>

As set out in Chapter 1, Lord Macfadyen and Akenhead J concurred that three preconditions are required for a construction claim to be successful, either pleaded on a global basis, or otherwise; i.e. that on a balance of probability, the claimant must satisfy the courts of the following:

i. An event(s) exists as a matter of fact, and that the effect of the event is the contractual responsibility of the defendant;

ii. The claimant, actually experienced a loss, and/or delay and/or disruption; and

iii. The burden of proof is discharged, where the claimant is then able to successfully persuade the court that there exists a causal link between the event(s) and the loss, and/or delay and/or disruption loss and expense suffered by the contractor.

So, what happens in the circumstance where, on balance, the courts are satisfied that the claimant has successfully proven that points (i to iii) above have been achieved, and, in consequence, it must quantify the loss. Is the quantification of the loss to be calculated based on a balance of probability, or is it simply a mathematical calculation which has to be carried out by the decision maker, once the precedent preconditions are satisfied? Put another way, is a tribunal freed from any legal principle when ascertaining the loss or damage to be awarded?

There is merit in first considering the quantification of damage in tort law, because the case law is thought provoking and relevant. In case of negligence for example, once the courts have established that a fact (or negligent act) has caused damage, then the damage is recovered in full. This principle was succinctly described by Stuart-Smith LJ in the case of *Allied Maples v Simmons & Simmons*[141]:

"Questions of quantification of the plaintiff's loss, however, may depend upon future uncertain events. For example, whether and to what extent he will suffer osteoarthritis, whether he will continue to earn at the same rate until retirement, whether, but for the accident, he might have been promoted. It is trite law that these questions are not decided on a balance of probability, but rather on the court's assessment, often expressed in percentage

[141] *Allied Maples Group Ltd v Simmons & Simmons* [1995] EWCA Civ 17, 6.

terms, of the risk eventuating or the prospect of promotion, which it should be noted depends in part at least on the hypothetical acts of a third party, namely the plaintiff's employer."

Therefore, if future losses are based on a court's assessment, then it would not be unreasonable to infer that any assessment of the quantum of damage in cases of tort, is simply a mathematical exercise, once the facts and causality have been established on a balance of probability. The calculation of the loss cannot therefore be based on the legal standard of proof on a balance of probability. It could be said that the judge is not concerned with whether the quantum associated with the actual damage caused, was on balance, the correct amount.

On the face of it, this position appears to be sustainable, since damage in cases of tort, ordinarily takes the form of monetary compensation, the quantification of the money associated with for example, physical damage to a person, and the loss cannot logically be based on any legal standard of proof, but is instead calculated by considering pecuniary and non-pecuniary damages[142] which are to be awarded within the guidelines set out in the relevant jurisdiction.

However, the foregoing position should be considered in light of the House of Lords case of *Murphy v Stone Wallwork (Charlton) Ltd*, determined by Lord Pearce in relation to an estimate of future damages for loss of earnings due to an injury at work:

"...the assessment of damages for the future is necessarily compounded of prophecy and calculation. The court must do the best it can to reach what seems to be the right figure on a reasonable balance of the probabilities, avoiding undue optimism and undue pessimism."[143]

In the following year, the House of Lords provided another decision in the case of *Mallett v McMonagle,* upon which Lord Pearce was one of the three presiding peers, however it was Lord Diplock who set out the following guidance:

"The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the

[142] Pecuniary damages include expenses, loss of earnings, which are uncapped, and non-pecuniary damages are damages associated with Pain Suffering and/or Loss or Amenity ('PSLA') these are normally capped in line with guidance from the Judicial Studies Board.
[143] *Murphy v Stone Wallwork (Charlton) Ltd* [1969] 2 All ER 949, 952.

court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards." [144]

Taking the foregoing cases into consideration, it would appear that when calculating damages in negligence cases, and whether or not the civil standard of proof is to be applied, depends upon the chronology of when and how the assessment of damages is to be calculated. It is therefore submitted that the assessment of damage which has already occurred, must be calculated on a balance of probability, however for future damage the court must make an estimated assessment of what those damages may be, which is not based on a balance of probability.

It is commonly understood that the general rule of compensation and the measure of general damage is to be applied to both tortious and contractual cases.[145]To reiterate Akenhead J above, when deciding upon the standard to be applied, *"The Tribunal must look at the evidence and decide not what is most or more probable but what probably happened or was said"*[146]. It is submitted therefore that the civil standard of proof, judged on a balance of probability in tort, is a legal standard to be applied to both the existence and/or causation of events, which assists the court in deciding on what *"probably happened"*. This is past tense and therefore any assessment of loss and expense in construction cases must analyse the facts retrospectively and provide a calculation on a balance of probability. Since the quantification of the loss, is ordinarily a monetary estimate, assessed in such a manner as to compensate the injured party as fairly as possible, and to restore them to the position they would have been in prior to the wrongdoing or breach[147], independently of any legal standard to be applied.

With respect therefore, it would be reasonable to suggest that Ennis is only partially correct when he states:

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[144] *Mallett v McMonagle and Another [1969] NI 91, 6.*
[145] Supra note 68.
[146] Supra note 92.
[147] Harvey McGregor, McGregor on Damages (20th Edition, Sweet and Maxwell, 2017), part 1 chapter 2 section 2-001 *"The object of an award of compensatory damages is to give the claimant compensation for the loss or injury he has suffered within the scope of the defendant's duty. The heads or elements of damage recognised as such by the law are divisible into two main groups: pecuniary and non-pecuniary loss. The former comprises all financial and material loss incurred, such as loss of business profits or expenses of medical treatment. The latter comprises all losses which do not represent an inroad upon a person's financial or material assets, such as physical pain or injury to feelings. The former, being a money loss, is capable of being arithmetically calculated in money, even though the calculation must sometimes be a rough one where there are difficulties of proof. The latter, however, is not so calculable..."* Refer also to the case of *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25 at 39.

"…that reliance on the civil standard of proof and consideration of the balance of probabilities, both as to entitlement in principle and as to the level of that entitlement, is an appropriate approach." [148]

It is submitted that the level of entitlement for future loss can only be ascertained by reasonable assessment, and not upon a balance of probability.

It is further suggested that the assessment of delay, is also to be considered to the same legal standard as that found in loss and expense claims, in Walter Lilly Akenhead J had this to say[149]:

"Whilst the Architect...can grant a prospective extension of time, which is effectively a best assessment of what the likely future delay will be as a result of the Relevant Events in question, a court or arbitrator has the advantage when reviewing what extensions were due of knowing what actually happened. The Court or arbitrator must decide on a balance of probabilities what delay has actually been caused by such Relevant Events as have been found to exist …".

Again, we see the reference made to a past tense of retrospective analysis of the delay, and therefore the balance of probability is to apply.

In conclusion therefore, it would appear to be correct to state that the courts assessment of loss and/or expense or delay must be considered and calculated on a balance of probability for matters/events which have already occurred, where future estimation of loss or damage is to be considered, the courts will do the best they can based on a reasonable estimate.

2.2.6 **Summary of the Standard of Proof**

In summary, when a tribunal has to decide in relation to a global claim for either a delay and/or monetary compensation, it must do so in line with the following preliminary legal considerations in relation to the standard of proof;

i. The civil standard of proof is to be applied;

ii. The standard of proof is fixed, there is no "heightened" proof for what might be considered more serious civil offences, however the evidence in those cases may require greater cogency;

[148] Supra note 130, 5.
[149] Supra note 11 [362].

iii. It must analyse and decide upon the amount and quality of evidence in order to discharge the burden of proof;

iv. On review of the evidence adduced, a tribunal must consider whether a fact existed and/or caused a loss or delay, on a balance of probability using common sense principles based on the "*guarded discretion*" of a reasonable man;

v. If in a tribunal's opinion, a fact probably caused a loss or delay, then from a legal perspective, it is considered that the fact did cause the delay;

vi. If a tribunal is required to choose between several causes, it should not decide what was more probable out of the choices available, but instead must consider what probably happened. This can of course be problematic where claims are evidentially weak or there are numerous events/causes associated with composite loss and/or delay, as is often present in claims deemed global in nature;

vii. If a tribunal is not satisfied that on the balance of probability a fact caused a loss or delay, then the claimant has failed to discharge the burden of proof;

viii. However, wherever possible to do so a tribunal must attempt to decide and not simply leave it to the higher courts to decide;

ix. A tribunal does not have to be certain, but must decide that loss and or delay probably happened, even if the contract wording asks the contract administrator to ascertain a loss and/or delay;

x. When calculating the damage due, a tribunal must do so on the balance of probability for retrospective breaches and must make a reasonable estimate for the future breaches.

2.3 Causation

2.3.1 **Introduction**

In a construction dispute the facts per se, will in most instances be readily apparent, and not particularly disputed by the parties. Where conflict can and does arise, is when facts interact and conflate as to cause a particular effect(s) on a construction project, such as a claim for an

extension of time, and/or a claim for monetary compensation. Under these circumstances the dispute is ordinarily one of causation[150].

Matters of causation, become especially acute in relation to global claims, where the claimant is burdened with persuading the decision maker to infer that multiple events (most but perhaps not all), have caused one or more effects or result. Therefore, as important as understanding the standard of proof in construction projects and how it relates to global claims, is understanding the nature of causation in relation to global claims. Indeed, the third limb of Lord Macfadyen's preconditions required for a construction claim to be successful in Scotland is that the pursuer must prove[151]:

"A causal link between the event or events and the loss and expense suffered by the Contractor"[152]

The law and how it interacts with the principles of causation is complex. It is not the sole purpose of this thesis, to affect an authoritative commentary on matters of causation generally. It is however essential to set out its basic principles, because when deciding upon matters of globality, a decision maker in law, must apply the rules of causation to the case at hand. With this in mind and given the distilled nature of this thesis, it will only be possible to tangentially consider causation in philosophical and/or delictual terms where helpful parallels can be drawn, however causation will be predominantly examined in relation to the law of contract, and in particular how causation relates to global claims for extensions of time and/or monetary compensation.

2.3.2 General Principles of Causation in Contract

In comparison to tortious cases, according to Hart and Honoré there is a relative dearth of literature in relation to causation in contract[153]indeed in their pre-eminent book titled Causation in the Law, from over 500 pages on the subject of causation, the chapter relating to

[150] Nicholas Baatz QC, 'Factual' and 'Legal' Causation in Construction and Infrastructure Law: A Thorny Subject, A paper based on talks given in London on 6th October 2015, Bristol on 10th October 2015 and Manchester on 22nd February 2016, Society of Construction Law, November 2015 at p 2 *"Construction and infrastructure cases throw up difficult issues of causation. More that than in many subjects... Legal causation is particularly sensitive to the legal context, the contract or any other duty, and to a thorough analysis of the facts. Above all such analysis should include an analysis of the loss because the causation answer may depend upon an accurate characterisation of components of the overall loss"*
[151] This was affirmed in the English courts in the Walter Lilly case.
[152] Supra note 10.
[153] Hart and Honoré, '*Causation in the Law*' (Clarendon Press Oxford Second Edition 2002), Part II section XI.

contract is only 16 pages long. The following reasons are cited for the *"less prominent"* role of causation in the law of contract[154]:

i. Although the causative principles follow similar patterns as those in tort, the harm in contract is usually economic and not physical;

ii. The causal connections are ordinarily simpler in breaches of contract; and

iii. Generalising about causation in contract has been discouraging to common law writers because *"liability to pay compensation for breach of contract is based on these disparate or only loosely connected types of relationship between defendants conduct and the harm suffered by the plaintiff"*.[155]

Notwithstanding the relative shortage of literature, a preliminary analysis of causation is of course required, to set the elemental landscape into which global claims raise their own particular causative phenomena, which will be examined in more detail at Chapters 6 and 7 of this thesis.

2.3.3 <u>**Philosophical and Legal Causation**</u>

When a tribunal is deciding upon matters of causation, it must attribute legal responsibility between either one or more potential causes to the effect felt by the injured party. In doing so, as helpfully suggested by Lord Salmon, the party must:

"…consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than by abstract metaphysical theory."[156]

Indeed, there is case law confirming that causation in the law, is to be understood and applied differently to causality in classical philosophical terms, as expounded by Aristotle, and latterly Hume, Russell, Mill et al; and instead should be *"concerned with everyday life and thoughts and expressions"* as the *"man on the street"* would understand it.[157]

Although the courts have differentiated between causation in the law and causation in philosophical terms, it does not provide any real clarification as to why this is the case. Hart and Honoré contend that philosophical approaches are too general and concerned more with

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[154] Ibid, 308.
[155] Ibid.
[156] *Alphacell v Woodward* [1972] A.C. 824, 847.
[157] *Monarch Steamships Co Ltd v A/B Karlshamns Oljefabriker* [1949] HL AC196, p 228, *Stapley v Gypsum Mines Ltd* [1953] A.C. 663 at 687, *Yorkshire Dale Steamship Company Limited and Minister of War Transport* [1942] A.C. 691, p 698.

establishing scientific laws, whereas the lawyer is more concerned with the particularities between the occurrence of an event(s) and its causes. Therefore, the law applies the generalities formulated by philosophical findings.[158]Baatz expands upon this notion and drawing conclusions from various cases and philosophical references suggests that:

"[in philosophical terms] .... *everything necessary to an effect is a cause equal with every other thing necessary to an effect and distinctions between causes and mere conditions (or occasions) are unsustainable…….It is hardly surprising that lawyers describe legal causation as something distinct from the philosophers' causation, which appears to be not much help in determining the binary outcome that is the required practical outcome of most fully contested cases."* [159]

Baatz also suggests that in philosophical causation, concepts such as 'dominant cause' and/or 'causative potency'[160] (often contemplated in determining global claims) are questionable. This view and others support the importance of differentiating between the law and philosophy and indeed, establishes that legal determiners are in the main dissuaded from following philosophical notions of causation.

2.3.4 Factual and Legal Causation

Of course, when understanding the causative principles, in the first instance, it is correct that the parties are governed by the contract that they have agreed between themselves. However, it is often the case that the express terms of the contract are inadequate, when considering the appropriate causative test to be applied[161]. With this in mind, the parties and the decision maker must look to the common law for assistance, however, it is difficult to assemble any real pattern as to how causation in contract is dealt with by the courts[162]. Notwithstanding the foregoing, there are however constants which can be relied upon and assist the decision maker in arriving at a conclusion. A reasonable starting point in summarising the principle of causation in contract and how they relate to global claims, would be to differentiate between causation in fact and causation in the law.

[158] Supra note 153, 12 & 13.
[159] Supra note 150, 4.
[160] These concepts will be explored at Chapter 6.
[161] Supra note 13, Section 9-058.
[162] Daniel Atkinson, *Causation in Construction Law* (Daniel Atkinson Limited 2007), p 4 para 1.4. Supra note 150, 1.

Prior to exploring the foregoing, there is merit in setting out Lord Hoffman's guidance on how the court considers causation[163], the message is more effective verbatim:

i. *"It is usually a condition of liability that not only should one have done, or been responsible for, some act which the law regards as wrongful, but that there should be a prescribed causal connection between that act and damage or injury for which one is held liable."* For claims which are global in nature, this precondition is difficult, especially in projects of scale, where they may be thousands of contractual changes impacted either the contract price and/or schedule. What is meant by *"there should be a prescribed causal connection"* in such circumstances? The practical understanding must lie in an analysis of the relevant case law, which is set out at Chapters 3 to 5. The findings of that analysis are set out at Chapters 6 and 7.

ii. *"…the question of what should count as a sufficient causal connection is a question of law, just as the question of what makes an act wrongful is a question of law."* This seems self-evidently to be the case; however, it will become apparent that Lord Hoffman is reinforcing the criterion that as well as establishing the precondition of causation in fact, causation in the law must also be established.

iii. *"…the causal connection most commonly prescribed is what I have called the standard criteria examined by Hart and Honoré. It is most commonly prescribed because it accords with our moral notions of responsibility."* The standard criteria Lord Hoffman is alluding to is the initial causative "but for" (or sine qua non) filter. This filter which practically translates as, *"but for the event, the result or effect would not have occurred"* or *"without which it could not be"*. This test is ordinarily a pre-requisite to proving causation in fact, however we shall see in the subsequent chapters that this criterion is inadequate in matters of globality on construction projects.

iv. *"…there may be reasons why the law sometimes deviates from the standard criteria."* In these instances, Lord Hoffman considers that *"deviations are sometimes said to be on grounds of policy but that expression is unhelpful unless you explain what the policy is."* The initial position accords with matters of globality, where deviations to the "but for" concept are contemplated by the law. Subsequent chapters will reveal that global claims, almost by definition, offend the "but for" filter, rendering the test insufficient. In claims for delay and/or disruption for example, there are a myriad of permutations

[163] Supra note 15, 3-4.

where the event which is pleaded to affect the damage, loss, delay or cost claimed, will not in and of itself change the totality of the overall position.

It is well established that legal or factual causation cannot be applied independently[164]. Either/or is insufficient to ordinarily prove (in the eyes of the law) that an event caused a result. However, it is important that the decision maker considers them in the correct order, again Lord Hoffman comes to our aide on this matter:

"There is nothing special or mysterious about the law of causation. One decides, as a matter of law, what causal connection the law requires, and one then decides, as a question of fact, whether the claimant has satisfied the requirements of the law. There is, in my opinion, nothing more to be said."[165]

Put another way, it is suggested that Lord Hoffman is clarifying that the decision maker must first understand the legal principles of causation and then apply those principles to the facts which are presented to him/her. Of course, the development of any legal principle is tested and modified by the nuanced factual background which arise in the case law, therefore in order to understand how legal causation operates in relation to global claims in a construction and engineering context, it is useful to first explain the general principles of factual causation. Notwithstanding explanation, it is beyond the scope of this thesis, to set out a historical jurisprudential analysis of causation in fact. The purpose of its inclusion in this chapter, is to understand the factual/logical tools a decision maker can rely upon and apply, to decipher culpability in fact in the context of contract law, particularly in relation to global claims.

From a contract law perspective, causation in fact is generally understood as the physical correlation between the term's "cause" and "effect". The noun cause can be defined as *"That which produces an effect; that which gives rise to any action, phenomenon, or condition and/or A person or other agent who brings about or occasions something, with or without intention."*[166] In transitive verb form cause can be defined as *"To be the cause of; to effect, bring about, produce, induce, make."*[167] An agent can be defined as *"A person who or thing which acts upon someone or something; one who or that which exerts power; the doer of an action"* [168]In the context of construction and engineering, the various standard forms consider the risk apportionment between the parties and the effect of a "cause" and how it is to be

[164] Supra note 15, 1.
[165] Supra note 15, 7.
[166] The Oxford English Dictionary (Online): http://www.oed.com/view/Entry/29147.
[167] The Oxford English Dictionary (Online): http://www.oed.com/view/Entry/29148.
[168] The Oxford English Dictionary (Online): http://www.oed.com/view/Entry/3859.

managed, often through the term "event"[169]. Identifying the event can be more complicated than it may first appear and is often misunderstood in the throes of a construction contract. For example, a contractor may be late in erecting a steel frame, because the procurement was late, due to late finalisation of the design, the design was delayed because the owner had approved design drawings, in line with its obligation to do so, as set out in the construction schedule, which were rejected by the steel fabricator and had to be re-drafted; on further contractual analysis it was found that despite the owners approval of the design drawings, the terms of the contract were such that any approvals did not waive the contractor's liability to ensure the design was correct and the owner was under no contractual obligation to ensure the efficacy of such a design. The example contract dictates that: *"The Owner's review of design drawings and data shall not relieve the Contractor from responsibility for any deviation to the design or its impact on the Construction Programme"*. The event and the consequences of the event are therefore matters which are the responsibility of the contractor, notwithstanding that the owner had approved design drawings, which were ultimately found to be incorrect. The example above illustrates the interaction between events/causes and how their perceived consequences and contractual risk responsibility interplays, through the causal change. Indeed, a technique often used by forensic construction law professionals is to start from the effect and work backwards to the event/cause, taking into consideration the parties rights and obligations in terms of ultimate culpability for the event.

How an effect/result is influenced by an event is more difficult in relation to claims asserted on a global basis, because, there are often many events which may or may not have had a contributive impact on the effect. Under these circumstances, where it is necessary to do so, causation is deemed to have been inferred, *"since legal fact finding's aim is always to seek out the best obtainable truth rather than the absolute truth."*[170] This approach accords with the standard of proof to be met, in relation to how a decision maker must decide a case in civil proceedings, i.e. on the balance of probability, and not beyond reasonable doubt.

Factual causation can be broken down into the following concepts:

i. It is trite law that the normal rule for identifying factual causation, is that a cause must, as a minimum, satisfy the "but for" test; also know by the Latin term "sine qua non".

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[169] An 'event' in The International Federation of Consulting Engineers ('FIDIC') Standard Forms. A 'Relevant Event' in The Joint Contracts Tribunal Limited ('JCT') Standard Forms and a 'Compensation Event' in The New Engineering Contracts ('NEC') Standard Forms.

[170] Russel Brown, "The Possibility of 'Inference Causation' inferring cause-in-fact and the nature of legal fact-finding" 55 McGill L. J. 1 (2010), 1.

Indeed, the test has been woven into the legal lexicon to such a degree that Lord Hoffman has referred to it as the "*standard criteria*"[171]. The "but for" acts as an exclusionary test[172], in order to allow the decision maker to discard events which are not the cause of either the loss or delay on a construction project. Put another way, a decision maker must be satisfied that "but for" the event, the claimant would not have suffered any loss and/or delay. The test becomes limited in cases where multiple causes may have a combined effect on loss and/or delay, which is often evident in a global claim. Since the purpose of this chapter is to set out certain preliminary considerations of a decision maker when evaluating a global claim, Chapters 6 and 7 will discuss the difficulties of applying the "but for" test in claims of a global nature, and why in many instances the test must be suspended to return a logical and credible decision, consistent with legal precedent.

ii. An alternative test in factual contribution, is the material contribution test. This test is ordinarily applied in delictual cases where it is impossible to prove an event caused a loss, through either scientific impossibility or indivisible causation. The Canadian case of *Clements v Clements*[173], reiterates the succinct definition of material contribution by reference to Smith J.A.'s judgement in *MacDonald v Goertz* as follows:

"…material contribution" does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation. In such cases, plaintiffs are permitted to "jump the evidentiary gap." [174]

While this test (or method) is ordinarily adopted in delictual cases, it has been applied in contract in the UK[175]. Its usefulness in navigating the "evidentiary gap" is also relevant to cases in contract law, indeed it is adopted in cases which are deemed global in nature. In *Doyle*, Lord Macfadyen stated:

[171] Supra note 15.
[172] *Orient-Express Hotels Ltd v Assicurazioni General S.p.a. (UK Branch) t/a Generali Global Risk* [2010] EWHC 1186 (Comm) [22].
[173] *Clements v Clements* [2012] 2 R.C.S. 190
[174] *MacDonald v. Goertz* [2009] BCCA 358, 275 B.C.A.C. 68 [17].
[175] *Orient-Express Hotels Ltd v Assicurazioni General S.p.a. (UK Branch) t/a Generali Global Risk* [2010] EWHC 1186 (Comm), *IBM v EMI* [1980] 14 B.L.R 1, HL

"A global claim, as such, must therefore fail if any material contribution to the causation of the global loss is made by a factor or factors for which the defender bears no legal liability" [176]

How material contribution accords with global claims will be analysed further at Chapter 6 below.

iii. When a decision maker investigates the causality of factual events and their effect on a global claim, he must do so, by the application of common sense. This guidance is initially borne out of Lord Justice Glidewell's often quoted judgment *in Galoo v Bright Grahame Murray*[177], where he stated:

"In considering whether a breach of a duty owed by the defendant (whether in contract or in tort in a situation analogous to breach of contract) was the effective cause of loss or merely the occasion for the loss, the court had to arrive at a decision by applying common sense to the facts of the particular case."[178]

On analysis of the literature on common-sense in relation to causation, it is difficult to get a feel or pragmatic understanding of what common-sense notions actually means[179]. The esteemed legal scholar, Glanville Williams opined that factual causation is a *"…common sense inference from the evidence….or a matter for expert witness"* [180], and by way of explanation, provides helpful practical examples of how common-sense can be better understood, such as if a young child was poisoned by tablets, it would be common-sense to infer that it would not be influenced by a label that stated that the tablets were poisonous. However, there is no definitive statement or overarching conclusion on the matter.

Hart and Honoré dedicated a full chapter to "Causation and Commons Sense[181]", which was succinctly summarised by Lord Hoffman, as follows:

[176] Supra note 10, [36].
[177] *Galoo Ltd and others v Bright Grahame Murray* [1994], 1 W.L.R.
[178] The test of Common Sense was also followed in *Humber Oil terminal Trustee Ltd v Owners of Ship Sivand* [1998] EWCA Vic 100 and in relation to global claims where common sense was to be applied to the effect of multiple causes in *John Holland Construction & Engineering Ltd v Kvaerner RJ Brown Pty* (1996) 8 VR at 689.
[179] Russel Brown, "The Possibility of Inference Causation: Inferring Cause in Fact and the Nature of Legal Fact Finding" McGill Law Journal, (2010) 55 RD McGill 1, Footnote 29
[180] Glanville Williams, 'Causation in the Law*'* 1961 Cambridge L.J. 62 1961, 3.
[181] Supra note 153, Chapter 2.

"They showed that when judges say that is a matter of common sense, they usually mean that it accords with ordinary moral notions of when someone should be regarded as responsible for something which has happened. In explaining this use of the concept, they drew attention to the importance given to voluntary human acts and to unusual natural occurrences."[182]

Daniel Atkinson goes further by stating that common-sense is usually referred to when *"the requirements of justice lead to a different allocation of liability than the application of general factual principles of causation"*[183].

While the foregoing statements may be true, when understood in terms of legal causation, they are separate to understanding how a test of common-sense is applied to factual causation, as Williams indicated, by inference from the evidence adduced. It is apparent therefore that the test of common-sense must be applied both legally and factually.

If the purpose of the concept of causation is to attribute responsibility[184], based on common-sense principles and moral notions, then as Lord Hoffman indicated in *Fairchild v Glenhaven, "…it may not serve us equally well when liability is based on something other than fault"*[185]. As will be seen in Chapter 3, the *John Holland* case confirmed that the application of common-sense must be applied to causative decisions made in relation to global claims, but it could be argued that given their nature, its application may be less obviously understood than say decisions borne out of morality, which is of course generally absent in claims for extensions of time and/or monetary compensation. To compound matters, Atkinson also suggests that the lack of definition in relation to the common-sense test, makes it difficult to apply it to practical problems raised in complex construction cases[186].

Given the generally accepted complexities of causation and the sensitivities to be applied on a case by case basis, the courts have been reluctant to lay down any hard and fast rules and/or definitions on how common-sense is applied generally and specifically in relation to global claims.

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[182] Supra note 15, 2
[183] Supra note 162, 5
[184] As expounded by Hart and Honoré and cited by Lord Hoffmann.
[185] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, 3
[186] Supra note 162, 1.36.

So although a common-sense test appears difficult to conceptualise, when a decision maker must apply the test to causation generally or specifically in relation to a global claim, the causal requirements should be explainable, as opined by Lord Hoffman "*…incommunicable judicial instinct…..It should be possible to give reasons why one form of causal relationship will do in one situation but not in another.*"[187]It would appear therefore that the application of common-sense is better explained retrospectively based on the circumstances, rather than through any definitive definition known and to be applied, as the circumstances unfold.

iv. Finally, although complex, causative principles are to be understood as the man on the street would understand them, as set out in *Yorkshire Dale Steamship v Minister of War Transport*[188]:

"This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common-sense standards. Causation is to be understood as the man in the street, and not as either of the scientist or the metaphysician, would understand it. Cause here means what a business or seafaring man would take to be the cause without too microscopic analysis but on a broad view."

Williams takes issue with such hypothesis, stating that at least from a lawyer's perspective, *"it is not true of a lawyer's use of the notion of but-for causation"*[189]*;* and that a lawyer's notion of causation will differ significantly from what the plain man may understand as being a cause. Since it is the lawyers who gladiate in the arena of causation and influence a decision maker as to the operative cause(s), it is readily comprehensible as to why Williams would arrive at such a conclusion.

From a contract law perspective, legal causation is "attributive" in nature. So, when factual causation is established, a decision maker must attribute legal responsibility as to the cause and its subsequent events. Legal causation can be broken down into the following concepts:

i. In the law of contract, legal causation is understood in terms of either an "effective", "dominant" or "sufficient" cause. The terms are similar, but do not have the same meaning and their application can and frequently does engender different results. Chapter 6 will consider the terminology in more detail and will also analyse whether

[187] Supra note 185, [52].
[188] *Yorkshire Dale Steamship v Minister of War Transport* [1942] AC 691, 706
[189] Supra note 180, 3

there is now a divergence between English and Scots law on the terms to be adopted. When a decision maker concludes on the cause, it is deemed the proximate (or legal) cause.

As a preliminary consideration, it is adequate at this stage to identify that since by definition, a global claim has potentially multiple causes, then a decision maker must navigate the various causal terminology and make the appropriate selection when deciding upon culpability.

ii. Once the proximate or operative cause(s) has been identified, the cause must also pass the foreseeability test in order to equate loss or damage which flows from the breach.[190]Much has been written about foreseeability in delict/tort[191], which asserts that a defendant is not liable for harm caused, which is unforeseen. As to how foreseeability operates in contract (and therefore global claims), the test is similar to that in delict/tort, but is more definitively set out in the case of *Hadley and Baxendale*.[192] Since foreseeability in contract and specifically global claims, will ordinarily relate to consequences associated with monetary losses and/or delays borne out breaches of a building contract, it is should be easier for a decision maker to appraise, when compared to breaches of duty in delict/tort, where consequences of harm can be variegated and extensive. The parties to a building contract in the 21st century, will have a reasonably good idea of the effects and consequences of its breach, which from a contractor's perspective will often mean late completion. Of course, in the vast majority of cases, modern building contracts, whether they be standard form contracts or bespoke in nature, will contain liquidated damages clauses and/or limitations of liability, to allow both the contractor and owner to assess their relative risks prior to entering into a contract. However, this does not generally extinguish the tangential rights of the parties in common law.

The landmark Court of Exchequer's decision of *Hadley v Baxendale*[193], is a relatively short judgement (only six pages long) but has been the legal bedrock for measuring the consequential and foreseeable damages for breach of contract, for almost two centuries.

[190] Sometimes referred to as the Risk Principle. Supra note 180.
[191] Indeed, Hart and Honoré dedicate a whole chapter to Foreseeability and Risk.
[192] *Hadley & Anor v Baxendale Ors* [1854] Exch J70.
[193] Wikipedia cites *Hadley v Baxendale* as one of the UK's landmark cases alongside the likes of *Donoghue v Stevenson* [1932] S.C. (H.L.] 21, *The Moorcock* 14 P.D. 64 (1889) and *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256.

The details of the case are well known, and from which, Alderson B's decision can be distilled into the following two limbs:

"Where two parties have made a contract which one of them has broken, [1] *the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e., according to the usual course of things, from such breach of contract itself, or* [2] *such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made where communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."* Numbers added to identify the two limbs.

iii. The final preliminary consideration relevant to legal causation that a decision maker must be alive to in his/her contemplation of a global claim, is the concept of novus actus interveniens, or new intervening event. The substance of this concept, is succinctly set out by Atkinson, who refers to it as follows;

"...a new event is so abnormal and extraordinary, or it is outside the contemplated scope of events to which the legal relationship relates, that it has a causal potency that makes it a sole cause of the damage." [194]

Put another way, a new event/cause may arise which breaks the existing chain of causation to such a degree that it overwhelms the origin cause. Atkinson considers the following levels of potency of such an event. Firstly, the new event either stops the initial event being a cause, or *"renders it legally insignificant"*, secondly, that the new event acts concurrently with the original event and both cause the damage and thirdly, that the new and original event, although independent of each other, combine in such a way that separately they would not have caused the harm. [195]

In the English courts, providing the original cause remains an effective cause, then the chain of causation will not be broken, whether it is concurrent or otherwise.

[194] Supra note 162, 23.
[195] Ibid, 23.

Furthermore, in order for the chain of causation to be broken, the claimant would have to have shown at the very least *"unreasonable conduct"*, but even this would not equate to a break in causation if the defendants breach was still an effective cause of the loss[196]. In the case of *Anthony Cowling v Liverpool Insurance*, Lord Matthews had this to say:

"It is well known that a novus actus has to be something 'ultroneous, something unwarrantable, a new cause which ... can be described as either unreasonable or extraneous or extrinsic." [197]

In the *Riva v Foster* case, Fraser J went onto say that reckless conduct by the claimant would ordinarily break the chain of causation, although there is no rule of law confirming such a position[198].

The first port of call for a decision maker when consider if a new intervening event has any contractual or legal significance, to either a delay on the project and/or losses would be to the wording of the contract agreed between the parties. The contract usually sets out the risk allocation of the project and identifies how the rights and obligations are to be apportioned relative to the event which arises. For example, a force majeure clause will set out how the parties apportion risk for matters such as strikes, shortage of energy suppliers, earthquakes, hurricanes, floods and the like, which on the face of it may seem extraordinarily and intervening but are actually anticipated by the contract.[199]

2.3.5 Summary of Causation

It important to set out the general principles of causation, because it provides the conceptual landscape which is applied to claims which are deemed global in nature and where the complexity of the claim is compounded by competing causes between the parties and/or others.

It is understood that the standard criteria, i.e. the "but for" test (while applicable), is often ineffective in matters of globality on construction projects and the courts will often resort to

[196] *Riva Properties Limited, Riva Bowl LLP, Riva Bowl Limited, Wellstone Management Limited v Foster + Partners Limited* [2017] EWHC 2574 9TCC) para 204

[197] *Anthony Cowling v Liverpool Victoria Insurance Company Limited* [2013] CSOH 49 – Based upon the judgement of Lord Wright in *The Oropesa* [1943] 1 All ER 211, 215

[198] It is submitted that there is no reason to suggest that this approach would not be followed by the Scottish courts. *Leonora McInnes v Norwich Union Insurance and AXA Insurance UK Plc* [2012] CSOH 6 A, *Alexander Greenlees v Allianz Insurance Plc* [2011] CSOH 173, which consider "effective causes" and "reasonableness" in relation to what may constitute a break in the causative chain.

[199] Atkinson provides some helpful examples of how new intervening events could be dealt with by a decision maker, based on real life cases. Supra note 162, 27-30.

deciding upon whether causes of the composite loss and/or delay are either effective, dominant, significant and/or material in their common-sense quest to adjudicate justice.

At this juncture there is merit in reiterating the view of the learned editors of the Building Law Report, reporting on *Doyle* who reminded us that:

"It is easy to forget that there is no set of special principles for construction contracts when it comes to the question of causation."[200]

We shall see however, that in Chapter 6, where there are competing causes in construction contracts, both the English and Scottish courts diverge on how causation is to be applied.

2.4 Summary of Preliminary Considerations

Chapter 2 sets out some of the preliminary legal principles, standards, tests and methodologies upon which the court and/or tribunal are able to rely upon in order to arrive at a decision where a construction claim may be deemed global in nature, or at least where a claim is evidentially weak and causation from competing causes has to be inferred.

In order to garner a more complete understanding of how the court and/or tribunals specifically apply these preliminary considerations on construction projects, it is imperative that a chronological, case based analysis is undertaken. In this regard, Chapters 3, 4 and 5, provide a distilled examination and commentary upon the construction cases brought to both the English and Scottish courts, from their inception in the 1960's until 2018.

These chapters will identify and expound upon the creative and intelligent ways the learned judges apply the preliminary considerations set out above and also identify where disparities have arisen between the English and Scottish courts in dealing with a subject matter, which remains far from settled.

[200] *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2004] B.L.R. 295, 297–8.

CHAPTER 3: THE RISE OF THE GLOBAL CLAIM

3.1 Introduction

Since there are no statutory regulations which provide for claims plead on a global basis; in order to address the proposition, research questions and objectives set out in Chapter 1, a case based reasoning methodology must be undertaken, firstly to identify a historical chronology of the case law germane to global claims and secondly, to appraise and extract the governing principles adopted by the UK courts in relation to global claims and to clarify if there is certainty surrounding the decision making, particularly in its application between the Scottish and English courts.

This chapter will therefore identify and provide commentary upon the case law in relation to global claims from when the concept was first raised by the English courts in the 1960's; until the introduction of the 1st Edition of the Society of Construction Law's Delay and Disruption Protocol, released in October 2002, where the authors were moved to state:

"The not uncommon practice of contractors making composite or global claims without substantiating cause and effect is discouraged by the Protocol and rarely accepted by the courts."[201] [emphasis added]

Where appropriate, the chapter will also punctuate the case summaries with any academic and/or professional thinking that existed at the time, to allow a fuller understanding as to the jurisprudential development of global claims both in the courts and in practise.

3.2 The Dawn of the Global Claim in the UK

In 1967, the English courts first began to recognize that a supplementary award could be made for the *"remainder of construction claims"*[202] which could not be dealt with in isolation or easily separated, in the case of *J Crosby & Sons v Portland*[203].

J Crosby & Sons entered into an ICE Conditions (fourth edition) construction contract with Portland Urban District Council to lay a trunk water main. Various disputes arose between the parties which they duly referred to arbitration. In Part 2 of his award, the arbitrator referred 29 questions of law in the form a special case to the courts pursuant to section 21(1) of the Arbitration Act 1950.

[201] Supra note 18, para 1.14.1.
[202] Phraseology at that time akin to what is now recognized as global claims, before the phrase was coined.
[203] *J. Crosby & Sons v Portland UDC* (1967) 5 BLR 121 (QBD).

The 29 questions were organized into five heads of dispute, and the parties accepted that the first question in each of the heads of dispute could be addressed by the judge, Donaldson, J. The fifth head of dispute related to the contractor's claim for delay and disorganisation. Within this final and most significant head of dispute (in terms of quantum), the arbitrator in his findings at sub-paragraph (f) stated that:

"The result, in terms of delay and disorganisation, of each of the matters referred to above was a continuing one. As each matter occurred its consequences were added to the cumulative consequences of the matters which had preceded it. The delay and disorganisation which ultimately resulted was cumulative and attributable to the combined effect of all these matters. It is therefore impracticable, if not impossible, to assess the additional expense caused by the delay and disorganisation due to any one of these matters in isolation from the other matters."[204]

In his response to the foregoing, Donaldson, J noted, *inter alia*:

"Since, however, the extent of the extra cost incurred depends upon an extremely complex interaction between the consequences of the various denials, suspensions and variations, it may well be difficult or even impossible to make an accurate apportionment of the total extra costs between the several causative events. An artificial apportionment could of course have been made; but why, they ask, should the arbitrator make such an apportionment which has no basis in reality?

I can see no answer to this question….provided he ensures that there is no duplication, I can see no reason why he should not recognize 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. This is what the arbitrator has done…

Accordingly I answer the first question of law in this group of questions in the affirmative and the arbitrator's award stands."[205]

In arriving at his decision, the arbitrator, had awarded 31 of the 46 weeks delay claimed by the contractor, by undertaking a review of the individual heads of claim and allocating responsibility as he saw it.

[204] Ibid, 133.
[205] Ibid, 136.

Crosby is important, because it established that the courts, at least in England, now acknowledged that a supplementary award could be made to a contractor for composite claims where it was difficult or impossible to make an accurate apportionment between causative events. Interestingly, Donaldson J could find no answer, when the contractor posed the question, why should the Arbitrator be compelled to make an *"artificial"* apportionment, which had no basis in reality. As early as the 1960's therefore, the English courts were contemplating "apportionment" as a basis to make an award, where it is difficult to separate causative effects from several events.

The phraseology *"remainder of construction claims"* is insightful because it is often the case that, when establishing its claim for delay and/or disruption, a contractor will, in the first instance, attempt to evidence and particularise its case as far as is reasonably possible with the information he has available. The contractor's first port of call when drafting a claim of this nature, will be to revisit existing variations[206] and well-defined claims (where entitlement is already established), he may also be able to attach prolongation costs to identified periods of what he avers, are employer delays. It is often the case that after this initial fact finding and quantification exercise, the contractor may still identify losses, or reduction in profit levels, which are much more difficult to ascertain (often called the indirect costs). Examples of activities which are generally difficult to quantify include localized disruption (reduced productivity), accelerative measures, and/or possibly the cumulative impact of many and varied changes, which have a negative ripple effect on the contractor's ability to carry out the works with planned efficiency.

In essence, this *"remainder",* is often where the contractor's claim becomes more "global" in nature, because given the structure of the losses incurred, once particularization of the claims has been exhausted, there may be other losses where the contractor may be unable to clearly show that causal nexus between the outstanding cause(s) and effect(s).

The decision moved the editors of the Building Law Review to state that Donaldson J *"gave judicial approval to a widespread and common-sense method of measuring claims*"[207], which applied equally to both extension of time claims and monetary compensation[208], however the following three principles must be adhered to:

[206] The contract will normally set out the variation procedure and whether a waiver of some kind has been included within the wording, to allow the contractor to re-price variations which are already agreed.
[207] Supra note 203, 123.
[208] The Editors also suggested that the principles should apply to any Standard Building Contract.

i. The interaction of events relied upon must be "complex" and it must be "impracticable" to separate them;

ii. There can be no duplication; and

iii. Any claim for money, must not include profit. This aspect of the judgement will be discussed later in the thesis, suffice to say at the stage that a profit sacrifice must be made by the contractor, should he decide to pursue a global claim. A building contract will ordinarily set out how changes to the works are valued, either based on a schedule of rates (which normally include profit), and/or cost based, and by its nature a global claim could be a conflation of events which should be valued differently.

Almost twenty years had passed since *Crosby* until in 1985, the case of *Merton LBC v Stanley Hugh Leach Ltd*[209] was brought before Vinelott J. The contractor Stanley Hugh Leach Ltd entered into a JCT Standard Form, 1963 Edition 1971 Revision, with London Borough of Merton ('the Council') to construct 287 no. dwellings. A dispute was referred to arbitration to decide upon claims for an extension of time, and the associated loss and expense incurred by the contractor.

The arbitrator made an interim award in favour of the contractor, which was appealed by the council who requested that the court decide upon some 15 separate legal questions, including the following:

Issue 9: *"Do the terms of the contract permit the contractor to recover direct loss and/or expense under clauses 11(6) or 24(1) in respect of any alleged event, when it is not possible for the contractor to state in respect of any such alleged event the amount of loss and/or expense attributable thereto?"*[210]

In his response to this question, Vinelott J stated the following:

"If application is …impracticable to disentangle or disintegrate the part directly attributable to each head of claim, then provided the contractor has not unreasonably delayed in making the claim and so has himself created difficulty, the architect must ascertain the global loss directly attributable to the two causes, disregarding as in Crosby, any loss or expense which would have been recoverable if the claim had been made under one head taken in isolation and which would not have been recoverable under the other head also taken in isolation"

[209] *Merton LBC v Stanley Hugh Leach Ltd* [1985] 32 BLR 51.
[210] Ibid, 52.

And

"…a rolled up award can be made only in a case where the loss or expense attributable to each head of claim cannot in reality be separated and secondly that a rolled up award can be made only where apart from that practical possibility, the conditions which have to be satisfied before an award can be made have been satisfied in relation to each claim head."[211]

The language used by Vinelott J, is slightly different to that used by Donaldson J in *Crosby*. Vinelott J discusses causative problems with loss or expense, which are *"impracticable to disentangle or disintegrate"* and *"cannot in reality be separated",* where Donaldson J, uses the words *"difficult or even impossible"*. It would be an artifice to draw any distinction between the differences in terminology, in essence both judgements contemplate and are sympathetic to, the contractor experiencing problems in wholly separating losses from two or more causes.

In his judgement, Vinelott J sets out three conditions the contractor must satisfy in order to overcome a defence to a rolled up claim. The first is similar to *Crosby* however, points ii) and iii) would appear to introduce two additional pre-conditions:

i. Where it is impracticable to disentangle or disintegrate the part directly attributable to each head of claim and cannot in reality be separated: Since Merton is only the second case in the UK to consider construction claims of a global nature, it is difficult to understand the practical application of what Vinelott J sets out here. Given the particularity of construction projects, each case would have to be assessed on its own merits;

ii. Provided the contractor does not unreasonably delay in making the claim: Vinelott J does not elaborate further on what is meant by "unreasonably delayed", it may be reference back to several other issues set out in his judgement which refer to matters such as whether the notice provisions in the contract were conditions precedent, or that that the contractor must make applications for loss or expense, in order to allow the architect to form a *"competent opinion"*. Immediately post this decision, it may therefore have been open for an employer to argue against a contractor's claim for a global loss if it were made so late in the project that the architect was less able to

[211] Ibid, 102.

accurately ascertain the amounts due, than if the claim had been made closer to when the contractor discovered the loss; and

iii. The conditions which have to be satisfied before an award can be made have been satisfied in relation to each head of claim: Since Vinelott J is referring to Donaldson J's decision in *Crosby*, then the conditions would be that there should be no duplication and that there should be no profit element.

It is prudent to note the introduction of particular terms in *Merton*, Vinelott J coins the term "rolled up" award and in their commentary of the case, the editors of the BLR specifically mention the *"concept of the global claim"* and *"global loss"*.

There is also merit in examining Issue 10 of this judgement which sets out the following question:

"Where a contractor notifies the architect in writing of an event which the contractor maintains qualifies under clauses 11(6) or 24(1), is the contractor or the architect under certain duties (as pleaded) thereafter and is the building owner liable in damages for failure by the architect to perform his duty?"[212]

In his response, Vinelott J *inter alia*, noted that when a contractor notifies a written application for loss or expense, it should be done:

"…with sufficient particularity to enable the architect to know upon what question he is required to form an opinion...decided in the light of all the relevant circumstances"[213] and

"…if the contractor……fails to identify with sufficient particularity the question on which the architect is required to form an opinion, he cannot recover direct loss or expense…. It does not follow that he has no remedy" and

"If he makes a claim but fails to do so with sufficient particularity to enable the architect to perform his duty or <u>if he fails to answer a reasonable request for further information,</u> he may lose any right to recover loss or expense under those sub-clauses and may not be in a position to complain that the architect was in breach of his duty."[214] [emphasis added].

On the face of it, it may appear that this section of the judgement is counter intuitive to the judgement set out in issue 9. How can a "rolled up" award be granted if the contractor fails to

[212] Ibid 103.
[213] Ibid 104.
[214] Ibid.

identify with sufficient particularity the question on which the architect is to form an opinion? However, upon reading the case in its entirety, the judgement in Issue 10 is consistent with that set out in Issue 9. When Vinelott J was referring to "particularity", it relates initially to the level of detail contained within a notice provision and contemplates a scenario where if the claim for loss or expense is unclear and the architect cannot form an opinion, "*it is for the architect to obtain the information which he considers is necessary to enable him to do so"*.[215] The final quotation above, reflects the commercial reality that the architect may on receipt of a claim for loss and expense, request additional information.

On receipt of that information, if the architect (and in turn, the client's quantity surveyor) cannot with certainty separate losses between two or more causes, they must still attempt to ascertain the amount due to the contractor in the form of a "rolled up" award. If the architect fails to do so, the contractors remedy is to seek justice through the dispute resolution procedures set out in the contract.

In conjunction with the foregoing, the contractor will have to make it clear in his discussions with the architect on his loss and expense claim, that this is precisely what he is requesting of the architect, i.e. provide some indication that the losses cannot easily be separated. If he does not set out the question the architect has to answer, it is under these circumstances that he risks losing his right to the claim.

3.3 A Dissenting Voice from the Commonwealth

In the case of *Wharf Properties Ltd v Eric Cumine Associates*[216] (No. 2) [1991] 52 BLR 8, Wharf Properties Ltd ("Wharf") were the developers of a residential and commercial development on the Hong Kong waterfront, who engaged Eric Cumine Associates ("ECA") as their architects and surveyors. In this particular instance (there were other actions) Wharf raised an action in the Court of Appeal of Hong Kong, against ECA for the recovery of sums which they had paid to their main contractor John Lok and Partners Limited ('Lok') and its sub-contractors, in consequence of ECA's negligent design and contract administration.

Special leave was granted to appeal the decision before the judgement of the Lords of the Judicial Committee of the Privy Council ('the Lordship's Board') because it was thought at that time, that the appeal raised a point of general significance to the construction industry and in particular, the two decisions made by the High Court of England, namely *J Crosby &*

[215] Ibid.
[216] *Wharf Properties Ltd v Eric Cumine Associates (No. 2)* [1991] 52 BLR 8.

Sons v Portland and Merton LBC v Stanley Hugh Leach Ltd, the details of which have been explained above.

ECA's complained that various sections of Wharf's claim should be struck out, because it was unclear what the case against it, actually was, and that Wharf have been *"…unsuccessful in uncovering what is the essential link between the various heads of breach which the pleading has promised to elaborate and the damages claimed"*[217].

On deciding upon the foregoing, the Court of Appeal reviewed whether the case had established all the 'material' facts in establishing an essential link between ECA's conduct and its relationship to the damages claimed. In doing so, Power J.A was guided by a definition of what can be deemed 'material' in the case of *Bruce v Odhams Press Limited*[218], namely that it means *"…necessary for the purpose of formulating a complete cause of action",* and that if any material facts are omitted, then the statement of claim is bad.

At the appeal hearing, Wharf had averred that:

"*Due to the complexity of the project, the inter-relationship of the very large number of delaying and disruptive factors pleaded and their inevitable 'knock on' effects and the necessarily overlapping nature of many of the allegations made….it is not possible at this stage to identify and isolate individual delays in the manner requested."*[219]

ECA contended that Wharf was precluded from any right to recovery because it has failed to release its burden to prove:

i. A breach of contract;

ii. The occurrence of an immediate intervening event caused by that breach; and

iii. The damage claimed was as a financial consequence of that event.

The appeal court concluded that Wharf had failed to provide the material facts to support that any action or inaction by ECA, was essentially linked to those events with the damages averred, and the case was (at that time) struck out accordingly.

In addressing the foregoing, the Lordships Board were, from the outset, of the opinion that the striking out of a pleading, should be left only for *"plain and obvious"* cases. In their summing up, they noted the possibility that it was at least theoretically possible that:

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[217] Supra note 216, 5.
[218] *Bruce v Oldham's Press Limited* [1936] All E.R. 287, 294.
[219] Supra note 216, 10.

"*…if Wharf were to succeed at the trial in proving every single instance of breach of contract alleged and those breaches cumulatively gave rise to the delays please in paragraph 6.6, they might reasonably establish their claim to the damage plead in paragraph 6.10.*" [220]

However, the Lordships Board then went onto say that it also must consider actions which may *"prejudice, embarrass or delay the fair trial of the action or otherwise constitute an abuse of the process of the court."*[221] This consideration was borne from Penlington J.A.'s opinion in the appeal decision that the court was being left to decide upon which variations were excessive and their effect. This would *"throw an enormous and quite unfair burden on the defendants and should not be allowed to continue."*[222]

In its conclusions, the Lordships Board stated:

"…the pleading is hopelessly embarrassing as it stands and their Lordships are wholly unpersuaded by Mr Butcher's submission that the two cases of J. Crosby and Sons v Portland Urban District Council and London Borough of Merton v Stanley Hugh Leach, supra, provide any basis of saying that an unparticularised pleading in the form ought to be permitted to stand. Those cases establish no more than this, that in cases where the full extent of extra costs incurred through delay depend upon complex interaction between the consequences of various events, so that it may be difficult to make an accurate apportionment of the total extra costs, it may be proper for an arbitrator to make individual financial awards in respect of claims which can be conveniently be dealt with in isolation and a supplementary award in respect of the financial consequences of the remainder as a composite whole. This has, however, no bearing upon the obligation of a plaintiff to plead his case with such particularity as is sufficient to alert the opposite party to the case which is going to be made against him at the trial. ECA are concerned at this stage not so much with quantification of the financial consequences – the point with which the two cases referred to were concerned – but with the specification of the factual consequences of the breaches pleased in terms of periods of delay. The failure even to attempt to specify and discernible nexus between the wrong alleged and the consequent delay provides, to use Mr Thomas' phrase, "no agenda" for trial."[223] (emphasis added)

[220] Supra note 216, 12.
[221] Supra note 216, 13.
[222] Ibid.
[223] Supra note 216, 14.

Under these circumstances their Lordships dismissed Wharf's claim to appeal and it was considered at the time that this could be the *"death knell"*[224] for global claims.

On the face it, it may appear that the assertion proffered by Wharf that "*unparticularised pleadings in this form ought to be permitted to stand"*[225], are indeed similar to the positions set out in both Crosby and Merton cases, however upon closer analysis there are some discerning features which differentiate the Wharf case, and which moved the Lordship's Board, to decide that the case was inadmissible.

On review of the judgement, it could be argued that Wharf were in effect *"flying a kite"*[226], in a desperate attempt to find someone to blame for the delay and additional costs to the project. Indeed, at one stage there were 17 defendants in the case, prior to ECA eventually becoming the sole defendant. Carelessly, Wharf originally also resorted to suing subcontractors, with whom they had no contractual relationship.

Although it was initially thought that the case may have had some significance in light of the decisions in *Crosby* and *Merton*, the counterpoint centred on a "*pure point of pleading*"[227], emphasizing that Wharf had failed on several occasions to particularise its claim.

The case was raised by Wharf in relation to delays allegedly caused by a breach of contract and negligence by ECA. Delays averred due to negligence are notoriously difficult to prove. Often it is the case that the claimant, lists out high level statements on why the defendant has been negligent with limited causal nexus to the actual delays or costs claimed. Indeed, that is what happened in Wharf, and the averment of negligence was dropped prior to the Court of Appeal.

It would be reasonable to conclude that the case was so poorly put together that ECA did not know the case they were to answer to. The Court of Appeal case extended beyond 400 pages, which their Lordships said was *"a document of immense length and complication*". Although the case before Lordship's was somewhat distilled, it is obvious that they were still frustrated by its opacity;

"The difficulty of connecting allegations in the main pleading with the confusing welter of documents in the schedules, which involves constant reference to two and sometimes three,

[224] Mark Wilson, 'Global Claims at the Cross Roads*'* Const. L.J. 1995, 11(1), 15-28.
[225] Supra note 216, 13.
[226] A term often used by construction professionals, where a claimant simply asserts an unparticularised and inflated claim.
[227] Supra note 216, 1.

different documents at the same time is further compounded by the division of the pleading into what are described as "sections" – a word which is also used in the pleading itself to describe particular portions of the development".[228]

The case then focused on somewhat general breaches of contract, indeed their Lordship's said the following three breaches typified the breaches averred generally, i.e. that ECA had:

i. *"...failed properly to manage, control, co-ordinate, supervise or administer the Third Defendants' contracts and works;*

ii. *...failed to provide information and instructions in respect of the Third Defendants contract and works accurately, properly, timeously, sufficiently or at all; and*

iii. *...caused or permitted the Third Defendant's work to be delayed"*[229]

In total there were six periods of delay and Wharf allocated some 15 separate breaches, similar to those set out above. That approach was rejected by the Court of Appeal as *"hopelessly embarrassing"*, which their Lordship's acknowledged, and attempted to test the submission for themselves. They took a systematic approach to reviewing each head of claim, the cause and effect.

On 5th August 1986, during the Court of Appeal procedure, ECA sought some 357 further particulars from Wharf to understand the case against them more fully. Wharf failed to serve those particulars, and on 14th February 1987, ECA sought an order for delivery. Mortimer J made an order that the particulars were to be delivered by 6th May 1987, and on 14th May 1987, Wharf responded in such a poor manner that their Lordships were moved to question whether they could be even be called particulars. Wharf's response consisted of a 3 column Scott Schedule with 65 items / variations stating *"...it will be necessary at trial to consider all variations instructed in order to establish which of them are unnecessary*"[230] the vagary of this statement was not lost on their Lordship's who somewhat sarcastically referred to it as an *"...ingenious statement",* and that it *"...discloses nothing that is not already in the pleading".*[231]Other damming statements by the Board include *"...insufficient pleading", "...tells the reader nothing", "...wrapped in mystery"* and *"...nowhere pleaded",* which are

[228] Supra note 216, 3.
[229] Ibid, 4.
[230] Ibid, 9.
[231] Ibid, 10.

used whenever Wharf utilize generic statements to amounts claimed. The Board provide many and varied examples in support of their frustrations such as:

"For example, one allegation is that ECA "caused or permitted there to be an excessive number of variations in the design of the third defendants work so as to disrupt their progress." What variations are alleged to be excessive, what disruption they caused and what contribution (if any) that disruption made to Lok's (i.e. the Contractor) claim and how they contributed, remain unspecified "[232]

The foregoing moved the Board to conclude that by 30th March 1998, the action had been ongoing for some 4.5 years, *"...without Wharf's case having been fully pleaded"*. ECA then issued a summons, that the statement of claim be struck out due to "*…no reasonable grounds for action"*, and Wharf duly issued a counter summons that ECA provide "*…all design flow information relevant to the aforementioned requests"*. The Court of Appeal dealt with both summons requests and decided on 23rd December 1988, that save a matter related to surety bonds and damages for increased excavation work, the case be struck out as an *"...abuse of the court process"*. Their Lordship's Board agreed with this view, emphasizing that Wharf had ample opportunity to provide additional evidence, was then ordered to do so by the Court, but ultimately failed to deliver suitable evidence.

Wharf's failure to provide further and better particulars (even when ordered to do so) and what would appear to be very poorly drafted statement of claim, were perhaps the most differentiating factors when compared to the previous two decisions on global claims, indeed as we shall see in subsequent decisions, Wharf is often referred to as an *"exceptional"*[233] case as in the majority of cases most applications to strike out global claims are unsuccessful.

Around this time, the decision in Wharf and others was significant enough for the late Ian Duncan Wallace QC, the highly regarded lawyer and legal scholar, to opine the following:

"It is submitted that, in the English and related Commonwealth jurisdictions, claims on a total costs 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 the interlocutory stage: Wharf Properties Ltd v Eric Cumine Associates (1991) 52 BLR 1, PC. It is further submitted that, even if such a claim is allowed to proceed, it should only be on the basis that, on proof of not merely trivial damage or

[232] Ibid, 7.
[233] Supra note 14, 16.

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. Any other course places the practical onus of providing the extent of the plaintiff's damage on the defendant or on the court itself". [234]

Wallace infers and introduces, without any express guidance or direction from the case law, what has been termed the *"Exocet"*[235] defence, i.e. that when a global claim is plead, if costs and/or delays are identified, which are not the responsibility of the defendant, the *"…entire claim will be dismissed".*[236]

3.4 Global Claims Rejuvenated, but a Tightening Discipline?

The case of *Mid Glamorgan County Council v J. Devonald Williams*[237] is germane because Mr Recorder Tackaberry QC sets out the particularization of the quantum for the global claim amounts in dispute, which was not provided in the previous case judgements. In the early 1980's the council employed J. Devonald Williams as the architect to design an extension to Rhondda College of Further Education. Two years after practical completion, on 20th May 1982, the council issued proceedings against the architect for loss and damage for both negligence and breach of contract in relation to the works carried out at Rhondda College. The amount claimed totalling £915,000, related to delay and disruption of the main contractor Fairclough's. Between May 1988 and June 1991, the architect had continually requested that the council provide better particulars, and towards the end of June 1991, the architect applied to strike out certain paragraphs of the council's statement of claim.

Prior to considering the law, Mr Tackaberry helpfully sets out an analysis of the points of contention. The council stated their case, firstly by setting out four relatively high-level statements / particulars defining the breaches and negligence of the architect, followed by eight separate heads of claim and the associated calculations; which were averred flowed from those particulars.

Post review of the particulars, and prior to any reliance on authority Mr Tackaberry stated the following:

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[234] Ian Norman Duncan Wallace QC, *Hudson's Building and Engineering Contracts* (11th Edition, Sweet and Maxwell 1995).
[235] Ian Pennicott QC, 'Global Claims', A Keating Chambers Seminar to the Society of Construction Law in Newcastle, 8th June 2006.
[236] Supra note 235.
[237] *Mid Glamorgan CC v j Devonald Williams & Partner* (1991) 29 Con LR 129 QBD (OR).

"On the one hand, a defendant is entitled to know the case that will have to be met well in advance of the hearing at which that case will be argued. On the other hand, it is to be hoped that no plaintiff with a genuine complaint will be shut out from the seat of justice because the information which he needs to prosecute his claims is in the hands of another, or others."[238]

Mr Tackaberry then goes on to review *Crosby, Merton* and *Wharf* as cases pertinent to his own. Given the architect had tried to strike out the action by relying on their Lordships Board's decision to dismiss an appeal by Wharf, Mr Tackaberry placed particular emphasis on the analysis of that case. Mr Tackaberry then summarised the principles of pleading complicated cases as follows:

"A proper cause of action has to be pleaded;

i. *Where specific events are relied upon as giving rise to a claim for moneys under the contract then any pre-conditions which are made applicable to such claims by the terms of the relevant contract will have to be satisfied, and satisfied in respect of each of the causative events relied upon;*

ii. *When it comes to quantum, whether time based or not, and whether claimed under the contract or by way of damages, then a proper nexus should be pleaded which relates to each event relied upon the money claimed;*

iii. *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 impracticable, it is permissible to maintain a composite claim."*[239]

In arriving at his decision, Mr Tackaberry notes that both *Crosby* and *Merton* were fully plead cases, whereas the case before him, was in relation to whether a case should be struck out, similar to the position in Wharf. Relying on a quotation from Wharf, Mr Tackaberry stated that an application to strike out, should only be allowed in *"...plain and obvious cases"*[240]. It is at this juncture where Mr Tackaberry differentiates between the case before him and the circumstances set out in Wharf. In Wharf the plaintiff had *"...avowedly and contumaciously*

[238] Ibid, 142.
[239] Ibid 154.
[240] Ibid.

failed to comply with an order of the court for a supply of particulars".[241]Interestingly Mr Tackaberry then stated the following:

"….applications such as the present are often made less for the purpose of actually achieving an order for striking out of a pleading….and more by way of encouragement to the party whose pleading is attacked to improve upon it. …I have not lost sight of the fact, as one would expect, there is an alternative order sought by the summons in this application. This seems to be a relevant factor where one is dealing with these rolled up claims arising from complicated and interactive events."[242]

Mr Tackaberry further differentiates the case before him to Wharf by noting that *"…this is not a case of a party asserting that he will particularise the case when he gets to court",*[243] which Wharf had alluded to in an attempt to justify the lack of particulars in its pleading. With regard to the council's evidential difficulties, he went on to say:

"Of course the council is pinning its colours to a case which creates evidential difficulties and is unlikely to be successful". However, I do not think that such matters justify the draconian remedy of striking out".[244]

Had the case proceeded to point, it would have been interesting to understand how the court would have decided upon this case, if it were, as he asserts below, *"…unlikely to be successful"*, however rather frustratingly, there is no further record of this case being pursued and decided upon.

Given there were no detailed particulars set out in *Wharf*, unlike *Mid Glamorgan*, it is difficult to compare whether the cause and effect and evidential difficulties did indeed differentiate the cases. It would appear that the Board struck out the case in *Wharf* due to their *"…blunt refusal"* to supply better and more detailed particulars; and the fact that they sought to rely on asserting further particularization when proceeded to court. Notwithstanding that *Mid Glamorgan*, had several attempts to produce better particulars and were *"unimpressive"* in this regard, what may be the most significant factor is that they had settled on their position. The following phraseology was relied up for several heads of claim:

"The [council] are unable to allocate items of loss as between the 4 sub-paragraphs of paragraph 10 of the Statement of Claim save that the losses please at items (i) and (ii) of the

[241] Ibid.
[242] Ibid.
[243] Ibid, 158.
[244] Ibid.

Particulars of paragraph 11 of the Statement of Claim were caused by the matters pleased by sub-paragraph 10(a) of the Statement of Claim."[245]

That position is not inconsistent with the guidelines set out in both *Crosby* and *Merton*.

Therefore, taking precedent and the presented facts, Mr Tackaberry allowed the case to proceed stating:

"On the contrary the council has asserted a case which is theoretically possible as a matter of fact, and arguably sustainable in law. Of course the council is pinning its colours to a case which creates evidential difficulties and is unlikely to be successful. However, I do not think that such matters justify the draconian remedy of striking out."[246]

Here we can see the beginnings of the court's tendency to disfavour, striking out applications which may appear evidentially weak. If ultimately the claim is unsuccessful, the parties will be expected to pay the costs for pursuing a case in which the standard of proof, is not satisfied.

In a similar manner, in the same court[247], and only five months later, Fox-Andrews J was asked to decide upon the case of *Imperial Chemical Industries Plc v Bovis Construction Limited*[248]. The plaintiff, ICI were pursuing three defendants, Bovis (the contractor), GMW (the architects) and Oscar Faber (the consulting engineer); for £19m of losses associated with the refurbishment and reconstruction of their new headquarters. ICI claimed that their failure to co-ordinate the works, caused delays and cost overruns.

The original claim was a combination of high level statements, which did not link the averred breaches with losses stated and ICI were ordered to serve better particulars by 31st July 1990, in the form of seven schedules. Upon receipt of those particulars, the defendants again complained about the lack of particularization and after various exchanges, resulted in the production of a Scott Schedule on 14th February 1991. Upon analysis, the defendants applied to strike out the Scott Schedule.

On arriving at his decision, Fox-Andrews J referred to the cases of *Crosby, Wharf* and *Merton*. Interestingly, he made no reference to *Mid Glamorgan*, decided only five months previously and whose factual circumstances were, at least on the face of it, very similar to the case at hand.

245 Ibid, 141.
246 Ibid, 158.
247 The Queen's Bench Division (Official Referees Business).
248 *Imperial Chemical Industries Plc v Bovis Construction Limited* [1993] Con LR 90.

In the first instance, Fox-Andrews J commented upon the efficacy of the Scott Schedule[249], which consisted of two lever arch files and a further two lever arch files containing some 37 appendices. The judge acknowledged that *"...considerable work"* had been done by ICI, and that there has been no *"...contumelious behaviour"* on their behalf. Fox-Andrews J makes deliberate mention of this phrase, as a direct reference to the reasoning in *Wharf* and why the case in front of him, is differentiated.

What could appear as an initially supported position, quickly deteriorates, and despite the voluminous documentation, Fox-Andrews J finds ICI's reliance on phrases such as the following, novel and objectionable although not unsustainable:

"....it is the Plaintiff's case that insofar as sums certified purportedly pursuant to the provisions of the Management Construction Agreement in favour of the First Defendants and paid by the Plaintiffs reflect costs occasioned by reason of the breaches of the Management Construction Agreement...the same should not have been certified and were not properly payable by the Plaintiff's. However, such sums having been certified and paid the Plaintiffs aver that they are entitled to recover the same as damages from the First Defendants in this action[250]" and if denied and in terms of any counterclaims by the defendants:

"...the Plaintiffs will say that sums represent, pound for pound, loss suffered by the Plaintiffs by reason of the matters alleged against the First Defendant…....and so is not recoverable by the First Defendant"[251]

With respect to the learned judge, it is difficult to understand how this approach is indeed sustainable. For ICI to state that any amounts counterclaimed by Bovis, are generally offset against losses suffered, or that any amounts already paid to Bovis, entitle it to damages for the same amount is stretching the definition of "sustainability" to unchartered territory. Just because losses have been incurred, does not entitled ICI to somehow precisely match these losses with Bovis' payments or counterclaims for that matter.

Fox-Andrews J goes on to discover significant anomalies and errors in the Scott Schedules and to address the various criticism levelled at it by the defendants. Despite his opinion that certain sections of the pleadings were *"entirely unparticularised"*, *"hopelessly inadequate. It is difficult to envisage a more embarrassing claim"* and *"confusing"*.

[249] A Scott Schedule is a way of tabularising and particularising a claimants causes / effects and associated losses.
[250] Supra note 248, 100.
[251] Ibid, 101.

By way of example, the defendants commented upon a claim averred in relation to the electrical subcontractor Balfour Kilpatrick, which included three pages of unidentified daywork sheets and a fourth page listing 3 items for preliminaries. There were no details as what dayworks or the preliminaries related to. Seizing the opportunity, the defendants by way of example set out two events i.e. the *"circuits needed changing"* and *"fire bell had to be repositioned"* and argued that if save for these two events they had a complete defence, how could they know the monetary consequences related to these two items. ICI's Counsel Mr Richard Seymour QC set out the following logic:

"The plaintiff's case is that the various events set out in section 6 all contributed to the sums claimed, with no actual apportionment being possible. However, as the total cost claims have in fact been paid, if any of the events is not proven at trial, the only consequence is that the actual sum paid will fall to be distributed between a less number of events, not that the total sum recoverable will be less"[252]

Unsurprisingly Fox-Andrews J found this approach *"…palpable nonsense"*[253] and that where possible financial consequences must be pleaded, there has to be the *"…necessary nexus shown*[254]*."* Perhaps it is only through the clear vision of hindsight and the plethora of case law and legal commentary since this case, that we now look upon how Seymour J, now a retired Senior Circuit Judge, could consider that an argument such as that posed above, had a modicum of merit. Section 6 consisted of 16 packages, totalling some £840,211. Adopting the logic averred, if say any of the packages were not proven at trial, ICI's position was that the total amount to be paid, stays the same, irrespective of the number of successful claims remaining. It would appear that their argument relies upon the premise that wanted to recover all losses, irrespective of the number of events which are ultimately proven. With respect, the logical conclusion of that argument would allow the outcome that if only one package was proven, however small such as the repositioning of the fire bell, then ICI would be entitled to the full £840,211 – a reductio ad absurdum indeed.

Despite the damning indictment by Fox-Andrews J of the quality of the submission, he concluded his judgement by stating:

[252] Ibid, 109.
[253] Ibid.
[254] Ibid, 110.

"The history of this matter is quite different from that in Wharf. There is no question of debarring of ICI from pursuing their claim. But the present substitute schedule is inadequate in so many different respects, as I have found, that a fresh schedule must now be served."[255]

At this juncture, it is of merit to dwell a little on this section of the judgement and ask the question *"why is this case quite different from that in Wharf"*? On the face of it, the cases are actually very similar, multiple defendants attempting to strike out a client's claim for damages, where they have been ordered to provide more detailed particulars in the form of Scott Schedules, however one case is struck out and the other is allowed to proceed. It is suggested that the answer can be found in the Privy Council's analysis in *Wharf.*

The case before the Privy Council was that they had to decide whether the Court of Appeal was correct in striking out the *Wharf* case. Notwithstanding that the Privy Council were not impressed with *Wharf's* claim from an evidential perspective, similar to the findings of Fox-Andrews J in ICI, they did nonetheless state *"Their Lordships have not felt able to follow the Court all the way in this conclusion.*"[256] Although they agreed that some sections of the claim could be struck out, they did not feel *"…able to say that the statement of claim discloses no reasonable cause of actions as to warrant its being struck out…".*[257] Using the same logic adopted latterly by Fox-Andrews J, i.e. that allowing a case to be struck out should be reserved for plain and obvious cases, they went on to add that *"…the extraordinary evidential difficulties which the pleading may pose for Wharf if the action were to go to trial on the pleading as it stands do not provide a sufficient ground for saying that it discloses no reasonable cause of action.*[258]*"* A very similar point was made by Fox-Andrews J in ICI, which the authors of Construction Law Report summarised as "*Although the Scott Schedule was inadequate in many respects, it would not be right to debar the plaintiff's from pursuing their claim"*[259].

Therefore, what does differentiate the two cases?

Again, we must refer to the decision of the Privy Council in *Wharf*, indeed if the matter ended there, *"…their Lordships might (subject to what is said below) feel bound to allow the appeal and to allow the action to proceed"*[260] However it did not.

[255] Ibid, 111.
[256] Supra note 216, 12
[257] Ibid.
[258] Ibid, 13.
[259] Supra note 248, 91.
[260] Supra note 216, 13

Their Lordships went on to consider that Order 18, rule 19(1) must also consider matters which may *"...prejudice, embarrass or delay the fair trail..."*[261]. In doing so they referred to Penlington J.A. in the Court of Appeal decision, who had been particularly frustrated that Wharf was in effect leaving it to the Court to determine what in that case, "variations" were excessive. Penlington J.A. went onto say that *"to make this speculative litigation which would throw an enormous and quite unfair burden on the defendants and should not be allowed to continue."*[262]and decided therefore that the court should *"intervene to prevent an abuse of its process"*.[263]

Their Lordships further explained that the defendants were not so much concerned about the financial consequences of the case, but the "*...specification of the factual consequences of the breaches pleaded in terms of periods of delay. The failure even to attempt to specify any discernible nexus between the wrong alleged and the consequent delay...provides...."no agenda" for the trial.""*[264]This is therefore one of the earlier cases to consider globality in the form of wrong and consequent delay, as opposed to globality in a monetary sense.

Therefore, the lengthy and *"contumacious"* manner that Wharf failed to provide further particulars, coupled with their abject failure to find any *"discernible nexus*" between the *"wrong alleged and the consequent delay*" does in fact differentiate it from his Honour Fox-Andrews QC findings in ICI.

The significance of both *ICI* and *Mid Glamorgan* moved Pickavance, to state that the judgements were *"...much needed*"[265] and a *"...tightened discipline in the particularisation of claims"*[266], and that

"...the courts appeared to demonstrate that any leniency as to the calculation of the value of the claim by way of a total loss calculation did not relieve C of its essential evidential burden of establishing liability, causation and damage, and that they would reject global claims."[267]

[261] Ibid.
[262] Ibid.
[263] Ibid.
[264] Ibid, 14.
[265] Keith Pickavance, 'Delay and Disruption in Construction Contracts', Fourth Edition, Sweet and Maxwell 2010, 19-043, referring to the opinion of the late Ian Duncan Wallace QC.
[266] Ibid.
[267] Ibid

The decisions in both *ICI* and *Mid-Glamorgan*[268], compelled Wilson to consider that global claims had in fact now came to a crossroads[269]. The main thrust of his paper was to analyse why the English and Australian courts were able to distinguish from the *Wharf* case. It is noted that the differentiations are not obvious, in comparing *Mid Glamorgan*, Wilson had this to say:

"…this decision goes little beyond a finding that the plaintiff council's actions in the face of the objections raised to its pleaded case were nowhere nearly as reprehensible as those of the plaintiff in Wharf[270]*"*

In comparing *ICI*, Wilson quotes Fox-Andrews J's clear reference that notwithstanding the various pejorative descriptions to *ICI's* Scott Schedules:

"There is a total lack of evidence of any contumelious behaviour on the part of ICI or its advisers"[271]

Wilson goes onto say that Fox-Andrews J had some sympathy for *ICI's* advisers as they had done their best, however:

"Whilst the solution reached in the ICI case may be applauded for its pragmatism there seems to be little doubt that there was ample scope for His Honour to strike out the entire claim in reliance of Wharf[272]*"*

It is difficult to argue with the observations above or say anymore, without access to the detailed particulars, all that can really be deduced from an analysis of the case law and why *Wharf* is differentiated from both *Mid Glamorgan* and *ICI*, appears to be the particularly obstinate behaviour of the plaintiff's in *Wharf*. Wilson concludes by recognising that since the cases referred to only consider global claims in the context of striking out the pleadings, this is only *"…half the battle faced by a claimant",* because if the claim is not struck out, then it must prove its case at trial. It is informative to note that Wilson, when describing the proof required of a claimant states that from the cases since *Wharf* and in consolation to a defendant who has failed to strike out a case:

[268] And the Australian case of *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical and Electrical Engineers Proprietary Limited* [1992] A.D.R.L.J. 223.
[269] Mark Wilson, "Global claims at the Crossroads", [1995] 11(1), 15-28 Const. L.R.
[270] Ibid, 5.
[271] Ibid.
[272] Ibid, 6.

"The preference has been to employ the more pragmatic--and much less harsh--step of attempting to ensure that pleaded claims falling short of meeting the required standard of fully and fairly advising defendants of the case which they are to meet be perfected by ordering the provision of further particulars in one form or another."[273]

On review of the same case law, Newman had this to say:

"…the apparent distinction between Wharf Properties and the earlier English cases is confusing. However, the answer is relatively straightforward. A claimant has to prove the facts giving rise to his claim. He must demonstrate the consequences. Only then will the Courts be possibly more tolerant when the issues turn to the quantification of loss. Even then Court decisions are not always consistent." [274]

It could be reasonably concluded therefore, that in the absence of any obvious sea change in law, each case will be fact sensitive, however it will only be in fairly narrow circumstances, that a court will strike out a pleading which may contain a global element.

Another example of such commentary around this time, came in the form of, what is now regarded as a seminal article on global claims Byrne J, published in the Building and Construction Law Journal in 1995[275].

Notwithstanding that the scholarly article focuses to some degree on Australian, American and Canadian case law, Byrne J manages to tie their relevance into the English cases set out above. He describes a situation where for breach of contract, and where a party can prove a loss[276]:

"Provided that breach is established and it is proved that loss has flowed from that breach, courts have been reluctant to refuse to award substantial damages even though the claimant has been unable to estimate precisely the relevant loss".

Perhaps there is no surprise with the formative assertion, what is of more significance is the latter, i.e. that the courts are willing to award substantial damages, where losses cannot be estimated precisely. It is suggested that Byrne J's assertion does not mean that the loss cannot be calculated accurately per se, ordinarily losses are well known to the party who has suffered them; instead it is the loss that has flown from the breach that can prove difficult to calculate

[273] Ibid, 9.
[274] Paul Newman, "The harsh world of global claims" (2001) 12 6 Cons. Law 14., p 2
[275] Mr Justice Byrne, "Total Costs and Global claims" [1995] 11 BCL 397. The Honourable Mr Justice Byrne was the Judge in charge of the Building Case list in the Supreme Court of Victoria.
[276] Ibid, 399.

with any accuracy. When faced with such circumstance, relying on US case law, the learned judge stated the following:

"As a matter of general principle, a tribunal is not relieved of the burden of estimating damages merely because the task is difficult." [277]

He justifies this remark by stating that the nature of understanding and deciding upon a global claim, is in effect retrospective. The losses are generally known to the parties and there is no requirement to decide upon the more difficult task of forecasting losses for some loss of chance or opportunity. This perspective is helpful as it provides the context in which a decision maker is placed, the task may be difficult, but not impossible.

Taking the UK case law in turn, Byrne J explains the difficulties associated with establishing clear precedent in the Commonwealth countries such as Australia, the UK and Canada, due to the relative "paucity" of case law. His frustration continues upon the difficulty in analysing the *Crosby* case, since there is no explanation as to how the arbitrator decided to award an extension of time of 31 weeks from a total overrun of 46 weeks, or how compensation totalling £8,835 was arrived at[278]. The inference he draws from the case is that the financial claim was not assessed by the arbitrator on a total cost basis.

He then turns his attention to the *Merton* case identifying the immediate differences in the facts of the cases to those in *Crosby*, which involved several events which might give rise to entitlement under different contract clauses, whereas in contrast, *Merton* was one event which may give rise to entitlement under different contract clauses. Notwithstanding those factual differences, Vinelott J was inclined to agree with the decision taken by Donaldson J in *Crosby.*

He then sets out what he regards as authority in the UK in relation to how a tribunal may decide upon global claims, notwithstanding that:

"The events which give rise to the entitlement are numerous and different;

The contractual provisions under which the entitlement arises are various, provided that the contractual requirements for each have been satisfied; and

No specific amount has been proved to flow from any one of these events." [279]

[277] Ibid. The US case relied upon is *Fink v Fink* (1946) 74 CLR 127 at 143.
[278] The writer has much sympathy with Bryne J's frustration, indeed there is a lack of detail set out in the judicial decisions in the vast majority of the cases relating to global claims.
[279] Supra note 275, 401.

The tribunal or court will be able to arrive at such a decision where:

"The loss and expense attributable to each head of claim cannot in reality be disentangled;

There is a complex interaction between the consequences of events; and

The inability to disentangle the consequence of these events is not the result of delay on the part of the contractor in making a claim" [280]

Byrne J then goes on to elucidate that the foregoing stands as a matter of law but does not deal with the pleading of the case. In relation to pleading he then goes onto the perhaps more interesting question i.e.:

"…how may a claimant present and a tribunal determine a claim where it is not possible to prove the loss which flows from a number of events which, individually, constitute a breach of contract or which give rise to a contractual entitlement"[281]

He provides three examples of how a claimant may endeavour to plead his case or a tribunal will determine it, firstly the claimant may adopt the measured mile method, secondly it may adopt the total cost method (or at least a variation of it) and/or thirdly be determined by a jury approach[282]. In essence, the first and second approaches set out above are ways of measuring losses in the claimant's productivity. This form of pleading is normally presented by the contractor, however, as seen in cases such as *Mid Glamorgan* above, it is also common for employer to plead its losses in ways which cannot necessarily be pleaded in terms of productivity measure.

The remainder of this highly articulate work focusses on the origins and strengths and weaknesses of the total cost claim drawing predominantly from established US case law and the importance of pleadings from a global claim perspective. In carrying out this analysis, Byrne J sets out what, in his opinion, is the difference between what he terms a

[280] Ibid, 402.
[281] Ibid.
[282] The case in question was *Fattore Coy Inc v Metropolitan Sewerage Commission of the County of Milwaukee* 505 F 2d 1 (CA 7th Cir, 1974). Here the Plaintiff contended that they had provided a most reliable form of claim, which set out the difference between their actual costs, with deductions for events which the defendant was not responsible and a comparison with its bid (in effect a total modified cost approach). Notwithstanding an award in the District Court, it considered that the *"jury type verdict is inappropriate"*. The defendants disagreed with this assertion citing failure of proof. In the appeal the US Court of Appeals judges affirmed the District Courts decision in that the amount already awarded to the Plaintiff stands, while reiterating the axiom that *"It is well settled that the one liable for established and proven harm shall not escape monetary responsibility because the one harmed failed to prove his damages with mathematical precision"*.

"conventionally presented claim"[283]as per the situation in *Crosby* and a total cost claim. The differences are best understood as set out in tabular form below:

Convential Claim (Crosby)	Total Cost/Time Claim
Claimant proves compensable event	Certain compensable events are established.
Undertaken for each compensable event relied upon.	Proven that cost/time was more that it ought
Where interaction between compensable events is complex - courts may deal with them globally	It is accepted that events caused additional cost or time may or may not be compensable.
	Proven that no non-compensable events caused additional cost or time
	Conclusion drawn that additional cost or time must have been caused by compensable event

Table 1 – Byrne J's differences between a conventional claim and a total cost claim

In Table 1 above, the main difference between a conventional claim and a total cost/time claim is that in a conventional claim compensable events are proven at the outset, in a total cost/time claim a conclusion is drawn from the inference that since additional cost or time are not caused by non-compensable events, ipso facto, they must be caused by compensable events. Of course, therefore the opposite must be true, in that if it cannot be proven that a non-compensable event caused additional cost or time, then the total cost/time claim may fail[284].

Byrne J concludes by stating that striking out of global claims is *"…not one readily exercised by the courts*"[285] and that *"…the court will ordinarily strive to assess these consequences, but it must be made to appear that real loss has been incurred"*[286]. In doing so, the claimant must have *"some rational basis for the assessment, however, must be offered, supported by the best available particulars grounded on fact not supposition or speculation."*[287]If this fastidious approach is insisted upon, then a *"…spurious claim can be exposed at an early stage and that the defendants and the court may know exactly what it is that the claimant is contending for."* [288]

Returning to *Wharf*, the language of their Lordships demanding that when asserting a global claim, the plaintiff must *"…plead his case with such particularity to alert the opposite party to the case which is going to be made against him at the trial."*[289]Upon analysis, this phraseology has been adopted by subsequent courts and commentators, however in the Court of Appeal case of *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons*

[283] Supra note 275, 410.
[284] *Lichter v Mellon-Stuart Company* 305 F 2d 216 (CA 3rd Cir, 1962)
[285] Supra 124, 415
[286] Ibid.
[287] Ibid.
[288] Ibid.
[289] Supra note 216, 14.

Ltd[290] Saville LJ puts an interesting interpretation on how he perceives that now well coined phrase.

3.5 The Case to be Answered to, Clarified.

The British Airways case was appealed from a decision by Fox-Andrews J, who had struck out a Consolidated Amended Statement of Claim during preliminary proceedings in relation to a claim made by the plaintiffs (including British Airways Trust) against PDP (the architects), McAlpine (the contractors) and Cowdi Al (the glazing subcontractor) for defective building works. The plaintiffs subsequently appealed that decision.

In the Court of Appeal, Saville LJ stated that despite further and better particulars should be provided by the plaintiffs, given that the defendants were on the site for a time after practical completion, they had a knowledge of the defects averred by the plaintiffs and consequently:

"….it seems to me that it can hardly be said that these Defendants were in any real fashion placed in a position where they were unable to know what case they had to meet or were facing an unfair hearing." [291]

Saville LJ, separates the notion of *"the case to answer to"* as it were, by stating it is not so much about what the claim is actually about, more what the claim is actually worth, the defendants were on site and have a first-hand understanding of the defects alleged; he then provides further explanation:

"The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularization even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some point has or has not been raised or answered, when in truth each party knows perfectly well what case is made by the other and is able properly to deal with it." [292]

Although the plaintiff's responses were inadequate, they were not unwilling to provide particulars and Saville LJ makes a direct and distinctive difference with the *Wharf* case where the plaintiffs had given an *"…express refusal to provide further particulars or a contumelious*

[290] *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* [1995] 72 BLR 26.
[291] Ibid, 3.
[292] Ibid, 3.

disregard of Court Order." [293] In conclusion, he allowed the appeal to proceed, reversing the order of his colleague Fox-Andrews J.

It is apparent therefore that the courts will be critical if the defendants attempt to rely on the argument that they do not know the case they are to answer to, when all that they really want to say is that they do not agree with the quantification of such an assertion. Indeed, when posed with precisely that question in the same year, in the Supreme Court of Victoria Nathan J, in the case of *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd*[294] set out that the defendant's line of argument where it pleaded confusion as to the case it had to answer to was *"self-generated"*[295]. And then went onto say that "*Any defendant can obfuscate the clarity of issues if given sufficient time"*[296]

The helpful observations set out by Nathan J above, was in respect of an amended summons appealed from interlocutory proceedings led by Byrne J.[297]The now oft quoted *John Holland* case[298]is informative, not only because Byrne J goes much deeper in his attempts to extricate bad pleadings which do not accord with common sense principles of causation while still being pleaded globally, but because it is an example of how his academic paper discussed above, manifests itself into judicial decision making.

Byrne J sets out the following important principles in relation to global claims[299]:

"Where a plaintiff established a breach of contract, it would not be denied relief solely because it was difficult to estimate the damages which flowed from that breach. A statement of claim which was unable to set out with precision the amount of the loss claimed ought not to be struck out. But even in such a case, the plaintiff was obliged to identify the loss alleged to have been suffered and which could not be quantified and how it was that the loss was caused by the breach. Any question of the causal link was to be examined in a pragmatic way by the application of common sense to the logical principles of causation...It was sufficient that the breach be a material cause"

"It was permissible to plead a claim for damages for breach of contract in global form, that is, not attributing any specific loss to a specific breach of contract, where it was impractical

[293] Ibid, 5.
[294] *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1997] no 6844/95.
[295] Ibid, 4.
[296] Ibid.
[297] *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 8 VR 681.
[298] For example, *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd* [1997] 82 BLR 39.
[299] Supra note 297, 2 and 3.

to disentangle that part of the composite loss which was attributable to each head of claim and where that situation had not been brought about by delay or other conduct of the claimant."

"A typical global cost claim involves the claimant establishing:

i. *the reasonable cost of the work unaffected by the suggested breaches, usually put as the tender price;*
ii. *that the respondent committed the suggested breaches of contractual or other duty; and*
iii. *that the actual cost of the work exceeded the reasonable cost.*

> *"The inference which the court is invited to draw is that the breaches represent the cause, and the only material cause, of the cost overrun. The unstated assumptions are that the breaches caused some extra cost and, further, that they were the only material cause of the whole of the cost overrun. In this case, where the breaches are said to have had an adverse impact on the tender as well as on the performance of the contract, the claim faces the added difficulty that there is no starting point - the reasonable cost of the work unaffected by the breaches. The tender price and the final cost were both presumed to have been affected by the design deficiencies. Assumed to have been eliminated, therefore, was any other material cause of any inadequacy in the tender price or any overrun in the construction cost.*
>
> *Where a proceeding was being managed in a specialist list, the judge…should, explore the claim to determine whether the form it took was driven by its nature and complexity or by a desire to conceal its bogus nature by presenting it in a snowstorm of unrelated and insufficiently particularised allegations, or by a desire to disadvantage the defendant in some way. Relevant to this was an acknowledgment that a total cost claim put a burden on the defendant involving the defendant in extensive discovery of documents relating to the performance of the project. It might mean that the defendant must cross-examine the plaintiff's witnesses to expose flaws in a claim which assumed that the defendant was, itself, responsible for every item of the plaintiff's cost overrun. It might mean that the defendant must lead evidence to explain what, in fact, was the impact of each of the acts complained of on the project. The court was obliged to exercise its powers to ensure that, as far as possible, the burdens of litigation were not unreasonable and not unnecessarily imposed.*

The court should approach a total cost claim with a great deal of caution, even distrust, though such suspicion should not be elevated to the level of concluding that such a claim should be treated as prima facie bad. Each aspect of the causal nexus between the defendant's wrongful acts or omissions and the plaintiff's loss had to be fully set out in the pleading unless its probable existence was demonstrated by evidence or argument and further it was demonstrated that it was impossible or impractical for it to be spelt out further in the pleading. The court should be assiduous in pressing the plaintiff to set out that nexus with sufficient particularity to enable the defendant to know exactly what was the case it was required to meet and to direct its discovery and its attention generally to that case.

In certain aspects of its breach of contract claims, the plaintiff had failed to set out a sufficient causal nexus between the defective work and the loss it suffered. In some of the sub schedules no sufficient causal nexus had been alleged in that they relied on an unstated inference that the defendant's breaches were the sole cause of the plaintiff's loss and damage and there was no reason, expressed or otherwise, for the failure to spell out the nexus. Accordingly, those aspects of the plaintiff's claim were embarrassing and could not be permitted to go forward."

There is merit in analysing, in part, the decision-making process in relation to the *John Holland* case, because it affords a deeper understanding of how Byrne J concludes on whether substantial parts of the case should be struck out, as pleaded by the defendants. Kvaerner Brown were part of a JV with John Holland who were responsible for the engineering and detailed design as part of a turnkey contract to supply skids for a floating offshore facility used in oil drilling off the West coast of Australia. Holland, who were responsible for the physical construction works, sued Kvaerner for various damages claims where they considered Kvaerner had breached their design obligations.

One section of Holland's claim centres upon a claim for breach of damages for the pre-bid and design agreements, set out in a number of terms in paragraphs 17, 20 and 21 and then more generally in paragraphs 18 and 22, the particulars of the breaches are set out in Schedule A (which forms various sub-schedules, A1 to A53, totalling $13,649,713. Byrne J then by way of example focusses on sub-schedule A1 to A6 titled *"Structural"*.

The allegations of breach are set out at paragraph two which merely refers to the generic allegations made at paragraphs 18 and 22. The remaining paragraphs set out the various

criticisms of Kvaerner design work and how it adversely affected the structural works. Byrne J set out that the particulars at paragraphs for both pre-bid and design agreements state:

"Holland refers to Schedule A hereof in respect of each specific claim under the heading Loss and Damage." [300]

Schedule A, at paragraph 3 states *"Holland's losses as a result of the said breaches are calculated as follows…"* The calculations were set out as the total loss incurred, less the tender estimate, which Kvaerner aver is embarrassing and should be struck out, due to lack of casual nexus between the causes and effects of the breaches alleged. In the absence of access to the Statement of Claim, it is not possible to say with certainty, precisely how Holland set out its calculations in relation to damages associated with the Structural Works, however Byrne J assists setting out the logic of the claim as follows:

"Kvaerner Brown committed breaches of contract in carrying out the pre-bid design;

> *Holland reasonably priced its tender on the basis of the pre-bid design;*
>
> *Kvaerner Brown committed breaches of contract in carrying out the construction design;*
>
> *Holland properly performed the work on the basis of Kvaerner Brown's construction design;*
>
> *the reasonable actual cost of the work was greater than the tender price."* [301]

In essence therefore, what can be garnered from the case drafting is that Holland, on a total cost basis claimed a total loss, it asserts was incurred by reason of a statement of particulars averring generic breaches of Kvaerner's design obligations in relation to defective structural works.

After consideration Byrne J concluded[302]:

"…for the reasons which I have set out there is no sufficient causal nexus alleged in subschedules A1 (Revised), A24, A27 all of which deal with defective work. Each of them relies upon the unstated inference to which I have referred. I can see no reason, expressed or otherwise, for the failure to spell out this nexus. I will not permit the claims made in them to go forward, expressed as they are in this embarrassing manner."

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[300] Supra note 297, 8.
[301] Ibid, 10.
[302] Ibid, 12.

Notwithstanding his findings, Byrne J allowed Holland the opportunity to "*mend its hand*"[303] and gave them leave to replead, with Holland to pay the costs of the application.

During the mid-90's in relation to global claims, a pattern begins to emerge where the courts are making decisions upon whether claims, (where particularization could be improved) are struck out in their entirety, as opposed to claims where the courts are actually deciding upon the validation and quantification of claims. It would appear that the courts will be reluctant to strike out claims plead (or if not plead, then by inference) on a global basis, it would also appear to be the case that the claimants are afforded the opportunity to re-particularise their claims, if deemed inadequate from an evidentiary perspective.

Unfortunately, from the cases set out above, there appears to be no appeal hearings, which would have provided a valuable insight to how our learned judges will ultimately decide upon cases which are admittedly evidentially weak.

3.6 Global Claims in the new Technology and Construction Court

In *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd*,[304]one of the first judgements in the new Technology and Construction Court, although again a summons by the defendant to strike out what it perceived as a global claim against the plaintiff, his Honour Judge Humphrey Lloyd QC took the opportunity to analyse what could be termed a traditional construction claim; in that the claimant was claiming both an extension of time and the delay and disruption associated with those delays. Bernhard's had been awarded the landscaping contract to construct a new golf course in Stockley Park, Stockley Park Consortium Ltd were the developers.

Among other things, Humphrey Lloyd J reviewed the particulars associated with the claimant's claim for an extension of time, which they aver was caused by certain variations and instructions issued by the defendant's Construction Manager Schal International Ltd.

In his deliberations, Humphrey Lloyd J differentiated between the standard of a claim made by a contractor for review by the contract administrator, and a claim made by the contractor in legal and/or arbitral proceedings:

"In litigation a claim has to comply with procedural rules which should secure that the plaintiff's case is presented after careful analysis and in a manner which will enable the

[303] Ibid, 18.
[304] *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd* [1997] 82 BLR 39.

defendant to plead to it in such a way that the issues which have to be decided between the parties may be clearly identified. A claims submission is generally written for the purposes of eliciting a line by line reply. Narratives which are in themselves persuasive presentations of a party's claim may well be unsuitable for incorporation lock stock and barrel in a pleading either because they fail to disclose the true grounds or cause of action or because they are repetitive or because they are argumentative."[305]

Humphrey Lloyd J was referring to Bernhard's statement of claim, which although set out various narratives on its claims for damages, it omitted specific contractual terms asserting entitlement to the breaches averred, which he pejoratively entitled a *"forest pleading*[306]*"*, i.e. that it had merely relaunched its previous claim, which during the interlocutory proceedings had been considered inadequate. Consequently, Humphrey Lloyd J directed that Bernhard's should reconsider its statement of claim after further debate and meetings between the parties Mark II was duly submitted. In defence of the revised claim, Mr Fernyhough QC representing Bernhard's submitted that the court, when deciding whether to strike out the claim, should be satisfied that the plaintiff has made a *"...diligent attempt to present its case coherently and comprehensively*[307]", leave to amend should not be given for claims which were "…*plainly and obviously unstainable*[308]*"*, for other claims however should be allowed to proceed since the defendant can request addition information by discovery of interrogation, if after those steps have been considered and there are claims which remain embarrassing, then they should not be struck out at this interlocutory stage, until a "*defence has been served*".[309]

In response Mr Williamson relied upon the approach of Sir Thomas Bingham in *E v Dorset*:

"...if after argument the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."[310]

In terms of their claim for delays to the works, Bernhard's contended that the issuance of numerous variations had caused delays to the works which was set out in an Approved

[305] Ibid, [32].
[306] Ibid.
[307] Ibid [39.1].
[308] Ibid [40.2].
[309] Reliance was placed on *British Airways v. Sir Robert McAlpine* at 33I 34D – see also *ICI* where Saville L.J. suggests that the defendant should know perfectly well what case he has to answer to.
[310] *E v. Dorset CC* [1995] 2 AC 633, 693.

Programme in Schedule 1 of the pleadings and particularised in Schedule III. Nineteen work areas are described and linked to the variations which effected the delay to those areas.

The defendant's barrister Mr Williamson QC pleaded that the foregoing was *"oppressive"* and *"global"* in nature, since there was no causal nexus between the variations set out and the delays averred and relied upon aspects of Bryne J's decision in *John Holland*, setting out his view of global claims in relation to both time and money matters – examples of which are set out below:

"…the claimant does not seek to attribute any specific loss to a specific breach of contract, but is content to allege a composite loss as a result of all the breaches alleged".

"Such a claim has been held to be permissible where it is impractical to disentangle that part of the loss which is attributable to each head of claim and the situation has not been brought about by delay or other conduct of the claimant."

"The logic of such a claim, namely that the contractor might reasonably have expected to perform the work for a particular sum, that the employer committed breaches of contract, that the actual reasonable costs of the work was a sum greater than the expected cost, led to the inference that the employer's breaches caused that extra cost or cost overrun and that the causal nexus was to be inferred rather than would be demonstrated."[311]

He also noted that Byrne J also set out three important principles, firstly that it is for the parties to decide how to frame their case, secondly, the court has limited powers to strike out a claim and thirdly, during interlocutory proceedings the judge can encourage the parties to clarify the matters between them. He then relied upon further passages from *John Holland* arguing, among other things, that a claim of this nature puts an unfair burden on the defendant:

"This burden may involve the defendant in extensive discovery of documents relating to the performance of the project; it may mean that at trial the defendant must cross examine the plaintiff's witnesses to expose the flaws in a claim which assumes that the defendant is, itself, responsible for every item of the plaintiff's costs overrun; it may mean that the defendant must lead evidence to explain what, in fact, was the impact of each of the acts complained of on the project."[312]

[311] Supra note 297, 19-30.
[312] Supra note 304, [111.7].

Mr Fernyhough stated that the claim was capable of correlation and introduced a table, pleading that the globality asserted for an extension of time was *"perfectly manageable"*.

Humphrey Lloyd J agreed that the pleading was embarrassing and that the defendant's arguments were justified; however it may be possible to rectify the lack of clarity by using the table proposed by the claimant to reconcile the variations identified in the programme and the narratives set out in schedules A to F. Finally, in relation to the extension of time claim Humphrey Lloyd J stated:

"*A distinction must be made by the plaintiff between the variations which are said to justify an extension of time and each of the other causes that are also said to entitle the plaintiff to further time for otherwise the defendant will not know what the plaintiff alleges in each case to be the causal link between the event and its effect on the completion of the works (or relevant section). The plaintiff must therefore, as a condition of obtaining leave to substitute the statement of claim, provide a list which will set out in relation to all the causes of delay in schedule III other than variations, the relevant contract condition if "any cause of delay referred to these conditions" is relied on, or any other special circumstance, in which case the nature of the cause or breach, if any, relied on must also be provided."*[313]

The case then moved to the claimant's claim for costs contained within its schedule II titled "Loss and Expense". Relying on the variation narratives set out at paragraphs 28 to 31 of its claim and the delay events narratives set out at paragraphs 39 to 52, the claimant asserted that they had incurred additional costs by reason of delay and disruption. The argument was run that the variations were valued at contract rates with no allowances for the effects of delay and disruption, for prolongation, overheads and other costs.

Again, Mr Williamson QC in a similar vein to the delay claim, argued that there was no causal nexus between the variations and the additional costs claimed and that:

"…although schedule III pleaded delays due to certain events, including variations, it did not demonstrate how those events either individually or overall delayed completion for the works as a whole or the sectional completion required by the contract. The 19 areas of the site identified (some of which were shown on the clause 14 programme) had no particular contractual significance in the context of a claim for delay and disruption." and

[313] Supra note 304, [117].

"...that the bulk of schedule II was no more than a re-presentation of the plaintiff's actual costs alleged to have been incurred which were claimed on the implicit basis they would not otherwise have been incurred and therefore were only incurred by reason of the variations and other events."[314]

A substantial part of the claim was made up by the claimant's subcontractor, however it was unclear whether they had actually reimbursed the subcontractor the amounts claimed or whether the subcontractor was entitled to the claims under the subcontract.

Once more, relying on Byrne J's analysis in *John Holland,* Mr Williamson QC argued that the *"...financial effect of each of the delays alleged should be pleaded.*[315]*"*

Mr Fernyhough disagreed, arguing that the pleading had identified specific periods of delay, which were attributable to specific variations and other events, which could be pro-rated accordingly to the award for delay. Mr Fernyhough suggested that there was a tension evident between two competing principles:

"...that in a judge managed list there should be control over a case at all stages but that a court should not place a party in a straitjacket or direct it as to how it should plead its case." [316]

Relying on various precedent[317] Humphrey Lloyd J set out his decision reinstating the current position in relation to global claims as follows:

"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.

With this in mind a court may ... require a party to spell out with sufficient particularity its case, and where its case depends upon the causal effect of an interaction of events, to spell out the nexus in an intelligible form. A party will not be entitled to prove at trial a case which it is unable to plead having been given a reasonable opportunity to do so, since the other party would be faced at the trial with a case which it also did not have a reasonable and sufficient opportunity to meet.

[314] Supra note 304, [123].
[315] Supra note 304, [125].
[316] Supra note 304, [126].
[317] *Nauru Phosphate Royalties Trust v. Matthew Hall Mechanical & Electrical Engineering Pty Ltd, Wharf Properties Ltd v. Eric Cumine, Holland v. Kvaerner RJ Brown.*

What is sufficient particularity is a matter of fact and degree in each case. A balance has to be struck between excessive particularity and basic information." [318]

Humphrey Lloyd J was not convinced that the claimant was unable to separate / apportion the overall costs to the individual variations or other events and that the loss and expense claim set out in Schedule II is a total cost claim, in that it seeks to recover its costs between the original date for completion and actual completion. Humphrey Lloyd J arrives at the conclusion that the claim is a total cost claim, even although the costs are presented as notional rates.

However, although Humphrey Lloyd J agreed with the defendants, he considered that the claimant's claim could be amended and that *"Its current form is not so oppressive or abusive as to justify refusal of leave to amend*[319]*."* His Honour suggested that the claimant should "*…identify those variations, events or acts and omissions set out in schedule III which are relied upon as critical to or crucial to the costs claimed in paragraph 57 (and which are not) so that the defendant knows which of the events are said to lie on a notional critical path, as it were, and which are not and how the costs were caused by those key events"*[320]

In summary, leave was served for the claimant to submit a substitute statement of claim**.** There is merit in noting that notwithstanding the English courts have confirmed that a claimant is free to present its case as it sees fit, upon doing so, in this case, Humphrey Lloyd J provides direction as to how it may be plead.

The next opportunity to consider how the courts would address the quantification of a global claim arose in *How Engineering Services Ltd v. Lindner Ceilings Floors and Partitions Plc*.[321] The case was brought before his Dyson J regarding, among other things, how the arbitrator had erred in his approach to the quantification of the defendant Lindner's loss and expense claim. How Engineering ('How') were the contractor in the redevelopment of Cannon Street Station and Lindner were subcontracted to How to carry out the specialist suspended ceiling works.

Mr Tackaberry argued for the claimant that in arriving at his decision, the arbitrator did not *'ascertain'* the loss and expense, but instead *'made an assessment of it'*. Mr Tackaberry had placed emphasis and relied upon the wording of the arbitration clause which stated that:

[318] Supra note 304310, [136.1].
[319] Supra note 304310, [140].
[320] Ibid.
[321] *How Engineering Services Ltd v. Lindner Ceilings Floors and Partitions plc* 1999 EWHC B7 (TCC)

"...the Arbitrator...may...ascertain any sum which ought to have been the subject of or included in any certificate"[322]

Then, relying on a definition of ascertain, i.e. to *'find for certain'* defined by Lloyd J in *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd*[323] averred that the arbitrator had failed to do what he was required to do. However, in contemplation of this argumentation, Dyson J clarified the position as follows:

"I do not understand Judge Lloyd to be saying that there is no room for the exercise of judgement in the process of ascertainment. I respectfully suggest that the phrase "find out for certain" might be misunderstood as implying that what is required is absolute certainty. The Arbitrator is required to apply the civil standard of proof".[324]

Dyson J likened the ascertainment of loss and expense to the calculation of general damages for breach of contract, i.e. that the decision maker should *"...exercise judgement when the facts are not sufficiently clear"*. It is only once those damages or loss and expense have been assessed, that the amount becomes certain.

In arriving at his decision, Dyson J referred to a section of the arbitrator's original reasoning, which is reassuringly pragmatic:

"Loss and expense calculations may be straightforward in simple situations where additional expenditure can be discretely recorded and attributed to a particular event and when safe assumptions can be made as to the situation had the event not occurred. Where the situation is complex, and discrete recording and attribution and safe assumptions are not possible, the calculation inevitably contains a measure of uncertainty."[325]

Looking at the arbitrator's decision in the round, Dyson J concluded that his decision could not be faulted and consequently dismissed How's application.

This case is important, because it reflects the reality that a decision maker deciding upon a case that may appear "global" in nature, does not have to be certain, but must use his judgement based on the civil standard of proof, i.e. on a balance of probabilities. The decision re-affirms the courts reluctance to intervene upon an arbitrator's decision.

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[322] Ibid, 5.
[323] *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd* [1996] 76 BLR 59
[324] Supra note 136.
[325] Supra note 321, 43.

On review of the case law in relation to global claims to date, analysis and interpretation of the sufficiency of the particulars averred (or otherwise) is somewhat limited, although the decisions set out by the judges make frequent reference to the particulars of a claim, the details of the particulars and are not included as part of the judgement. So, there is a sense of how decision makers will apply the law to claims which appear global in nature, but not how they will actually quantify/assess those cases.

In this regard, the 2001 case of *Amec Process and Energy Ltd v. Stork Engineers & Contractors BV*[326]is relevant. The defendant Stork entered into a subcontract with Shell to provide part of a turnkey solution for a floating production unit[327] for extracting Crude Oil from the North Sea, the claimant, Amec was engaged to carry out certain subcontract activities to Stork; including steelwork, piping and mechanical and electrical works.

The trial judgement for this case decided by Thornton J runs to some 242 pages, however in summary, Amec was awarded the contract on 15th February 1995, with Sail Away, i.e. completion of the Works, being 31st July 1996; for a lump sum price of £14,085,015.

Sail Away was actually achieved on 24th August 1996.

Stork had instructed Amec to effectively accelerate the works, to recover delays and ensure adherence to the contract programme (the 'Protech Plan'), by increasing its direct labour force, which effectively doubled to 180,000 hours and at a cost of some £7 million.

The judgement contains a highly detailed forensic commentary of the factual background, including a comprehensive setting out of the precontract negotiations, through to contract award, to post contract matters. In essence Amec's claim can be distilled into a significant increase in man hours due to two programme revisions, namely Rev B and Rev C. Both programme revisions reflected Stork's insistence that Amec improve its productivity and rate of progress, while delaying the delivery of materials, changes in work scope and incomplete design information.

After various drawing delays, drawing revisions and changes to scope, Stork's position was that Amec had failed to produce:

"…detailed analysis of the potential work content of each individual suggested cause of delay, whether it be a hold, a drawing or detail issued late or a variation, nor had it produced an

[326] *Amec Process and Energy Ltd v. Stork Engineers & Contractors BV* [2002] All ER (D) 98 (Feb).
[327] The unit was actually built on a barge, called the Ansuria.

analysis of what specific labour usage reasonably followed from that individual event that was additional to the labour content on which payment for that work under the contract had been based." [328]

Amec responded stated that it has not intended to identify and link individual events and their causes and effects, given the magnitude and timing of change, the exercise was carried out in totality based on the cumulative effect of the events which[329]:

"...led to the effective abandonment of the modular, sequential method of working and its replacement by a piecemeal method of working"

To illustrate the point Amec metaphorically explained that:

"…the topsides work was intended to be like a sand clearing exercise on a beach using well-oiled sand clearing machines. This planned method of clearing had had to be replaced by manual methods of clearance. It was impossible to identify which grains of sand had caused the well-oiled beach clearing machinery to seize up and to have led to the use of maids with mops to sweep the beach by hand. All that could be done was to look back, as an historian and see that the huge number of sand particles, or variations, had inevitably led to the breakdown of the planned method of working and its replacement by the ad hoc response actually employed." [330]

Stork continued with its argument citing no cause and effect, and that Amec had failed to identify the factual consequences of each delaying event to support their assertion that that were compelled to mobilise additional man hours which would not have been incurred in any event. Mr Backhouse, Stork's delay expert provided his opinion of what Amec should have done in the circumstances:

"...identify what activities were completed and link that back to the flow of information and the flow of variations. From that, he would be able to draw conclusions as to what did and did not have any effect or direct effect" [331]

This technique is often adopted by delay analysts who upon identifying the event, retroactively seek to find the cause. However, it is to the degree of forensic analysis and causative assumptions which introduces subjectivity into this exercise. In this case, Thornton

[328] Supra note 326, 88.
[329] Ibid.
[330] Ibid.
[331] Ibid, [771].

J with respect, took a somewhat literal interpretation of Mr Backhouse's opinion and had this to say:

"This exercise would amount to a virtual reconstruction of the pattern and history of virtually every piece of design information including every drawing and isometric, variation and hold piece of steel, pipe and instrument that was issued, the fabrication of every piece of steelwork and spool, and the construction of every module. This would have to be compared with the working pattern and output of every direct labourer on every working day. The object of this prodigious task would be to see what did and did not have any effect on the increase of labour on the job."[332]

Furthermore, Thornton J sets out that, in effect, Amec had already carried out a similar exercise in that they in fact had provided:

i. *"Daily direct man hours;*

ii. *Comparison was made with the programmed / planned use of daily man hours, which had the variations/claims superimposed onto them;*

iii. *Evidence of productivity, measure as a percentage of completion through the duration of the project;"*[333]

Coupled with the information set out above Thornton J, then goes onto explain the significance of augmenting such information with eyewitness evidence. It is the first case dealing with claims of an asserted global nature where a judge gives his opinion of what is to be expected of a witness under these circumstances. Thornton J does not expect the witnesses to:

"... give evidence of the disruption that occurred and its causes, for him to have to recount the history of nearly every drawing from first issue to final installation on the module"[334] and that to do so would *"run the risk of the witness' account being a meaningless confusion."*[335]

Thornton J was satisfied that Amec's witnesses were able to provide clear accounts of how they were disrupted and how it became necessary to deploy additional man hours due to discontinuity of design, which was *"...corroborated with isoviews, photographs and the*

[332] Ibid, [772].
[333] A 6 week period of that productivity calculation was manipulated, but Thornton J was satisfied that *"a good approximation of the corrected figures could have been produced"*.
[334] Supra note 326, [774].
[335] Ibid. Judge Thornton compares the situation with Pierre's account of the battle of Borodino, the rambling hero from Tolstoy's classic War and Peace.

contemporary documents[336]*"*. Given the complexity of the circumstances, Thornton J said that to carry out such an exercise as suggested by Mr Backhouse, may actually lead to *"…an inaccurate picture of cause and effect*"[337].

Prior to an interrogation of the quantum associated with Amec's claim, Thornton J sets out short but informative section of his judgement titled *"Global Claims"* which opens with the following definition:

"…one which claims the totality of a contractor's expenditure incurred on the contract less its recovery on the basis that a mass of variations and breaches of contract collectively caused the difference between expenditure and recovery, that difference being claimed as money due for the execution of the variations and as damages for breach of contract. Usually, in this type of claim, no attempt is made to link individual causes, by way of individual variations or breaches, to any part of the global financial claim. The linkage is said to be impossible to establish save on the basis of showing that the weight and totality of the causative events collectively led to the totality of the expenditure."[338]

With respect, Thornton J has in essence defined a total cost claim, which is not a definitive definition of what constitutes a global claim. Furthermore, no mention is made of delays, which can also be understood as being asserted on a global basis. Of course, Thornton J's explanation, is not inconsistent with what could be regarded as a global claim, however it is still a work in progress.

He then goes onto to describe three general objections to such an assertion set out by Stork, firstly two of which are substantive and secondly, one which is procedural, namely:

i. That it offends the contractual provisions;

ii. That the case fails in principle, due to the possibility that the contractor may have caused some of the cost or delay, which the employer was not responsible is now culpable for. Since there is no way to apportion the losses, then the claims fail in its entirety;

iii. Pleading are presented in such a way that it makes it very difficult and expensive to respond proportionately at trial stage.

[336] Ibid, [775]
[337] Ibid.
[338] Ibid, [777].

It is instructive, with regard to the procedural element (iii) above, that Thornton J expands upon Storks point that in essence there are two masses of fact, one is a list of every variation and/or breach, and the other is the losses (or quantum) averred. In the middle is the "flimsiest" of pleading of causation, stating the cumulative impact of the causes, was responsible for the losses incurred.

Whether the procedural objection set out above is justified in this case or otherwise, nonetheless the description of two masses of information, one the breaches and the other the quantum, with a weak causal nexus linking the two, is an excellent way of describing the reality of the situation that often occurs during construction disputes.

It is all too often the case that the contractor, particularly towards the end of a project, where he finds himself in a situation where he has identified a list of events / breaches which he considers are the responsibility of the employer, and a reasonable understanding of his losses, but down to a combination of poor record keeping, lack of experience and complexity, he is unable to identify and articulate how, on a case by case basis, the events asserted correlate with the losses incurred. In effect the contractor is therefore left with *"two masses of information"* and losses associated with cumulative impact of multiple events.

Thornton J then takes each of the three objections to a global claim asserted by Stock in turn:

Procedural Objection: Further broken down into three separate explanations, namely:

i. Since Stork allowed a huge amount of evidence to proceed to trial and since it engaged its experts to agree much of its contents, it could not therefore then argue the evidence adduced was unmanageable. What is should have done was object at the interlocutory stages and apply for much of the evidence to be excluded, but it did not. Thornton J's main objection here was that he considered that much of what was agreed was left to the experts with much of the preparation being carried out with quantity surveyors, without involving the court and their experience with case management stating:

   "A jointly appointed engineer expert could have been appointed to report to the court. However, rather than allowing the court to proactively case manage the preparation of the case, both parties worked in isolation of the court and did not co-operate in trying to determine jointly what methods of analysis should be adopted prior to undertaking that analysis, preferably on a joint basis[339]".

[339] Ibid, [782].

ii. Thornton J's decision to decouple the schedules to the annexes of the pleadings, which were thousands of pages long, made the trail more manageable, since much of what was included in the schedules was corroborative and merely supportive of Amec's primary case.

iii. Since the experts agreed much of the details, "*…a fair trial was possible and reasonable*[340]".

Global claim fails in principle: Despite Stork's protestations, Thornton J was of the opinion that the claim by Amec was in fact not a global claim, for the following reasons:

i. It restricted its claim to the direct labour hours it utilized, with discrete claims for subcontract and drawing office hours;

ii. The direct man hours expended were set out on a weekly basis, so Stork had the ability to contest any section of the claim, and its effect over time.

iii. Given that the variation was in effect an instruction to deploy as many labour hours as necessary to complete the Mechanical Completion Date, then "*the resulting claim would be bound to be both large in size and superficially rounded in nature since it would appear to be a claim for all unpaid direct labour*[341]"

Paragraph 785 of the judgement sets out perhaps one of the most legally significant aspects of the case. Thornton J suggests that as the direct man hours were set out on a weekly basis, it would, in effect, allow Stork to challenge the claims performed, week by week. The example given was that Stork had contended Amec was claiming for works that it had already been paid for. Stork argued that they could not apportion the hours on this basis, however Judge Thornton disagreed as follows:

"Stork kept contending that such proportioning was not an exercise that a court could engage in at all. Detailed proof of every hour worked had to be adduced by Amec. However, the common law and its trial procedures are not so rigid and are certainly not so rigid under the CPR[342]*. So long as there is some evidence which allows a court to conclude, by way of general assessment, that a particular proportion of the work was MHI work, for example one third, a court can apportion the number of hours claimed for a particular week accordingly, namely two thirds to be paid for, one third to be rejected. In fact, 10,000 hours or about 1,000 hours*

[340] Ibid, [783].
[341] Ibid, [784].
[342] The Civil Procedure Rules came into effect on 26th April 1999.

a week for each of the 10 relevant weeks between early May 1996 and mechanical completion, fell to be deducted for this reason. This was assessed or apportioned using a general appreciation of the mass of evidence that was adduced which showed that an average of about 100 - 150 hours a day of such interference occurred." [343]

So here we can see an English High Court judge advocating that claims which are difficult to separate, into their precise cause and effect, may be apportioned.

Global claims precluded by the contract: Stork argued that the only way Amec could claim for loss or delay was through Article 13 which required Amec to *"...prove cause and effect and, for any individual failure, to demonstrate the direct consequences in cost and time of that failure.* [344]"Thornton J disagreed with the foregoing citing three reasons, namely:

i. Since Stork had requested additional resources, to achieve completion, providing Amec can show that the only reason it was directed to adopt additional resources by those variations, it is not required to establish a link between each variation, provided Amec did not cause the direction;

ii. In any event Amec claim is in fact claimed under Article 131; and

iii. Amec had satisfied any casual connections required, which were reasonably incurred by from the variations and did not include any matters for which Amec could be said to be responsible.

Amec were ultimately successful and were awarded their claim plus profits and indemnity costs, as Thornton J determined that there was no requirement for Amec to prove the direct cause and effect of every variation to the man hours claimed. Of course, *Stork's "...continuous and obstructive obfuscation"*[345], during court proceedings would not have benefitted their case.

In carrying out a review of the relevant construction law in 2002, Elliot concluded that post Amec, the law relating to global claims still remains *"...far from certain"*[346]. In part due to the fact that the findings of the case did little to definitively settle how global claims are to be dealt with by the courts.

[343] Supra note 326, [785].
[344] Ibid, [786].
[345] *Amec Process and Energy Limited v Stork Engineers & Contractors BV* (No3) [2002] All ER (D) 48 (Apr) [84].
[346] Simon Elliot, "Review of 2002" (2003) 14 2 Cons. Law 14, 2.

3.7 Summary of Case Law

From *Crosby* in the 1960's until Amec in 2002, there has been a relative dearth of court decisions in relation to claims deemed global in nature. It would appear, despite the language in the English courts confirming that a "supplementary" award may be allowed for amounts which could not be disentangled from the composite whole, no such award has actually been issued. The case law in the period before the release of the 1st Edition of the SCL's Delay and Disruption Protocol, established that it may be permissible to plead a global claim, however the decisions centred on whether cases should be struck out or otherwise and saw the courts allowing claimants to revisit their claims if they required to be better particularised.

Notwithstanding what could be described as a fairly balanced and non-committal stance by the courts during this period, the respected construction law text books around this time were adopting fairly negative language in relation how global claims were perceived.

The 8th edition of Emden's Construction Law stated:

"….it relies on a number of assumptions: one, in particular being that the difference between actual and anticipated costs results entirely from matters for which the defendant is responsible. ... It is now clear, however, that presenting a claim on such a basis is unacceptable unless any other form of evaluation is either impossible or impracticable in the circumstances[347]."

The 7th edition of Keating on Building Contracts stated:

"The danger of advancing a composite financial claim is that it might fail completely if any significant part of the delay is not established and the court finds no basis for awarding less than the whole. It might also conceivably fail if the court were to find that proper separate identification and linking of the factual consequences constituting the contractor's entitlement to claim and his losses could have been made."[348]

The 11th edition of Hudson's Building and Engineering Contracts stated:

"Global claims may be defined as those where a global or composite sum, however computed, is put forward as the measure of damage or contractual compensation where there are two or more separate matters of claim or complaint, and where it is said to be impractical or

[347] A.J. Anderson, S. Bickford-Smith, N.E. Palmer, R. Redmond-Cooper, *Emden Construction Law*, (8th Edition Butterworths 1990).

[348] S. Furst, D. Keating, V, Ramsey, A. Williamson, J. Uff, *Keating on Building Contracts,* (8th Edition, Sweet & Maxwell 2001).

impossible to provide a breakdown or sub-division of the sum claimed between those matters. 'Total actual cost' or 'total cost' are American expressions used ... to describe those claims, whether in respect of one only or more than one matter of complaint, where the alleged total costs of the contractor ... is compared with the contract value or price, and the difference then put forward as representing the measure of damage or additional cost caused by the one or more matters complained of where more than one separate matter is relied on, as is very often the case, a total cost claim will also, therefore, constitute global claim as above defined."[349]

Upon analysis therefore, up until 2002, the jurisprudential thinking, in relation to global claims can be summarised as follows:

i. A tribunal can make a supplementary award of the remainder of a composite claim which cannot be further particularised, providing that it is impossible or impractical to do so, cannot be disentangled and that there is no duplication.

ii. When pleading a global claim, the claimant must not unreasonably delay making the claim;

iii. The claimant must plead with sufficient particularity, to enable the defendant to know the case it has to answer to, bearing in mind that the defendant will have a practical understanding of the events as the occurred. A balance must be struck between excessive particularity and basic information;

iv. In general, a global claim will not be struck out, unless it is a plain and obvious case and that the claimant has not acted contumaciously;

v. If a claim is unparticularised, the courts may allow leave to re-particularise the claim at the interlocutory stages, prior to trial;

vi. A Scott Schedule may be an appropriate way of setting out and particularising claims, showing cause and effect (loss) where possible;

vii. The claimant must attempt and be seen to attempt to establish a causal nexus between cause and losses asserted;

[349] I.N.D. Wallace, *Hudson's building and engineering contracts: including the duties and liabilities of architects, engineers and surveyors* (11th Edition Sweet and Maxwell, 1995).

viii. In the ascertainment of loss and expense, a tribunal does not have to be certain, but must be satisfied that the loss was incurred due to certain events, on the balance of probability;

ix. That the tender price of the claimant was adequate or reasonably priced, and therefore the loss would not have been incurred in any event.

It is a moot point whether it was common practise for contractors to assert global claims without first substantiating cause and effect. Firstly, because the definition of a global claim means that cause and effect cannot be readily substantiated and secondly, there were no cases of contractors actually expressly pleading a global claim during the period, however granted this may be inferred. It is difficult to reconcile with the opinion that global claims are *"…rarely accepted by the courts"*[350], as set out by the SCL Protocol because during this time, with the exception of *Wharf* the courts were amenable to global claims, although admittedly they were treated with caution and distrust.

[350] Perhaps the rare acceptance alludes to the fact that no supplemental awards have been made by the court up until 2002.

CHAPTER 4: POST THE DELAY AND DISRUPTION PROTOCOL 2002

4.1 Introduction

The previous chapter set out the rise of the global claim from their origins in the late sixties with *J Crosby & Sons v Portland*, through the eighties and the nineties and up until early 2002 in the case *Amec v Stork Engineers*.

February 2002 saw the release of the 1st Edition of the Society of Construction Law's Delay and Disruption Protocol. The Society of Construction Law was established in 1983, and its members, who consist of judges, lawyers, and construction professionals (engineers, surveyors and the like) work to promote research in the field of construction law, and related subjects, both in the UK and internationally.

Since one of the main objectives of this thesis is to explore, analyse and articulate the possible tension between the position of the Society of Construction Law, maintained in its 2nd Edition of the Delay and Disruption Protocol, released in 2018, and the courts apparent move towards leniency on global claims, in the first instance, it is necessary to carry out an analysis of the case law relevant to global claims, from release of the 1st Edition of the Delay and Disruption Protocol in 2002, up until 2012, using the seminal case of *Walter Lilly* to punctuate the timeline of that analysis. The 1st Edition of the Protocol sets out its opinion on global claims as follows:

"The not uncommon practice of contractors making composite or global claims without substantiating cause and effect is discouraged by the Protocol and rarely accepted by the courts.[351]*"* [emphasis added]

This chapter will analyse whether the case law supports (or otherwise) the statement set out above. Furthermore, where it is pertinent to do so, the chapter will also draw on the authoritative and recognised text of experienced construction professionals, who have provided insightful opinions on the principle of global claims during this period. The chapter will also identify and analyse the Scottish cases which begin to arise in relation to global claims.

[351] Supra note 18, 1.14.1.

4.2 The First Scottish Case Emerges

The first case in to be examined in this chapter, is the case of *John Doyle Construction Ltd v Laing Management (Scotland) Ltd*[352] which was also the first Scottish case to consider claims which are deemed global in nature. The pursuers John Doyle were the contractor's and the defenders, Laing's were the management contractor in the construction of a new head-quarters for Scottish Widows Ltd. In the Outer House of the Court of Session, Lord Macfadyen had to decide on whether Doyle's were entitled to an extension of time of 22 weeks, and the recovery of uneconomic labour costs totalling £1,649,505.

The main thrust of Doyle's position was asserted as follows:

"Despite the pursuers' best efforts, it is not possible to identify causative links between such cause of delay and disruption, and the cost consequence thereof…although it is not possible to show direct cause and effect...They have compared labour productivity actually achieved by them on site when work was largely free from disruption ('normal work') with labour productivity achieved when work was disrupted ('disrupted work')."[353]

Mr Borland, for the defendant responded, relying on the persuasive argumentation and precedent set out in Chapter 3 above:

"…. a global claim might be made on the basis that the aggregate loss had been caused by the interaction of a number of events, if the party against whom the claim was made was legally responsible for all of those events. In such a case it was incumbent on the party making the claim to aver that it was impracticable to trace the causal nexus between individual event and individual item of loss."[354](emphasis added)

Therefore, in Mr Borland's view (and relying on various American cases)[355], if it was found that the contractor was responsible for any of the events, from which the global claim was based, the whole claim must necessary fail.

Mr Smith for the pursuers, disagreed with Mr Borland's proposition on three counts, namely:

"(1) that where alternative concurrent causes were relied on by the pursuers for a period of delay, a conclusion that one of them was not relevantly attributed to the defenders'

[352] Supra note 10.
[353] Ibid, [14].
[354] Ibid, [15].
[355] *Lichter v Mellon-Stuart Co.* 305 F. 2d 216 (1962), *Wunderlich Contracting Co and Others v United States* 351 F. 2d 956 (1965), *Phillips Construction Co v United States* 394 F 2d 834 (1968), and *Boyajian v United States* 394 F 2d 834 (1968).

responsibility did not necessarily cause the claim to fail (2) that even where a single cause for a period of delay was stated, and was held to be the pursuers' responsibility, that would not be fatal to a global claim if a rational basis for awarding an appropriate part of the global claim could be found and (3) because of the unattractive consequences of the defenders' approach, which would dismiss the whole global claim because one causal element among many was held not to be relevantly attributed to the defenders, the court should be slow to sustain that argument at debate, but should allow a proof before answer.[356]*"*

Mr Smith concluded that in light of foregoing, a global claim may be apportioned for the causes which the defenders were responsible.

Upon hearing the parties' requisite positions, Lord Macfadyen set out that the main issue which arises from this case, i.e.:

"…whether the fact that the global loss and expense is said to have been caused inter alia by that factor for which the defenders have no contractual responsibility is fatal to the relevancy of the global claim."[357]

In his judgement, Lord Macfadyen then set out what a pursuer must prove to assert a claim for loss and expense, (1) an event arises for which the defenders bear responsibility (2) that the pursuer has suffered loss and /or expense and (3) that the event caused the loss and/or expense. He explained that these events may interact in complex ways, however this does not absolve the pursuer from the requirement to prove the causal connections, between the events and the loss and expense. He then goes onto say that:

"A global claim, as such, must therefore fail if any material contribution to the causation of the global loss is made by a factor or factors for which the defender bears no legal liability"[358]

He justified this proposition by clarifying that the cause has be material and not just any cause, and whilst acknowledging that global claims are a "*risky business"*, if the pursuer fails to prove a non-material event which the defender was responsible, it will not be fatal to his claim, provided it could be proven that the defender "*caused the global loss"*.

Lord Macfadyen's analysis is based on two suppositions, firstly that where there is sufficient evidence to find causal connections between losses and events or a "*rational*

[356] Supra note 10 [28].
[357] Ibid [35].
[358] Ibid [36].

apportionment"[359] of part of the global claim, then a global claim may succeed and secondly, taking guidance from the Bryne J in *John Holland*, that causation must be treated as a common-sense matter.

Upon allowing a proof before answer, his Lordship stressed that notwithstanding the aforementioned supposition, it did not allow the pursuer *"carte blanche*" to prove their case and the risk still existed that the defender could prove a material part of the claim existed for which they were not liable.

In response to the decision, Frame in her article in the Construction Law Journal, had this to say[360]:

"This is a significant case. Although it cannot be taken to be an endorsement of the global claim route, it may illustrate the court's reluctance to rule out certain claims categorised as 'global' without hearing evidence…They (Pursuers) will not be permitted to raise new matters in evidence not contained in written case. They will also need detailed proof of delay or quantum if any allocation is likely to be required to give the judge enough evidence to make any allocation"

Collier, was of the opinion that the *Doyle* case *"…possibly shows a more relaxed approach to global claims"*[361] and suggested that despite it still being a *"risky strategy",* there may be scope for the courts to further relax global claims in light of the decision in *Fairchild*[362] where mesothelioma sufferers were able to successfully claim even though they could only prove that the defendants had materially contributed to the risk of injury, although acknowledged that the case was distinct and may have been driven by public policy to ensure the sufferers were fairly compensated.

Throughout 2003 there were various cases brought to the courts concerning global claims[363], however arguable the most notable for the purposes of this thesis, was that of *Joinery Plus Limited v Laing Limited*[364]**.** Joinery carried out specialist joinery subcontract work for Laing

[359] Ibid [38].
[360] Shona Frame, "How to avoid global claims" (220) 13 10 Cons.Law 21.
[361] Clare Collier, "What happens when a claim 'goes global' (2003) 14 8 Cons. Law 29, 3.
[362] *Fairchild v Glenhaven* [2002] 3 WLR 89 House of Lords.
[363] *John Holland Pty Ltd v Hunter Valley Earthmoving Co Pty Ltd* (2003) 19 Const. L.J. 171 (Sup Ct (NSW)), *Joinery Plus Limited v Laing Limited* [2003] EWHC 3513 (TCC), *R. Durtnell & Sons Ltd. v Kaduna Ltd*. [2003] EWHC 517 (TCC), *Hurst Stores and Interiors Ltd. v M.L. Europe Property Ltd*. [2003] EWHC 1650 (TCC), *ConocoPhillips Petroleum Company UK Ltd v Snamprogetti Ltd and anothe*r - [2003] All ER (D) 134, *Wiltshier Construction (Scotland) Ltd v. Drumchapel Housing Cooperative Ltd* [2003] ScotCS 21
[364] *Joinery Plus Limited v Laing Limited* [2003] EWHC 3513 (TCC).

(in its role as the management contractor) on the New Stakis London Metropole Hotel. Joinery asserted delay and disruption and referred an amount of circa £700,000 to adjudication, broken down into (1) the difference between actual and planned labour (2) overtime payments (3) additional preliminaries and (4) overheads. The adjudicator had awarded an amount of £70,424.80 to Joinery. Notwithstanding that Joinery sought a court declaration that the adjudicator's decision was either valid or a nullity[365] and for Thornton J to decide upon the associated quantum to be paid by Laing. The case is worthy of commentary as it shines a light on how the adjudicator arrived at the quantum awarded, notwithstanding his belief that the claim was global in nature.

Joinery's claim was in the main asserted on a lack of access to certain areas of the site, however its calculation for loss of labour was not presented in a manner where particular delays could be allocated to particular locations. In consequence, Laing considered, *inter alia,* that Joinery had failed in its attempt to prove a global claim, because:

"…unlike the present case, such claims are only permitted when specific linkage between causes and consequences is impossible." [366]

The evidence set out in Joinery's Referral Notice was deemed unsatisfactory and in consequence the adjudicator directed that Joinery provide a schedule, which identified 89 separate items, where both Joinery and Laing were invited to allocate the labour hours spent on each item, which were also a delaying event. The adjudicator then held a meeting with the parties to discuss their respective positions on the schedules and duly arrived at his decision.

The case is informative because when arriving at his decision, the adjudicator was of the view that Joinery had underestimated its tender[367], which is of course, one of the three essential criteria which must be established when asserting a global claim, as set out by Bryne J in the *John Holland* case:

"…the arbitrator must decide inter alia whether the costs built into the tender rates were realistic." [368]

As set out by Thornton J, there were a number of matters the adjudicator was not satisfied with:

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[365] The question at law related to a jurisdictional challenge as the Adjudicator had, in error, been referring (at times) to a Subcontract which had been used by the parties on another Adjudication procedure.
[366] Supra note 364, [14].
[367] This is perhaps one of the first reported cases in the UK to do so?
[368] Supra note 136.

"I am not satisfied that Joinery has established, in its referral notice and subsequently, the nexus between the events that it alleges caused delay/disruption and the resultant delay/disruption. However, I am satisfied that Joinery has suffered some disruption and possibly delay leading to an entitlement to an extension of time by reason of piecemeal access to working areas and other matters claimed. ... There is no evidence to support the contention that the additional/wasted hours claimed resulted from the listed events and it is apparent that the figures are virtually entirely theoretical. ...Laing has made submissions sufficient to create doubt as to the validity of the theoretical calculations so that I cannot be satisfied that they can justifiably be relied upon."[369]

Notwithstanding this rather damning account, the adjudicator had decided that although Joinery had suffered some disruption he was not prepared to "guestimate", but nonetheless arrived at an award totalling £5,000, based on what he could derive from the allocation sheets. The adjudicator awarded a further £53,107.15, based on 18 items from the Cause and Effect Schedule, with interest due totalling £1,765.

In only awarding a relatively small proportion of the total claimed by Joinery, the adjudicator set out the following reasoning:

"Joinery suffered some delay and disruption.

The only evidence of this delay was to be found in a comparison of actual and tender costs.

The adjudicator was not satisfied that the claim could only be put on a global basis.

The adjudicator was not satisfied that the tender was adequate or that sufficient allowance had been made for the recovery already achieved for variations. He was also not satisfied that Joinery's records, particularly the labour allocation sheets, were adequate or that its management, supervision, output, workmanship or performance were satisfactory and had not contributed to the additional hours claimed.

Joinery's claim could be maintained despite lack of contractual notification but the absence of notices, written complaints or notices claiming extensions of time provided a further basis for his overall conclusion that Joinery had not established a nexus between the events allegedly causing loss and their effect by way of resultant delay and disruption."[370]

[369] Supra note 364 [18].
[370] Ibid.

In his summing up, Thornton J considered the decision by the adjudicator as a nullity, because, in law and in error, he had based his decision on the wrong contract[371], therefore given without jurisdiction, however Joinery was allowed to retain the cheque for £70,424.80, for what it believed was a kind of payment on account. Joinery were given leave to serve another Notice of Adjudication for the case to be retried, under cover of the correct contract.

The *Joinery* case is of interest, because it one of the earliest cases to show a decision maker (in this instance an adjudicator), adopting what could be construed as a stricter approach to claims which may be global in nature. From an original claim of circa £700,000, the adjudicator awarded approximately 10% to Joinery, which could at best, be considered a pyrrhic victory.

The year 2004, saw the decision of *John Doyle Construction Limited v Laing Management (Scotland) Limited* appealed to the Extra Division, Inner House of the Court of Session[372]. In the earlier decision, Lord McFadyen had allowed a proof before answer and the task at hand was appealed to the eminent triumvirate of Lord MacLean, Lord Johnston, and Lord Drummond Young.

To reiterate, Doyle were contracted to undertake superstructure work on two packages known as WP2010 and WP2011. The Project was delayed, and Doyle claimed 22 weeks extension of time with loss and expense totalling £4,807,144.16, for alleged delay and disruption.

In an opinion delivered by Lord Drummond Young, a global claim was defined as:

"a claim in which the individual causal connections between the events giving rise to the claim and the items of loss and expense making up the claim are not specified, but the totality of the loss and expense is said to be a consequence of the totality of the events giving rise to the claim."[373]

The defenders argued that a claim of this nature will fail if one factor of the claim (which was the responsibility of the pursuer) had a material impact on the causation of the global loss.

Lord Drummond Young agreed with the Lord Ordinary that since part of the delay was said to be related to concurrent causes, i.e. the delay in completing WP2010 and snow, whether they made a material contribution to the global claim should be dealt with upon proof before

[371] Another Laing subcontract where Joinery carried out specialist Joinery services associated with the Old Admiralty Building, London.
[372] *John Doyle Construction Limited v Laing Management (Scotland) Limited* [2004] A806/01.
[373] Ibid [4].

answer, based on the pleadings. However, given upon appeal, Doyle revised the definition of its averments from a global claim (in its strictest sense), to one of a total modified cost, their Lordships found it pertinent to set out their own reasoning.

In their reasoning, their Lordships not only define a global claim, but also differentiate and elaborate on the definitions of a "total cost claim" and a "total modified cost claim", terms more commonly adopted in the American courts[374] and occasionally and mistakenly used interchangeably as synonymous with global claims, set out as follows:

"In the American terminology, a total cost claim involves the contractor's claiming that the whole of his additional costs in performing the contract have been the result of events for which the employer is responsible. A modified total cost claim is more restrictive, and involves the contractor's dividing up his additional costs and only claiming that certain parts of those costs are the 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."

Of further note, their Lordship's found it necessary to elaborate on the merits of a total modified cost claim, suggesting that it could be of particular use in relation to delay as opposed to disruption costs:

"The delay, by itself, will invariably have the consequence that the contractor's site establishment must be maintained for a longer period than would otherwise be the case, and frequently it has the consequence that foremen and other supervisory staff have to be engaged on the contract for longer periods. Costs of that nature can be attributed to delay alone, without regard to disruption. Moreover, because delay is calculated in terms of time alone, it is relatively straightforward to separate the effects of delay caused by matters for which the employer is responsible and the effects of delay caused by other matters. For example, delay caused by late instructions and delay caused by bad weather can be measured in a straightforward fashion, subject only to the possibility that the two causes operate concurrently…"[375]

On analysis of the foregoing, their Lordships consider that it was easier to carve out delaying events between employer and contractor, and then allocate the correct delay / prolongation costs to those, than it is to carry out a similar exercise for loss and expense relating solely to

[374] Ibid [11].
[375] Ibid.

disruption. With respect, it is difficult to reconcile their Lordships logic, the exercise of delay analysis, is wholly separate from any exercise to carry out a modified total cost claim. The correct approach to quantifying delay and disruption is firstly carry out a delay analysis[376], to identify critical and non-critical delays to the project and allocate which events are either the employer's, the contractor's or concurrent responsibility, secondly allocate the prolongation costs to the delay events identified and thirdly, once the delaying events are understood to analyse how they have disrupted the works (if at all). Perhaps when their Lordships are referring to modified total cost claim in delay terms, the mean that when carrying out the delay analysis, the claimant / pursuer is more readily able to apportion / discount delays for which he is responsible.

Their Lordships then customarily reviewed relevant precedent pertaining to global claims, including persuasive cases from both Australian and American jurisdictions, in particular the judgement of Bryne J in *John Holland*. Their Lordships appear to have been particularly influenced by the following aspect of the judgement[377]:

"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 ... The understated assumption underlying the inference may be further analysed." [emphasis added].

The three propositions referred to above, are that the tender price was reasonable, the claimant committed breaches and the reasonable cost of the work was greater than the tendered cost.

On analysis, the sentence underlined above can, on a practical level, easily deteriorate into a quagmire of logical supposition. The beginning of the fourth proposition envisages *"proprietor's breaches*", i.e. plural, however combined they represent a *"casually significant factor"*, i.e. singular, which is responsible for the difference between the planned and actual costs?

Bryne J recognises this complexity as identified by Lord Drummond Young:

[376] Either prospectively or retrospectively, adopting the requisite methodology, which can take many forms including, Time Impact Analysis, Windows Analysis, Collapsed As-Built, Impacted As-Planned.
[377] Supra note 372 [12].

"It is the second aspect of the understated assumption, however, which is likely to cause the more obvious problem because it involves an allegation 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."[378]

The proposition for a global claim to succeed is therefore, predicated on the logic that a multiple number of the defendant's breaches were the singular causal factor which caused additional cost to the claimant.

Their Lordships then explained that if a global claim was to succeed the contractor must eliminate any matters for which he is culpable, mitigated by the Lord Ordinary's view that it may be possible to rationally apportion losses and events, and the contractor should firstly attempt to group events, with employer events, provided that the loss has no other "significant" or "dominant" cause. Secondly, establishing the causal link between the events should be undertaken using common sense principles[379] and that the proximate or dominant cause is *"sufficient to establish liability",* even if some other events are concurrent. Thirdly, where the employer's event or events could not be considered dominant but are nonetheless deemed to be a material cause of the loss, *"it may be possible to apportion the loss"*[380], between the events which the employer is responsible and other causes. Note that his Lordships state that it "may" be possible to apportion responsibility, such as in events which are "truly concurrent"[381], the position is not definitive. The weight of this induction will become apparent in subsequent chapters 6 and 7 of this thesis; therefore, it is important to provide a point by point commentary on their Lordships reasoning for arriving at apportionment liability as a just outcome.

In arriving at the foregoing view, their Lordships set their rationale against work which is delayed due to an employer event[382]and a neutral event[383], such as adverse weather conditions. Under these circumstances, it was considered that the responsibility for the loss could be

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378 Ibid [12].

379 Supra note 363 per Byrne J.in *John Holland*; *Alexander v Cambridge Credit Corporation Ltd*, (1987) 9 NSWLR 310; *Leyland Shipping Company Ltd v Norwich Union Fire Insurance Society Ltd*, [1918] AC 350, 362.

380 Supra note 372 [12].

381 As this section of the thesis is focussed predominantly on the chronological development of global claims, coupled with the fact that the concept of concurrency is a fluid and complex concept, and consequently it is explained in detail at Chapter 6 below.

382 In this instance, the late provision of architectural drawings.

383 Neutral events can be defined as events which are not the contractual responsibility of either the employer or the contractor, i.e. the parties to the contract.

apportioned due to their *"relative significance"*. Their Lordships then felt it necessary to explain that it should be a relatively more straightforward exercise to carry out an apportionment exercise for matters of delay, as opposed to disruption to the works, although it is still possible to assess disruption on a similar basis[384]. In this instance, their Lordships take the view that unless there is a *"special reason"* to indicate otherwise, the delay period should be divided on an equal basis, *"at least where the concurrent cause is not the Contractor's responsibility"*. Where a portion of the delay is the contractor's responsibility, their Lordships explained that it may be appropriate to deny him any recovery for the delays which he may have caused.

It could be inferred from the last sentence, that if there were competing ("concurrent") events, which were both the responsibility of the employer and the contractor, and the contractor's event was deemed dominant, he may be denied recovery.

It is of interest to note that at this stage in the judgement, their Lordships have deliberately avoided any comparison between an employer event and a contractor event. Maintaining the reasoning between an employer event and a neutral event[385], allows them to sustain the argument that under those circumstances, just because the contractor could not separate the causative effects of both an employer and neutral event, he should not be denied recovery, if he is not culpable, and should recover at least part of his loss or expense. However, with respect, it would also have been pertinent at this stage to also state that, since construction contracts generally entitle a contractor to extensions of time for neutral events, but no entitlement to loss and expense, then the apportionment would be for the cost element only and not time, where the contractor should be entitled to an extension to the contract duration borne out of both employer and neutral events.

In carrying out an assessment of the apportionment of either delay or disruption, their Lordships conceded that the exercise will produce a *"rough and ready result"*.[386]In this regard, their Lordships likened the assessment to that carried out in calculating contributory negligence awards in tortious cases.

In terms of the difficulties with casually linking the event(s), to the quantum or delay averred their Lordships explained that since commercial disputes are dealt with in the commercial

[384] Supra note 372 [17].
[385] This could be due to the fact that at one stage of proceedings the contractor had averred that 7 days of its delay was due to the effects of bad weather.
[386] Supra note 372 [17].

courts where "…*elaborate pleadings are unnecessary"*[387]and that since causation is a matter of inference, the claimant need only "…*set out the general proposition that such links exist"*[388]. Since the parties' respective positions are generally set out in the form of expert reports, it is unlikely that the parties will be surprised by their counterparts' position.

Upon a detailed commentary of the contractor's pleadings, which included a measured mile approach to the quantification of its disruption claim, their Lordships were convinced that the contractor's case was relevantly pled and that the case should proceed to a proof before answer.

To facilitate a more detailed analysis in the chapters 6 and 7, the key elements of this seminal judgement can be summarised as follows[389]:

i. If there is a truly concurrent delay between an employer event, and a neutral event, unless there is a special reason to the contrary, the delay period should be divided equally.

ii. Where a portion of the delay is the contractor's responsibility, it may be appropriate to deny him any recovery for the delays which he may have caused.

iii. The apportionment exercise will produce rough and ready results;

iv. The assessment is not fundamentally different to contributory negligence in tortious cases; and

v. Causation is inferred and the pleadings do not have to be elaborate, since the dispute is essentially a commercial matter.

Winter QC[390] suggests that the first Scottish decision on global claims, may have created a disparity with the English courts despite their Lordships referencing the previous English decisions. Indeed, Winter considers that *Doyle* is *"not good English Law"* as the English courts will only consider a global claim where it is *"…impracticable, if not impossible, to value [claims] individually"*. He contrasts this position with *Doyle* as he interprets the decision as allowing contactors to jump "…*straight to a global basis on all his heads of claim,*

[387] Ibid [20].
[388] Ibid.
[389] This summary is in addition to the key points set out by the Lord Ordinary in the Outer House Decision.
[390] Jeremy Winter, "Global Claims and John Doyle v Laing Management – Good English Law? Good English Practice?" A paper given to meetings of the Society of Construction in London on 6th March and Birmingham on 7th June 2007. July 2017 140.

without any attempt to quantify" [391] (in terms of time and money those heads which were capable of quantification. Chapters 6 and 7 of this thesis examine whether there is, in fact, any disparity between the English and Scottish jurisdictions in this regard.

In his judgement, Lord Drummond Young asserts that the parties' contentions will be set out in the form of expert reports. Due to the often volume and complexity of the information provided by the parties, and the relatively short hearing time for disputes which could have been running for many years, the expert report is an essential cog in the resolution of the construction claims wheel. Of course, the role of the independent expert, is to assist the court in arriving at a decision, where the judge is free to favour one expert opinion over the other, or indeed to put both opinions aside and make his own assessment. Unfortunately, it is often the case that either by coincidence or design, the independent expert's opinion generally favours their pay masters. This situation has been recognised in England, where the courts appear to favour either a single, or joint expert reports.

4.3 Losses able to be Separated

The difficulty with expert opinion is discussed, *inter alia,* in the next case to touch upon global claims, namely *Skanska Construction UK Limited v Egger (Barony) Limited*[392]. The parties entered into a Guaranteed Maximum Price Contract totalling £12 million, and in the course of the works, various issues arose due to defects in the floor of the newly constructed chipboard factory, which was designed and constructed by Skanska[393]for the client Egger Ltd. In his judgement, after deciding the quantum of various and many discrete heads of claim[394], when it came to a review of the loss and expense claims, Wilcox J had this to say about the experts' opinions:

"The two quantum experts have considered these claims as if looking through different ends of a telescope. Mr Simper focuses through a narrow end and looks sometimes in vain for perfect proof and the demonstrations of every causal link. Mr Wishart looks at the broader picture and as to certain elements his focus is somewhat blurred."[395]

[391] Ibid, 20.
[392] *Skanska Construction UK Limited (Formerly Kvaerner Construction Limited) and Egger (Barony) Limited* [2004] EWHC 1748 (TCC).
[393] The contract was between Egger and Kvaerner Ltd, who were succeeded by Skanska Ltd.
[394] In many instances, his Honour was influenced by the opinions put forward by the opposing experts, on a case by case basis. In many instances the experts were able to reach an agreement on the quantum.
[395] Supra note 392 [325].

Mr Simper acting for the defendant, asserted that many of the claimant's claims were global in nature. This position was met by the rather sympathetic commentary by Wilcox J as follows:

"In many cases which concern pleading issues and applications to strike out insufficiently particularised allegations, courts have understandably been cautious in permitting global claims to proceed. But in some circumstances a global or total cost claim may be the only practical way to present a claim."[396]

With respect to Wilcox J, on review of the case law to date, it could be considered that although the courts may have been "cautious" in permitting global claims, in the majority of cases reviewed in this thesis, the claims were not struck out and were actually allowed to proceed. The difficulty is that once the cases have proceeded, they appear to have been resolved along the way, and have not cumulated in a decision. This has meant a relative dearth of court decisions in relation to global claims.

Acting for the claimant, Mr Williamson QC, endeavoured to set the context as to how a global claim should be considered:

"…the appropriate approach is one based on common sense and practicality. This is not a criminal trial or a 19th Century Chancery Action: the court, taking into account its considerable and specialist experience should adopt a common sense and practical view of the question of whether the SCL have proved their loss. Perfect proof may on occasion be lacking, but that is no reason for the court not to do the best it can.'"[397]

Wilcox J accepted a pragmatic view should be adopted, but *"…mere common sense cannot supplant proof"*[398]. He then takes guidance from *Doyle*[399], and in this instance was able to separate out the claims for loss and expense[400], and make separate judgements on the respective heads of claim. This case therefore shows a judge, when the evidence is made available to do so, is able to assimilate and separate claims which are averred by the opposing side as global in nature. The Skanska case was, to date, one of the only cases to do so.

[396] Ibid [327].
[397] Ibid [323].
[398] Ibid [325].
[399] Quoting paragraphs 36 to 39, which sets out Lord Macfadyen's opinion on how global claims are to be considered.
[400] Loss and Expense Claims included – "Increased Management and Common User Fee / Additional Staff Costs / Delay Costs / Overheads and Profit / Insurance Charges / Interest and Finance Charges among others.

4.4 Global Claim for Loss of Profit Fails.

In the case of *Mr Tombs v Wilson Connolly Ltd*[401] the claimant, a bricklayer claimed £101,604.58 for loss of profit associated with the alleged repudiation of the contract by the defendant.

In obiter judgement, His Honour Judge Peter Coulson Q.C. decided that:

"The pleaded global claim must therefore fail in its entirety"[402]

Although an obiter commentary, Coulson J felt that given the point was fully argued by the defendant, there was merit in analysing their position. In doing so, he decided that the claim failed on two main issues, firstly, that the defendant had claimed for damages for work which had not been started and had therefore not been repudiated and secondly, the defendant was unable to evidence actual loss of profit on the work in question, or the anticipated profit for the future work which was yet to be carried out[403].

The case provides an example of the courts rejecting a global claim, the complexity of which has been compounded by the claimant being unable to evidence loss of profit for the project and for future work. Coulson J noted that it is not enough for a claimant to state that they intended to make a profit, but that on the balance of probabilities, it would in fact have made a profit.

4.5 Dominant Cause Test & Apportionment – Adopted by English Courts

In 2005, the case of *Great Eastern Hotel v Laing Construction*[404] came to be decided at the TCC, where the claimant's i.e. the Great Eastern Hotel, claimed £17m in damages for loss of revenue and additional payments made to various contractor's and its professional team in consequence of some 44 weeks delay to the hotel refurbishment allegedly caused by the defendants' Laing, who were the construction managers of the project. Laing counterclaimed, alleging that claimant's made material misrepresentations, upon which it relied upon prior to entering into the Construction Management Agreement.

In the course of the proceedings the defendants' QC asserted that even if it could be proven that his client was responsible for major breaches associated with delays, the case must fail

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[401] *Mr N.K. Tombs v Wilson Connolly Ltd*, [2004] EWHC 2809 (TCC)
[402] Supra note 401 [62].
[403] It was shown that Mr Tombs actually made a greater profit once he stopped working for WCL.
[404] *Great Eastern Hotel Company Ltd v John Laing Construction and Laing Construction Plc* [2005] EWHC 181 (TCC)

because they *"...were unable to demonstrate that such breaches caused particular loss and damage."*[405]

On the thorny subject of causation, Wilcox J relied upon the approach taken by Devlin J in *Heskell v Continental Express Limited*:

"If a breach of contract is one of the causes both cooperating and of equal efficiency in causing loss to the Claimant the party responsible for breach is liable to the Claimant for that loss. The contract breaker is liable for as long as his breach was an "effective cause" of his loss." [406]

He then goes onto say that there is no requirement for the court to choose between the effective causes or to decide which one was "more" effective. Wilcox J went further:

"In the absence of such provision the appropriate test is that if GEH prove that Laing were in breach and the proven breach materially contributed to the loss then it can recover the whole loss, even if there is another effective contributory cause provided that there is no double recovery.[407] (emphasis added).

With respect, the position arrived at by Wilcox J above is only sustainable if the other 'effective cause(s)' are not also the responsibility of the claimant. In this particular case it makes sense to arrive at the foregoing conclusion on 'effective cause', as the contract between the claimant and the defendant was a construction management contract, therefore there were potentially 'other' delays which could be considered, and which were caused by other trade contractors, and not the claimant. That causative position would be untenable if the contract was procured on a more traditional basis, i.e. employer to contractor, where the contractor was solely responsible for the performance of the trade subcontractors. By way of example, if the employer and the contractor has caused concurrent critical delays, it would be illogical to conclude that if both claimant and defendant had effective causes of delay, then the claimant could claim for liquidated damages and the defendant could (for the same period of delay) also claim for loss and/or expense, commonly understood as the obverse problem.[408] That position is not accepted and is known as the Devlin Approach, and is only relevant when:

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[405] Ibid [298].
[406] *Heskell v Continental Express Limited* [1995] All Eng 1033, 1047.
[407] Supra note 404 [315].
[408] The Hon Vivien Ramsey et al, 'Keating on Building Contracts' 5th Edition 1991 Sweet and Maxwell, 8-22.

"…competing causes are the responsibility of a defendant and another defendant or third party, or the defendant and another factor unconnected with the claimant."[409]

A third party, not the employer.

Wilcox J then went onto review the delay and disruption costs incurred by the claimant to compensate various trade contractor's, which as part of this case, was in turn claimed against the defendant. In this regard, he was satisfied that the trade contractor's claims were global, and that for them to succeed, the claimant must attempt to separate and deduct amounts which were not the responsibility of the defendant. In this instance, the exercise was deemed possible, because there was adequate evidence to identify the causal links between the additional costs and defendant's responsibility for those losses.

Adopting the method set out in *John Doyle*, Wilcox J concluded that:

"I am satisfied on the basis of Mr Mitchell's evidence that the dominant cause of Trade Contractor delay was in fact the delay to the project caused by Laing's proven breaches."[410]

The quantum experts were then able to apportion to amounts paid to the Trade Contractor's which was attributable to the defendant in the sum of £3,770,109. Indeed, their evaluations were accepted by Wilcox J, who had this to say:

"It seems to me that such an apportionment would be on a more informed basis than if the Court at this stage attempted that exercise on the present evidence and I so direct."[411]

This case therefore provides a helpful example of an English court being influenced by a recent Scottish Court decision, by applying the dominant (not effective) cause method of causation and with the experts being able to apportion the quantum, despite Wilcox J considering they were largely global in nature. In this case, the judge heavily relies on the experts to arrive at his decision.

4.6 A Decision from Down Under - Methodology

On 6th March 2006, His Honour Judge Bergin of the Supreme Court of New South Wales, presided over the case of *Shell Refining (Australia) v AJ Mayr Engineering.*[412] The proceedings initiated by Shell, seeking a declarator that an adjudicators decision to award the

[409] The Hon Vivien Ramsey et al, 'Keating on Building Contracts' 10th Edition 2018, Sweet and Maxwell, 9-094.
[410] Supra note 404 [330].
[411] Supra note 404 [328].
[412] *Shell Refining (Australia) P/L v A J Mayr Engineering P/L* [2006] Adj.LR. 03/06.

defendant $11,085,692, from a claimed amount of $11,137,998 losses associated with delay and disruption while fabricating pre-assembling modules for the plaintiff's refineries in various locations, should be null and void. The defendant's position was that:

"There is no precise way to compute the costs and losses incurred for both labour and equipment due to disruption to the original program. In AJ Mayr's claim, the quantification has been derived from specific events, specific circumstances, the consequences of those events and circumstances and a degree of subjective judgment."[413]

The plaintiff's position was as follows:

"To date we have received several unsubstantiated global claims associated with delays. Our request to have the basis of claims substantiated ... has been ignored to date ... On the information provided to date we are unable to assess the basis or quantification of these claims and have, as such, valued the claim as "0"..."[414]

The parties adjudicated on the matter, and the adjudicator determined that on analysis, the plaintiff had caused delay and disruption and accordingly the defendants were entitled to an award of $11,085,692. In the current action, the plaintiff claims that the adjudicator failed in considering and determining the merits of the claim in particular:

"...whether the claimant[415] *had established a nexus between delays and costs said to have been incurred; if so whether all delay costs were necessarily and reasonably incurred; (3) whether the claim included inter-state construction work or related goods and services; (4) whether all the rates claimed were reasonable; (5) whether the adjudicator agreed with the "subjective judgment" of the defendant as to its methodology; and (6) whether the plaintiff had already paid the defendant amounts referable to delay damages."*[416]

Taking each assertion in turn, Bergin J dismissed the summons, and ordered the plaintiff to pay the defendant's costs. The case is of interest, because the judgement sets out the quantum methodology adopted to calculate the costs associated with the asserted delay and disruption and upon which the adjudicator answered in the affirmative. Of particular interest, is the calculation in relation to labour efficiencies, where the defendants chose a form of total modified cost, taking the total spent labour manhours, and deducting the total earned hours

[413] Ibid [7].
[414] Ibid [10].
[415] The "claimant" in the adjudication was of course AJ Mayr, who is now the defendant in this particular judgement.
[416] Ibid [21].

adjusting for manhours already paid for variations. The total modified cost, however, does not deduct any man hours, for which the defendant is responsible, the only hours deducted are for variations already awarded. Perhaps in this instance, "all" additional hours incurred, were the responsibility of the plaintiff, however given the final project price was in the region of $35,000,000, it is difficult to arrive at the position that the plaintiff was responsible for "all" of the defendant's additional man hours.

The additional manhours calculated, are then multiplied by a single labour rate of $55.00. The rate is calculated by dividing the total tender amount for labour, by the total labour hours included in its tender, producing an average hourly gang rate. In this regard, Bergin J had this to say:

"The amount of $55 per hour as the multiplier was explained in the defendant's application and, although the adjudicator does not expressly refer to that figure, it is clear that he has considered the plaintiff's response in the payment schedule and AKA's assessment of the payment claim."[417]

No further information is provided in relation to the background of the average labour rate[418], however it is likely that on a project of this scale, the defendants would have required the services of various trades, who's hourly rates will vary significantly, for example the difference in rates between a welder fabricating the modules and a labourer are significant.

If the labour average labour rate per gang, and the personnel in that gang are consistent, for example, for work of this nature a single gang could consist of a number of welders, welder's mates and labourers. If that is the case, then the position that an average rate of $55 per gang, could be perceived as reasonable. However, if the defendant utilises various trades, such as welders, joiners, concrete gangs, labourers, electricians etc, then in the authors experience, it is surprising that one composite rate, is deemed acceptable by the adjudicator.

It is noted that Bergin J was not directly asked to decide upon the merits of the quantum asserted by the defendants, including the labour efficiency calculation, the claimants had sought a decision on whether the adjudicator, had given adequate consideration to the claims. On review of the quantum calculation related to labour efficiency, it would be reasonable to arrive at the view that, with respect he did not.

[417] Ibid [29].
[418] It would have been useful to understand the histogram information to ascertain the various designations of labour utilised.

4.7 Scots Law – Dominance and Apportionment fortified.

The dominant cause approach to causation in relation to global claims adopted in *Great Eastern* (which was influenced *Doyle*) was again examined in the Scottish case of *Musselburgh and Fisherrow Co-op Society v Mowlem Limited*[419]. The case related to three defects in a swimming pool which caused water leakage into the M&E ducting, which was built by the defendants Mowlem. Of the three defects namely, the faulty design of the overflow channel and the walkway using a sealant, the junction between several drainage holes and the pipework for the overflow water, and the apparent seepage of water from the body of the swimming pool itself, a previous judgement concluded that any claim to the first two defects had been extinguished by the five-year negative prescription law pursuant to section 6 of the Prescription and Limitation (Scotland) Act 1973.

In May 2003, the pursuers carried out significant remedial works to the swimming pool, as part of larger refurbishment works to the sports centre as a whole, and in consequence brought an action against the defenders for the cost of said work, in the sum of £280,702.35. As part of their submission, the pursuers counsel argued that the third defect, i.e. the general seepage from the swimming pool materially contributed to the loss[420]and the defender was therefore liable for the total cost of the refurbishment around the swimming pool area.

The defenders disagreed and asserted that the global costs claimed in relation to the first two defects (which were prescribed by law), the seepage defect was "minimal". Relying upon *Doyle*, the defenders added that the pursuers must eliminate any causes for which it was responsible, which the pursuers had not done i.e. deducted the costs associated with remedying the prescribed defects, the case should fail, caveated by the following:

"(i) that a particular dominant cause might be identified between matters for which the defender was responsible and individual items of loss; (ii) if there was a dominant cause of the loss in question, that might be treated as the operative cause; and (iii) if it could not be said that the events for which the defending party was responsible were the dominant cause, it might be possible to apportion responsibility between the events for which responsibility was present and those for which responsibility on the part of the defender was lacking."[421]

[419] *Musselburgh and Fisherrow Co-operative Society v Mowlem Scotland Limited*, Outer House, Court of Session [2006] CSOH 39 CA30/02.

[420] The loss being the requirement to replace the entire membrane underneath the swimming pool, making it watertight.

[421] Supra note 419 [19].

Since the dominant cause of the necessity to repair ducts and the swimming pool membrane, related to the first two defects, as they were *"by far the major sources of escape of water from the pool"*[422], then the case must logically fail. Furthermore, since the pursuers expert was of the opinion that the three defects were of equal importance, the render seepage could not be said to be the dominant cause, as established in *Doyle*, and therefore not the operative cause. The only option therefore open to the pursuers was apportionment despite none being pleaded.

In consideration, Lord Eassie favoured the defenders view, however he did not consider that the defenders could be exonerated completely, hence a move to apportion the loss deemed appropriate.

".. I have come to the conclusion that the appropriate way of apportioning costs relating to the overall waterproofing of the pool is firstly, to apportion the cost of removal and replacement of the channel and gratings into three shares, with the remainder of the costs included in the waterproofing and related works being split equally."[423]

Taking the heads of claim in turn, Lord Eassie granted a decree that the defenders must pay the pursuers an apportioned amount of £104,274.38, in part compensation for the rectification works. This case provides a clear example of the Scottish courts following the precedent set out in *Doyle*, i.e. that the dominant cause approach to establish the causative potency of competing causes is to be considered in the first instance, and that apportionment may be appropriate when calculating the quantification of the associated losses.

In terms of causative principles, reflection on the chronology of case law up until by 2005, would suggest that the courts consider the dominant cause approach as the first test when deciding upon the causative potency of competing causes in relation to global claims. The *Musselburgh* case above succinctly summarises the position in this regard, however we have to delve deeper, if we are to understand the position more fully. The dominant cause test applies to the causative potency of two or more competing events prior to the quantification / loss and/or expense; not the quantification per se. This exercise is relatively uncontroversial when none of the competing clauses are the responsibility of the defendant as for example, in the *Musselburgh* case set out above, the three competing causes were the responsibility of the defendant(s), which was not denied. Once dominance is established and the breach identified,

[422] Ibid [20].
[423] Ibid, [17]. His rationale for this proportion of apportionment, may (to a degree) have been influenced by the defenders' expert, who had recommended *"a three-way apportionment on the basis of there being three defects"*, although his Lordship, chose an equal split for the remainder of the costs, since the experts view was oversimplified.

then the loss and/or expense which naturally flows from that breach, is ascertained. So, in *Musselburgh* for example, the specific facts of the case moved Lord Essie to apportion the loss and/or expense, because dominance could not be established.

In contrast to the Heskell case, where liability for competing causes at the entitlement level is said to be both the liability of the claimant and the defendant, then, as we will see in the case of *City Inn v Shepherd Construction Limited*[424], the industry stops and listens. The opinion of Lord Drummond Young in the Outer House, Court of Session, caused a great interest upon its publication and spawned a cornucopia of articles from construction lawyers and professionals, seldom seen in the field of construction law. It could be argued that this seminal case (like *Doyle)* was a further catalyst for an emerging departure between how the law relating to competing causes and the quantification of same both from a delay and loss and expense perspective, is perceived in the English and Scottish courts.

The pursuers entered into a standard form building contract[425] with the defenders, to build a Hotel in Bristol. The project was planned to be completed on 25th January 1999, however Practical Completion was awarded on 29th March 1999. The employer's architect had awarded a four-week extension of time, and the employer subsequently levied liquidated damages for a further five-week delay totalling £150,000. The case was referred to adjudication, where the adjudicator awarded a further five-week extension of time and instructed the pursuers to reimburse the liquidated damages to the defender.

The case was referred to the Outer House where the pursuers argued, *inter alia*[426], that the delays were concurrent with defenders' delays and therefore no extension of time should be granted. The defenders countered, arguing that they were actually entitled to an extension of time totalling 11 weeks (plus £27,069 for the additional 2 weeks prolongation costs) and that the correct date of Practical Completion should have been the 14th April 1999. The eleven-week delay was set out as follows:

i. Three and a half weeks for late architect's instruction, changing the substructure membrane;

ii. Five weeks for late architects' instruction after the original Completion Date varying the roof cladding. Three and a half weeks were concurrent with item (a) above;

[424] *City Inn Limited v Shepherd Construction Limited* [2007] ScotCS CSOH_190.
[425] JCT Standard Form of Building Contract (Private Edition with Quantities) (1980 edition) with additional provisions.
[426] The pursuer's main argument centred upon issues of time bar, not explored in this thesis.

iii. Six weeks due to the dismissal of the employer's design time causing various delayed instructions for variations, and late confirmations.

Upon review of the relevant precedent[427] Lord Drummond Young had difficulty with Seymour J's logic in *Malmaison* in relation to competing or concurrent causes of delay. In *Malmaison*, Seymour J set out the position, which has essentially remained unchanged in the English courts:

"[I]t is agreed that if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event. Thus, to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour."[428]

Upon reading of the foregoing, Lord Drummond Young considered that Seymour J was referring to a situation where a relevant event and a shortage of labour *"occurred simultaneously*", which he felt was an *"arbitrary criterion"* and had this to say:

"It should not matter whether the shortage of labour developed, for example, two days before or two days after the start of a substantial period of inclement weather; in either case the two matters operate concurrently to delay completion of the works. In my opinion both of these cases should be treated as involving concurrent causes, and they should be dealt with in the way indicated in clause 25.3.1 by granting such extension as the architect considers fair and reasonable."[429]

[427] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] BLR 111, *Balfour Beatty Building Ltd v Chestermount Properties Ltd* [1993], 62 BLR 1, *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [1999] 70 Con LR.
[428] *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [1999] 70 Con LR, [13].
[429] Supra note 424 [16].

He drew further comfort for the older authority of *Wells v Army and Navy*[430], and the more recent case of *SMK Cabinets v Hilti Modern Electricity*[431]relying on the principle of prevention, translated in these circumstances as follows:

"…the fact that delay has been caused by matters for which the contractor is responsible will not deprive the contractor of his right to claim an extension of time for delay caused by a relevant event."[432]

The subsequent section of the judgement is significant, because it is the first time a UK judge has differentiated between global claims relating to loss and expense and global claims relating to delays. The pursuers had relied heavily on the opinion of Lord Macfadyen in *Doyle*, which as is seen above, dealt with a global claim for loss and expense and how a pursuer could establish its case, where it was impossible to link cause and the events for which the defenders are responsible for, in this case the contractor and the employer. Lord Drummond Young paraphrased Lord Macfadyen's view that a contractor must prove that the whole of the loss is attributable, mitigated by the following criterion:

i. It may be possible to separate individual cause and effect

ii. Causation must be treated by applying common sense, and where possible identify a dominant cause which is sufficient; and

iii. Apportionment between employer causes and other causes may be possible.

In reviewing the foregoing Lord Drummond Young considered that the principles set out above, had only limited application to the case at hand, as *Doyle* was concerned with concurrent causes relating to loss and expense, whereas the current case related to concurrent causes in relation to delay. The differentiation in this case had practical application because the wording in clause 26 in the JCT Suite of Contracts, i.e. the loss and expense clause, required the architect to act "fairly and reasonably", whereas, clause 25 i.e. the extension of time clause makes no such demand on the architect. His Lordship went onto say:

"In practice causation tends to operate in a complex manner, and a delay to completion may be caused in part by relevant events and in part by contractor default, in a way that does not permit the easy separation of these causes. In such a case, the solution envisaged by clause 25 is that the architect, or in litigation the court, must apply judgment to determine the extent

[430] *Wells v Army and Navy Co-operative Society*, 1903, 86 LT 764.
[431] *S.M.K. Cabinets v Hilti Modern Electrics Pty Ltd*, [1984] VR 391.
[432] Supra note 424 [17].

to which completion has been delayed by relevant events. In an appropriate case apportionment of the delay between relevant events and contractor's risk events may be appropriate. Precisely when and how that should take place is a question that turns on the precise facts of the case."[433]

The judgement of Lord Drummond Young shows a departure from the English Courts, as to how competing or concurrent causes are dealt with in relation to delays, when one of the causes is a relevant event, and the other an event (say a contractor's lack of labour), which is not the responsibility of the employer. In England, the contractor will be entitled to an extension of time, however in Scotland if appropriate, and if a dominant cause cannot be established, the delay can be apportioned between the competing / concurrent causes. In England, it would appear to be the case that the competing/concurrent causes have to exist simultaneously, while in Scotland, the causes do not.

In 2007, it would be reasonable to conclude that the law in England was unclear as to how loss and expense were to be dealt with, in cases of competing causes, and that apportionment may be available. In City Inn, Lord Drummond Young clarified the position in Scotland, when dealing with the prolongation costs of the defender:

"In this respect the decision in John Doyle Construction Ltd v Laing Management (Scotland) Ltd, supra, may be relevant. In that case it is recognised at paragraphs [16]-[18] that in an appropriate case where loss is caused by both events for which the employer is responsible and events for which the contractor is responsible it is possible to apportion the loss between the two causes. In my opinion that should be done in the present case."[434]

Although a worthy thesis topic in its own right, concurrency (competing causes which both critically delay the project completion date), is nevertheless important in the analysis of global claims. A claimant may aver that several events for which it is not contractually responsible, have caused a delay to the completion of a project, while the defendant may counter by asserting that concurrent to the events argued by the pursuer, there were additional events for which the pursuer was contractually responsible. An argument of concurrency is therefore a construct to defend against a global claim for delay. Chapters 6 and 7 explore the fundamental differences between a global claim for delay and a global claim for loss and expense, as well as matters of concurrency.

[433] Ibid [22].
[434] Supra note 424 [166].

4.8 Global Claims in Relation to Delay – Courts support of the Arbitrator

The next case in chronological terms, to explore the courts handling of global claims, also relates to matters of delay. In *London Underground v Citylink Telecommunications*[435]the claimants ('LUL') entered into a contract with the defendants ('CTL') to provide integrated communications systems across the London Underground Network. The project was delayed and following the dispute resolution procedure in the contract the case was referred by senior management to adjudication[436] and then to arbitration. The arbitrator influenced by the decision in *Doyle*, awarded CTL an extension of time of 48 week, from a total of 81 weeks claimed.

Dissatisfied with the findings of the arbitrator, LUL duly appealed the case to the TCC. Whilst agreeing with the arbitrator's approach in rejecting CTL's evidence on causation of delay, LUL challenged his decision to award a 48 weeks extension of time, on the basis that the arbitrator had relied upon a case (i.e. *Doyle*) which was never argued by the parties, consequently the claimant opined that it had no opportunity to answer to the case asserted, and should now therefore, be afforded the opportunity to address it.

Upon his analysis of how the arbitrator dealt with CTL's claim for an extension of time, Ramsey J made interesting reference to both parties' counsel pleadings. CTL had asserted four approaches in justification of its extension of time claim, in consequence CTL's counsels reminded the arbitrator that he was free to choose either / or of the four EoT methodologies or he could also take a *"…broad view as to how the matter should be judged"* and that LUL's position was if the arbitrator does not accept any of the four approaches, he should give no reward, they considered this approach as incorrect.[437]LUL's counsels position response to this assertion is set out in full below:

"…CTL tend to elide two separate questions. The first is whether analysing a pleaded claim for an extension of time, taking into account the evidence that is relied upon to support that, it is open to you to reach any other conclusion than the pleaded period of delay is made out or not.

The second question, which is having reached the conclusion that each and every pleaded basis of claim, and the facts which are relied upon to support that claim, fail and you are not

[435] *London Underground Ltd v Citylink Telecommunications Ltd* Rev 1 [2007] EWHC 1749 (TCC)
[436] CTL's claim was rejected by the Adjudicator due to its globality and that CTL did not *"make good the claim in all but the most trivial respects"*.
[437] Supra note 435 [96].

in a position to award any extension of time on any of those bases, it is open to you to create, by reference to the evidence, some other basis.

In relation to the first and quite distinct proposition, we wholly accept that when you are considering a pleaded claim… when you are working through the critical locations, you may say: this delay was caused by a delay event in the period alleged or a lesser period, and arrive at a conclusion on that basis.

It is equally possible that you may look at Ms. Ramey's[438] *analysis and say: well having rejected CTL's analysis, there are some parts of Ms Ramey's analysis that have attraction.*

But what you cannot do is embark upon a wholly new separate and different inquiry. The restriction that we seek to impose is a restriction upon the second exercise which I have identified, which is having rejected all and reached the conclusion that none are sustainable, it is open to you to consider the case on some hitherto unpleaded basis.

It is important to keep those two points quite separate."[439]

Ramsey J succinctly summarised the position as follows:

"CTL was trying to convince the Arbitrator to take a broad view of the evidence and submissions in coming to a conclusion on the appropriate extension of time and LUL was trying to persuade the Arbitrator that he should not do so."[440]

The judge then explored the arbitrator's reliance on *Doyle*, quoting the arbitrator verbatim as follows:

"CTL do not suggest that their claim is a "global" or "total cost" claim of the type discussed by the Court. However CTL's claim has similarities because on CTL's case the delays in the Claim period were overwhelmingly caused by one major factor, namely the late completion of EBW. The issue between the parties identified by paragraph 8.20 of the Defence is whether the late completion of EBW (which is prima facie the contractual responsibility of LUL) was in fact caused by matters for which CTL is contractually responsible.

CTL say that on the evidence … is not made out. However it might be that the Arbitrator will conclude that matters for which CTL is contractually responsible were a contributory cause of late completion of EBW[441] *if so paragraph 17 of the judgment would justify an*

[438] Ms Ramey was the delay expert for LUL.
[439] Supra note 435 [97].
[440] Ibid [98].
[441] EBW – Enabling Works.

apportionment to be carried out on a percentage basis (as indeed LUL's internal assessments contemplated)."[442]

and

"In these circumstances, it seems to me to be right that I should consider whether it may be possible, as was contemplated in the John Doyle case, to identify a causal link between some of the events for which LUL is responsible and the delays which were encountered. In doing so, I think it right to confine myself to breaches of obligation and exercises of right on the part of LUL which remain open to CTL in the light of my rulings on the pleading point set out above. I also think it right to confine myself to aspects of the progress of the work which LUL have had a reasonable opportunity to investigate and explore in the evidence."[443]

LUL were of the opinion that apportionment should not be allowed, and that the *"Arbitrator had constructed a case of its own initiative*"[444] which amounted to a serious irregularity.

The arbitrator decided that (as averred by CTI) that the claim was not best suited to a critical path methodology, although it was possible to identify a link between LUL's breaches and a 48 week delay to the works.[445]

In his conclusions, Ramsey J dismissed LUL's application. He accepted on the evidence that breaches by LUL had caused a 48-week period of delay, and was satisfied that by the arbitrator referencing *Doyle*, suggested *"...nothing, in my judgement, by way of fairness which required the Arbitrator to seek further submissions from the parties before making his findings.*"[446]He then set out three issues which should be considered:

i. As the contract had obligated the arbitrator to act fairly and reasonably, meant that the arbitrator is not *"tied to a particular analysis"*, nor *"bound to follow the contentions of the parties"*. The assessment must be subjective, based on the circumstances;

ii. Critical Path Analysis, it is "*at most an area of expert evidence"* and although it can assist the court (or arbitrator), the findings *"should not be seen as determining the*

[442] Supra note 435 [106].
[443] Ibid [129].
[444] Ibid [114].
[445] Specifically, a delay at Edgware Road and the Corporate Line, since "*the progress of commissioning the Corporate Line governed everything that followed. Therefore, all key milestone's that fell post the Corporate line were delayed."*
[446] Supra note 435 [160].

answer to the question". In this case Ramsey J agreed with the arbitrator and decided that project was not best suited by analysis using the Critical Path Method.

iii. An arbitrator award must be based on the pleadings, and "*whilst it does not prevent an Arbitrator from going outside the limits, or acting in a manner which is unfair*", it is *"less likely to happen when the Arbitrator consciously approaches the questions with the relevant considerations in mind*"

In general terms, the *London Underground* case again evidences that the courts are reluctant to overturn an arbitrator's position. In specific terms, *London Underground* is the first reported case where a decision maker (in this instance, the arbitrator), has arrived at a decision[447] by determining a case is "global" in nature and without the claimant arguing their case as such. It would seem therefore that whether a case is asserted as a "global claim" or otherwise, the decision maker will nevertheless decide upon the merits of the case, taking into consideration, the contract, the surrounding facts, causation principles based on common sense and precedent. The question could be asked therefore, is there any merit in defining a claim as "global" in the first instance? The question is explored further at Chapter 6 of this thesis.

Global claims by their nature, are often considered as a claim made by a contractor, in relation to the cumulative effect of change to a multitude of trades. Often a series of events which have the effect of delaying and/or disrupting a particular trade, will inevitably have a knock on, or domino effect on subsequent trades. However, disputes where claims are defended as being global in nature, can also arise under relatively narrow circumstances.

4.9 English Courts still not averse to Apportionment

A narrow approach can be found in the case of *Maersk Oil Ltd v Dresser Rand Ltd*[448], the claimant Maersk had procured the services of the defendant Dresser, to provide a compressor facility as part of a project to extract oil from the subsea wells located in the Janice Field in the North Sea for a contract price of £3,133,400. Due to alleged defects in the compressor equipment, Maersk claimed damages totalling £7,927,487. The largest head of claim totalling £3,767,359 related to a claim for additional diesel costs, which were allegedly incurred due to the compressors being inoperative for periods of time. When the compressors were

[447] In this case an extension of time award of 48 weeks.
[448] *Maersk Oil UK Ltd (Formerly Kerr-McGee Oil (UK) Plc) v Dresser Rand (UK) Ltd* [2007] EWHC 752 (TCC)

inoperative, Maersk had to engage their standby procedure of powering the turbines with diesel, as opposed to compressed gas.

The calculation was based upon the total cost of the diesel in question, based on a *"baseline diesel consumption level"* totalled for the period in question. This amount was then deducted from the actual cost of the diesel consumed, with a slight adjustment for shipping costs. Dresser's position that the claim could not succeed because it was global in nature, and losses incurred were only partly due to the inoperability of the compressors. Maersk's position was that the global claim was *"susceptible of apportionment"*.[449]

Dresser's quantum expert was of the view that since there were many reasons for the downtime in the compressor operation, which were not the responsibility of Dresser, the correct approach was to analyse the daily production logs to arrive at what losses could be attributed to Dresser. Given the information provided by Maersk, it was impossible to make such a calculation. It was not denied that some of the downtime was caused by Dresser's breaches.

Maersk's quantum expert was of the view that a loss based upon a base line consumption figure was appropriate and proportionate, to avoid the:

"…onerous exercise of identifying and quantifying each and every event that would have affected diesel consumption over the claim period. Such an exercise would entail the production and examination of detailed operational records in order to ascertain the volume of diesel consumed each day, and to identify the precise reasons for such consumption in order to establish whether or not, it could be attributed to compressor unavailability"[450]

His Honour Judge David Wilcox, sought guidance from *Doyle*, summarising the Scottish courts position that, for losses from competing causes, only some of which are the responsibility of the defendant, the claimant must prove that those cause are the proximate or dominant cause of the loss. In the event that this is not possible, then apportionment may be considered, providing the defendant's cause(s) are material to the losses incurred.

Wilcox J concluded therefore that:

[449] Ibid [664].
[450] Ibid [637].

"If an apportionment, based on the evidence is possible, albeit difficult it would be manifestly unjust to deny a remedy, where there are plain contractual breaches by the defendant."[451]

Upon an assessment of the evidence adduced, Wilcox J decided that it was not possible to identify a dominant cause, or to apportion the loss, therefore Maersk's claim should fail in its entirety.

The Maersk case illustrates that even when a head of claim appears relatively narrow in context, i.e. it a claim for additional diesel costs, the events which were relied upon to arrive at the total cost asserted were various. In a classic construction claim, diesel costs would ordinarily form merely a part of the overall claim asserted. It is interesting to consider this case, the argumentation around whether the claim was global or otherwise, centres solely on diesel costs. The case also evidences an English court having the fortitude to reject in its entirety, a global claim, even although it acknowledged that losses incurred by the claimant were in part the responsibility of the defendant. Finally, the case is significant because it quite clearly reveals an English High Court judge following the precedent set in the Scottish courts, in relation to how global claims should be decided upon. Wilcox J followed the test set out in *Doyle* (as he did in *Great Eastern*) and deciding that since he could not identify a dominant cause, or apportion the loss, then the global claim must fail. It is of note that Wilcox J seems to have acknowledged that apportionment in the English courts may be possible,

4.10 The Burden of Proof must not be Reversed.

The next case congruent to global claims (and of significance) which occurred later in the same year as *Maersk*, was the Court of Appeal case of *Petromec v Petrobas*[452]. There is merit in examining this case because the principles of deciding on how best to frame Petromec's quantum claim, occurred at the case management stage, when preliminary issues were being discussed. During those preliminary proceedings, the parties had petitioned the court to decide what evidence would be required when the case proceeded to trial. It is particularly significant because the first instance decision by Moore-Bick J had held that Petromec were not responsible for delays to the project and were therefore entitled to additional time related costs. Therefore, the thorny issue of entitlement was not in dispute and the question in law to be decided upon was, in the main, distilled into how the additional costs incurred by Petromec were to be evaluated.

[451] Ibid [690].
[452] *Petromec Inc v Petroleo Brasileiro SA Petrobas* [2007] EWCA Vic 1371.

The additional costs incurred had been borne out of an upgrade to the specification of an offshore platform, where the operator Petrobras had agreed to pay the reasonable extra costs to upgrade the vessel originally constructed to explore the South Marlin field, to be modified to explore the newly discovered Roncador field instead. In the appeal hearing, Cooke J was invited to decide whether on construction of the Supervision Agreement the sum due was to be calculated:

As the difference between the reasonable costs which may have been incurred upgrading the Vessel for the requirements of the South Marlin field and the as built cost it actually incurred to upgrade the Vessel to the suit operation in the Roncador field. The view of Petromac.

OR

As the sum ascertained pursuant to clause 12.1[453] on the basis of evidence of expenditure, upgrading the Vessel in accordance with the Amended Specification and the reasonable costs of the original specification. And pursuant to clauses 12.2[454] & 12.3[455], the cost of further alteration in addition to the change to the amended specification including engineering work. The view of Petrobas.

OR

On some other basis.

Petrobas asserted that Petromec's calculation is global in approach and that a detailed review of the changes to the specifications must be carried out and costed, whereas Petromec assert that clause 12.1 i.e. the entitlement to *"reasonable extra cost"* does not require it to justify every change to the specifications, all it has to evidence is that there are extra costs and that

[453] Clause 12.1: In consideration of Petromec's agreement to upgrade the Vessel in accordance with the Amended Specification Brasoil agrees to pay to Petromec an amount equal to the reasonable extra cost (if any) to Petromec of Upgrading the Vessel in accordance with the Amended Specification over and above the cost that Petromec might reasonably have incurred in Upgrading the Vessel in accordance with the Original Specification.

[454] Clause 12.2: In the case of any further alterations or changes instructed by Brasoil pursuant to Clause 10 hereof, Brasoil agrees: (i) to pay to Petromec the reasonable costs (if any) incurred by Petromec and its contractors in progressing the engineering in accordance with such Specification as was agreed before the alteration or change; (ii) to pay to Petromec an amount equal to the reasonable extra cost (if any) to Petromec of Upgrading the Vessel in
accordance with the Specification as altered or amended; and (iii) to extend the date by which Petromec must complete the Upgrade.

[455] Clause 12.3: The additional costs referred to in Clauses 12.1 and 12.2 above will become due and payable on the production by Petromec of evidence of expenditure satisfactory to Brasoil and Brasoil being satisfied that such costs were reasonable and properly incurred.

they are reasonable. In turn Petrobas considered that adopting this methodology reverses the burden of proof, and importantly that Petromec should:

"…identify the causal nexus between any work which a claim is made for "extra cost" and a change order. This is needed to show that the work constitutes a true difference between the South Marlim build and the Roncador build, for the costing exercise to be done. As a matter of case management the court should also require Petromec to adopt Petrobras's approach."[456]

Petrobas also contended that the changes should follow the variation order procedure set out in clause 10, which leads to the requirement pursuant to clause 12.3, for Petromec to produce evidence of expenditure.

Finally, Petromec asserted that:

"…it is entitled to put its case in the way that it wishes and that the court cannot or should not compel it to do otherwise. It is a matter then for Petrobras as to how it wishes to deal with the case put and whether it wishes to adopt its own method of assessment of 'reasonable extra cost'."[457]

After a detailed analysis of the construction of the Supervision Agreement, Cooke J, finding favour in Petrobas's argumentation, decided that:

"…in order to succeed it is necessary for Petromec to identify the work, and the cost attributable to that work, required to effect changes from the former specification to the new specification under both cl 12.1 and cl 12.2. In the case of cl 12.2 it has also to establish the instructions from Petrobras/Brasoil for the alterations or changes, as well as the work done. For both sub-clauses, the reasonableness of the work and costs has also to be shown. When this is done, the appropriate extension of time can be determined."[458]

May LJ also set out his judgement at the invitation of Sir Anthony Clarke MR, and agreed with Cooke J's interpretation of the Supplemental Agreement:

"'The essential problem with Petromec's methodology is that it fails to grapple with the issues of instructions from [Petrobras] pursuant to cl 10 for the purposes of cl 12.2 and fails to identify the work done, whether pursuant to cl 12.1 or cl 12.2.' (See at [38].) Petromec's

[456] Supra note 452, [10].
[457] Ibid [11].
[458] Ibid [26].

method would not establish that the difference in cost was reasonable extra cost. It would reverse the burden of proof."[459]

As has been set out in previous cases relating to global claims, the courts have favoured the production of a Scott Schedule, to facilitate a better understanding of the causal nexus between events and their effects. In the Petromec case, May LJ went further stating that:

"But the court should not, in my view, order a Scott schedule or similar document without stipulating its form and the nature of the detail which each party is sequentially required to give. Without these matters, the particularised detail which the court requires is not sufficiently determined."[460]

Finally, May LJ tackled the often-circumvented definition of what is meant by a *"detailed particular"*, a term often used in relation to global claims. Whilst his definition is isolated to the specifics of this case, including the wording of the Supplemental Agreement, May LJ had this to say:

"…Petromec should specify in the schedule with sufficient itemised particularity the work content, the authority under which they did that work and what they claim to be its reasonable cost…… No doubt, for much of the direct work, the causal nexus will be obvious and need not be spelt out - as if there is an instruction for additional steelwork and this is the direct cost of the additional steelwork. Other indirect work and its costs may need a better particularised causal link to the work content and instruction which caused the cost to be incurred."[461]

4.11 The Bottom Up or Top Down Approach.

If we are able to pause for reflection, as Petromec had asserted a claim for simply the difference in its costs, it is convenient at this juncture, to note that various judgements of the courts have adopted similar phraseology, more termed as total cost or total modified costs claims, when referring to claims which could be defined as global in nature, particularly when dealing with complex matters of disruption. The methodologies set out above, are set somewhat at odds with the court's requirement for the pursuer to endeavour to prove the causal nexus between the events and their effects. Whatever methodology ultimately chosen, the Scottish case of *Ronald Smith v Honda Motors*[462]provides an extremely helpful general

[459] Ibid [24].
[460] Ibid [29].
[461] Ibid [40].
[462] *Ronald M Smith & Co v Honda Motors Europe Limited t/a Honda (UK)* [2007] CSOH 74.

definition, often used in industry when describing the approaches which can be taken when calculating the losses associated with multiple breaches of contract.

The case is actually delictual in nature and concerned a local Ayrshire car dealer ('Doonfoot Garage') and his franchise dealership with Honda Motors. The relationship had come to an end,[463] and in consequence, Honda had written to its customers in the area[464], stating that the dealership had ceased. The ambiguous nature of the letter could have been construed that Doonfoot Garage has actually closed. Accordingly, Doonfoot claimed damages for loss of earnings totalling £45,000 spread over a period of 5 years, due to negligent misrepresentation, and a breach of duty owed by Honda.

Honda asserted that Doonfoot's expert had incorrectly adopted a "top down" approach, when it should have carried out a "bottom up" approach in calculating its averred losses, which were denied. The experts agreed the general definition in these circumstances, which was set out by Lord McEwan as follows:

"Top down looks at generalities, work done in different years, pricing for jobs and discounts for costs and overheads. It makes the assumption, in this case, that any downturn in business was caused by the letter 6/2, and that the loss of job means loss of customers who would have taken their Honda to the new Doonfoot for servicing and other work but who have gone elsewhere because they believed the garage was closed. The whole downturn in jobs is ascribed to that set of facts. It does not make any continuing allowance in the two years for the Arnold Clark factor or the vicissitudes of the motor trade. "[465]

And

""Bottom up" looks at individual customers who have left and calculates up from that. That is the case on Record."[466]

In support of its "top down" approach, Doonfoot had led evidence from four customers of the garage that the letter from Honda had meant that they took their business elsewhere[467]. Eleven customers in total were named. The calculation was based upon actual losses for the first 2 years which were then extrapolated for years 3 to 5 by the adoption of a decreasing formula

[463] Arnold Clark had taken on the franchise.
[464] Referred to as letters 6/1 and 6/2 in the pleadings.
[465] Supra note 462 [23].
[466] Ibid.
[467] There was a data base of 3,000 customer names available.

i.e. 75% down to 25%. The reducing percentages were prepared by a retired accountant, living abroad who did not attend the hearing and therefore the percentages were unexplained.

In his judgement, Lord McEwan set out his concerns with the approach taken by Doonfoot:

"In my view, proof to some degree of loss of specific customers would be necessary in a case pleaded in this way. Obviously not every customer would need to be called but once a pattern emerged, general losses could competently be proved making proper allowance for other relevant factors e.g. the loss of the franchise, the Arnold Clark factor etc."[468]

Doonfoot had pleaded that if the "top down" methodology is disputed; it should at least be apportioned, relying on the judgement in *Doyle*.

Lord McEwan differentiated the current case with *Doyle* due to the very different factual background and that in *Doyle*, a proof before answer had been required. In his summing up, Lord McEwan found that the case could not succeed. The claim was global in nature, which had attempted to prove that customers stayed away after receiving the letter from Honda confirming Doonfoot's disenfranchisement. It was clear that not enough evidence was adduced to support this view, the vagaries of the motor industry were not the fault of the defenders, and that since Honda had simply appointed Arnold Clark, no breach was owed. Had a "bottom up" approach been undertaken and the percentage reductions for years 3 to 5 been explained, it could have been possible to make a jury award, however since that was not the case, the case must fail.

The *Doonfoot* case is significant, because it uses the terminology of "top down" and "bottom up" to articulate different ways in which losses can be evidenced. This terminology is often relied upon within the expert fields, and normally pejoratively when referring to "top down" claims.

4.12 City Inn – revisited.

Similar to the first instance decision by the Lord Ordinary, Lord Drummond Young; the Inner House decision of *City Inn v Shepherd Construction*[469]was again the catalyst for much debate in legal and professional circles in England and Scotland. The appealed case came before Lord's Osborne, Kingarth and Carloway, where the reclaimers tabled that the Lord Ordinary,

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[468] Supra note 462 [30].
[469] *City Inn Limited v Shepherd Construction Limited* [2010] CSIH 68 CA101/00.

had erred in law, in awarding the respondents ('Shepherds') an extension of time of 9 weeks and the associated loss and expense[470].

Lord Osborne examined the chronology of case law as it related to the rules of causation and clause 25 of the JCT Standard Form (Private Addition with Quantities, 1980), and reaffirmed the decision set out by the Lord Ordinary in the Inner House decision:

"… I would endorse the view of the Lord Ordinary that where two causes, neither of which is dominant, are under consideration, a relevant event and a non-relevant event, it may be appropriate for the architect or decision-maker to apportion responsibility for the delay between the two causes."[471]

Although questions of waiver and personal bar arose in this case, it is perhaps for matters of concurrency that it is better known. Although concurrency is not the primary focus of this thesis, it nonetheless maintains a relevance to claims which could be described as global in nature, as the cause and effect is often absent in global claims relating to delay, the matter is conflated when competing concurrent causes are also present.

Given the tangential relevance of concurrency to this thesis, there is merit in exploring what could be regarded as a somewhat unconventional (and perhaps insightful), opinion set out by Lord Carloway, on the matter. Although Lord Carloway was in general agreement with his colleagues, in relation to concurrent or competing clauses, he considered that primacy should be given to whether a delaying event was a Relevant Event (an employer's event), as defined under the JCT Suite of Contracts and adopted in the current case.

"…the exercise remains one of looking at the Relevant Event and the effect it would have had on the original (or already altered) Completion Date. If a Relevant Event occurs (no matter when), the fact that the Works would have been delayed, in any event, because of a contractor default remains irrelevant."[472]

This position is interesting because it goes against the classic notions of causation and the but-for principle, an example of which was articulated by HHJ Seymour QC in *Royal Brompton*, where he said:

"However, it is, I think, necessary to be clear what one means by events operating concurrently. It does not mean, in my judgment, a situation in which, work already being

[470] Ibid [16].
[471] Ibid [51].
[472] Ibid [110].

delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a Relevant Event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a Relevant Event…the Relevant Event simply has no effect upon the completion date.[473]

Put another way, if the contractor is already in culpable delay and a Relevant Event occurs, then the delay associated with the Relevant Event is inconsequential, because the contractor would be in delay, in any event. Lord Carloway acknowledges that although this may well be the case in classic causation theory, it is not what is envisaged by the contract. In his view, the architect must firstly decide whether a Relevant Event is likely to cause a delay, and then fairly and reasonably set a new completion date. Lord Carloway went further:

"…where there are potentially two operative causes of delay, the architect does not engage in an apportionment exercise. Where the contractor can show that an operative cause of delay was a Relevant Event, he is entitled to an extension to such new date as would have allowed him to complete the Works in terms of the contract."[474]

Unfortunately, his Lordship does not elaborate as to what would happen with the associated loss and expense associated with the extension of time given.

In the UK, since the coming into force of the Housing Grants, Construction and Regeneration Act 1996, disputes in construction contracts have been predominantly resolved through the adjudication procedure. It is unfortunate therefore, that there has been limited development in precedent in what could be considered classic claim territory (i.e. EOT and loss and expense claims), which also, in many instances, includes claims of a global nature. Given that global claims can fail because of the lack of a "causal nexus" between multiple and often competing causes, and their cumulative effects, it would be reasonable to assume that a party unsuccessful in their attempts at asserting a global claim, may be compelled to have another bite at the cherry.

Incidentally, the *City Inn* appeal was, to date[475], the last case in the Scottish courts which dealt with claims of a global nature.

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[473] *Royal Brompton Hospital NHS Trust v Hammond & Others (No 7)* [2001] 76 Con LR 148, [31].
[474] Supra note 469, [114].
[475] As at the end of 2017.

4.13 If at first you don't succeed.

Continuing to pursue (or re-plead) a global claim, which is essentially the same as a previously unsuccessful claim, comes with a note of caution as was apparent in the case of *Carillion Construction Limited v Stephen Smith*[476]. Stephen Smith was the proprietor of an underground piping company, who were carrying out subcontract services for Carillion at Broadgreen University Hospital, Liverpool. An adjudicator deciding upon a second adjudication for prolongation costs, delay and disruption and overhead recovery totalling £380,589.53. On review of the evidence[477], the adjudicator concluded on 28th August 2003 that:

"...It seems to me that [the Company] have not been able to distinguish the amount of losses (if any) allegedly incurred in each of the variations which could be attributed to the loss and/or expense rather than the items already recovered in the final account… It is my view that the claim in respect of the loss and/or expense by [the Company] lacks particularisation. The assertions made by [the Company] are mostly on a general basis without proving the causal links which may persuade me that on the balance of probabilities loss and/or expense were incurred by [the Company] and that the loss and/or expense were as a direct result of breaches of Contract by [Carillion]…"[478]

Consequently, no money was awarded to the Company, i.e. the subcontractor Stephen Smith.

Perhaps unsatisfied with this result, Mr Smith filed for a third adjudication serving Notice in September 2011.[479]He claimed that during the previous adjudication, Carillion had withheld a number of important documents, and re-staked his claim in a total of £1,097,871.23. Carillion argued that the third adjudicator had no jurisdiction to decide upon the claim as it was essentially pleaded on the same grounds of the second adjudication. The case came before Mr Justice Akenhead in November 2011. In arriving at his decision, Akenhead J carried out a detailed analysis of the claim asserted in the second adjudication and the third adjudication[480] and reached the conclusion that the third adjudicator had no jurisdiction:

[476] *Carillion Construction Limited v Stephen Andrew Smith* [2011] EWHC 2910 (TCC).
[477] Which included a 43 page claim documents, with Appendices including the Subcontract and Programme
[478] Supra note 476 [43 & 48].
[479] Mr Smith had filed personally, trading as Underground Pipeline Services.
[480] At paragraph 56 of the judgement, Mr Justice Akenhead set out 8 helpful factors in considering whether a dispute is similar or the same as a previous decision.

"…what Mr Smith has done is to seek to overcome, by a massive effort on his part, the lacunae and gaps in the Subcontractor's case as led the Second Adjudicator to decide that the quantum case was not proved in the Second Adjudication."[481]

Clearly therefore an injured party will have to be very careful when trying to assert a global claim, when it has been previously unsuccessful in other dispute forums.

4.14 Summary of Case Law

The period between the introduction of the 1st Edition of the SCL Delay and Disruption Protocol in October 2002, until the *Carillion* case in 2011, saw the emergence of the first Scottish case to deal with matters which are global in nature. The Lordships in the appeal case of *Doyle*, set out three preconditions for a global claim to stand any chance of success in the Scottish courts, namely:

i. The claimant[482] must eliminate matters for which it is responsible, however failing to do so, the total claim may not necessarily fail. It may be possible to separate individual cause and effect;

ii. Establishing the causal link between events should be undertaken using common sense principles; and

iii. Where the claimant's events are not considered to be dominant, but are nonetheless a material cause, it may be possible to apportion the losses.

When considering the effect of causes, dominance is still a primary consideration.

The time period saw a divergence between how the English and Scottish courts manage matters of concurrency, which is discussed later in the thesis. It would also appear at this time, and as set out in the *Maersk* case, the English courts were still willing to consider apportionment for claims deemed global in nature. Finally, it is also likely that a bottom up approach to quantifying global claims is to be preferred over a top down approach as recognised in *Ronald Smith.*

[481] Supra note 476 [61].

[482] The pursuer in Scotland. As noted previously, the thesis adopts the term claimant for the party raising the claim.

CHAPTER 5: WALTER LILLY TO PRESENT DAY

5.1 Introduction

The previous chapter set out the development of how the UK courts dealt with global claims from the introduction of the 1st Edition of the SCL's Delay and Disruption Protocol in October 2002, until the Carillion case in 2011. This chapter provides a review and commentary of the UK courts approach to global claims from the case of *Walter Lilly* in 2012 until time of writing and submission of this thesis.

The period identified in this chapter also saw the release of the 2nd Edition of the SCL's Delay and Disruption Protocol, February 2017. The 2nd Edition Protocol was moved to say that:

"There is a recognition of an apparent trend for the construction legal industry and the courts to take a more lenient approach towards global claims, albeit the risks in proceeding on this basis remain."[483](emphasis added)

It is submitted that the SCL's position i.e. that there is a trend towards leniency in relation to global claims, is in the main based upon Akenhead J's decision in *Walter Lilly* set out below. This chapter will also review all UK case law germane to global claims in the UK in the period identified, to understand if there is indeed a move towards leniency of global claims.

5.2 Walter Lilly – a move towards leniency?

Arguably the pre-eminent[484] case in relation to global claims and concurrent delays, *Walter Lilly & Company Ltd V Mackay and Anor*[485], similar to the *City Inn* decision, caused considerable interest in construction law circles. Mr Justice Akenhead described the case as a *"full-bloodied conflict"*[486], where the claimant Walter Lilly ('WL'), raised a claim against the defendant, a Mr McKay for outstanding payments totalling £2,383,600.96, an extension of time from original completion of 23rd January 2006 to practical completion of 13th August 2008; and a repayment of Liquidated Damages. The defendant counterclaimed an amount of £68,340.80. Incredibly the fees associated with this relatively small claim were in the region of £10 million.

[483] The Society of Construction Law 2nd Edition October 2017, Introduction Section K (e).
[484] Gurbinder Grewel, 'A New Leading Authority' Construction Law (2012) 23 8 Cons. Law 14.
[485] Supra note 11.
[486] Ibid [2].

Mr McKay was one third part of a special purpose vehicle DMW Developments Ltd ('DMW'), and WL contracted with DMW under a JCT Standard Form of Building Contract 1998 Edition Private without Quantities, to build three adjacent houses in Earls Court London, known as Plots A, B and C.

Prior to reviewing Akenhead J's perspective on global claims, it is essential to first understand his commentary on concurrency, because for the first time it is acknowledged by a High Court judge that there now appears to be departure between how matters of concurrency are considered in the English and the Scottish courts. His analysis will be summarised here, because the principle of concurrency is discussed in more detail at Chapter 6 of this thesis. Upon review of the relevant precedent[487] Akenhead J succinctly summarised the position as follows:

"... I am clearly of the view that, where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time. Part of the logic of this is that many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to construe Clause 25 on the basis that the Contractor should be denied a full extension of time in those circumstances. More importantly however, there is a straight contractual interpretation of Clause 25 which points very strongly in favour of the view that, provided that the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question."[488]

There would appear to a clear departure between how concurrency is dealt with in the English and Scottish courts, which will be examined later in the thesis. At this juncture, on analysis of the immediate judgement above, it is interesting to note that Akenhead J's emphasis focuses on the fact that the delay must be analysed first and foremost by the impact of the Relevant Event. This view is consistent with that of Lord Calloway, in his partially dissenting judgement in the appeal of *City Inn*, examined in Chapter 4. Also, of interest is the omission of any reference to the "dominant" cause, which now appears to have been replaced by

[487] *Balfour Beatty Building Ltd v Chestermount Properties Ltd* (2003) 62 BLR 1, *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32, *De Beers v Atos Origin IT Services UK Ltd* [2011] BLR 274, *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 Comm.

[488] Supra note 11 [370].

"effective" causes when considering how competing clauses are to be evaluated. Upon review of the evidence adduced, the learned judge awarded WL an extension of time until 7th July 2008.[489]

In his initial commentary in relation to WL's claim for loss and/or expense due, Akenhead J dealt with the substantial debate about what level of information/evidence was required by WL to satisfy its case. Mr Pontin (DMW's Quantum Expert), had argued that WL should provide, staff and labour locations and actual costs, scaffold utilities, expense and other materials with copied invoices and explanations, subcontract accounts already discounted by amounts which were not the employer's responsibility and such other date to enable the actual costs to be vouched. In doing so, they rely on the wording of Clause 26.1 of the Conditions of Contract which require the employer's quantity surveyor to "ascertain" the amount of such loss and/or expense which has been or is being incurred by the contractor.

Akenhead J disagreed that the ascertainment of the loss and/or expense due meant that the quantity surveyor must be "certain" and that the clause 26.1.3 states that the contractor need only submit details which are "reasonably necessary" for the quantity surveyor to arrive at a position on the loss and/or expense averred. Given the significance of his view, it is worthy setting out his rationale, in its entirety.

"Clause 26.1 talks of the exercise of ascertainment of loss and expense incurred or to be incurred. The word "ascertain" means to determine or discover definitely or, more archaically, with certainty. It is argued by DMW's Counsel that the Architect or the Quantity Surveyor cannot ascertain unless a massive amount of detail and supporting documentation is provided. This is almost akin to saying that the Contractor must produce all conceivable material evidence such as is necessary to prove its claim beyond reasonable doubt. In my judgement, it is necessary to construe the words in a sensible and commercial way that would resonate with commercial parties in the real world. The Architect or the Quantity Surveyor must be put in the position in which they can be satisfied that all or some of the loss and expense claimed is likely to be or has been incurred. They do not have to be "certain". One has to bear in mind that the ultimate dispute resolution tribunal will decide any litigation or arbitration on a balance of probabilities and at that stage that tribunal will (only) have to be satisfied that the Contractor probably incurred loss or expense as a result of one or more of the events listed in Clause 26.2. Bearing in mind that one of the exercises which the Architect

489 Original Practical completion was 23rd January 2006. Akenhead J reviewed delays to the project through 8 time periods.

or Quantity Surveyor may do is allow loss and expense, which has not yet been incurred but which is merely "likely to be incurred"; in the absence of crystal ball gazing, they cannot be certain precisely what will happen in the future but they need only to be satisfied that the loss or expense will probably be incurred."[490]

In its monthly interim applications for loss and expense, WL had attached a list of the preliminaries effected by the employer delays, compared it to the original tender, and then multiplied the additional weeks by the tender preliminary rate. They also included amounts claimed by subcontractor's, due to the delay periods. In doing so, Akenhead J was satisfied that the criterion had been achieved by WL:

"This provides, particularly to an architect or quantity surveyor who is well acquainted with what is happening on the project, all the detail that is reasonably called for by Clause 26.1. It is linking the loss and expense claim to the particular factors relied upon to a specific extension of time claim; it is identifying each head of loss or expense, spelling out the precise period for which it is claimed and the precise cost or loss which is put forward. It is not necessary that the details provided are actually correct but they need to be what the Contractor is putting forward."[491]

The foregoing commentary is significant, as it sets an explanation as to why loss and/or expense evidence in JCT Contract does not have to be exhaustive, but that it must be what is "reasonably necessary" for the quantity surveyor to arrive at a view. This makes sense as it may be the case that the loss and/or expense incurred has not yet materialised, as is envisaged by clause 26.1 above.

With this in mind, the following question arises: are loss and/or expense claims under a JCT Contract, to be based upon known / realised costs, and then allowances made for what could be construed as forecasted costs, for events which the employer bears liability under the contract? A more detailed analysis of whether a contractor must assert actual costs is discussed at Chapter 6 below.

As part of their overall quantum claim, WL claimed for additional preliminaries, which included the "thickening" or additional personnel required to deal with additional variations and late instructions. DMW considered that these claims were barred by authority as they were "global" in nature. Prior to his decision, Akenhead J carried out a chronological review

[490] Supra note 11 [468].
[491] Ibid [470].

of some of the most important cases relating to global claims which have arisen over the last half century and came to the following conclusion:[492]

"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 the alleged causes of delay. Simply because a contractor claims all the 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 on"[493]

Akenhead J considers that since WL's preliminary claim related solely to the periods of delay it asserted, and that it had adduced evidence for each member of staff during that extended period[494], the claim could not be considered global. He then set out seven conclusions as to how the English Courts will consider global or total cost claims[495]:

i. Must be proven as a matter of fact and does not have to be impossible to plead. In the first instance, the contract clauses must be reviewed to understand how global claims are to be dealt with between the parties;

ii. Conditions precedent must be adhered to, such as notices;

iii. No set way to prove the three elements of a contract claim, however the claimant must adhere to the following pre-requisites[496];

   - Demonstrate on a balance of probability that the events create an entitlement to the delay and/or disruption;
   - The events cause the delay and/or disruption; and

[492] *Crosby v Portland* UDC (1967) 5 BLR 121, *London Borough of Merton v Stanley Hugh Leach* (1985) 32 BLR 68, *Wharf Properties Ltd v Eric Cumine Associates* (1991) 52 BLR 1, *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 82 BLR 81, *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd* 82 BLR 39, *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [20012] BLR 393, *Petromec Inc v. Petroleo Brasilerio SA Petrobras* [2007] EWCA Civ.1371
[493] Supra note 11 [484].
[494] The associated costs were taken from WL's COINS system. Construction Industry Solutions (COINS), is an industry recognised business software which has been established for over 30 years.
[495] Akenhead J's position is set out verbatim at Appendix 3.
[496] Supra note 11.

- The delay and/or disruption cause loss and/or expense (or damage).

iv. Claimant must prove loss would not have been incurred in any event. It is open to the defendant to adduce evidence that, for example, the tender was inadequate, and losses would always have been incurred. The freedom of the defendant to pursue such an action, does not reverse the burden of proof on the claimant to prove its case on a balance of probabilities;

v. If there are elements of the global claim, which are the fault of the claimant, it is not fatal to the claim and does not mean that it recovers nothing;

vi. No need to pursue a global claim if it is possible to separate events and the associated costs. Even if this is not deployed, whilst a tribunal may be more sceptical, a global claim should not be rejected out of hand; and

vii. A global claim might not necessarily be disallowed where the claimant created the impossibility of disentanglement.

On analysis of WL's claim, Akenhead J referring to the language of precedent on the matter, stating that even if a global claim he was satisfied that WL's situation was "impracticable", using Donaldson J's words from the 1967 case J Crosby & Sons, and also "very difficult" adopting the words of Lord Macfadyen in the 2002 case of *Doyle*. It is noted that he did not say that is should be "impossible", wording which was also used by Lord Macfadyen. Once again it is useful to express the judges unadulterated position, which paints a clear picture of the what he perceives is the impracticability on WL's part:

"This project was, essentially, a complete mess from the administrative side on the part of DMW and its professional team. The job started with remarkably little design, there were hundreds of variations, there was throughout the project hopelessly late provision of information and instructions to WLC, there was a substantial level of discord between, principally, Mr Mackay and most of his professional team most of the time and there was a strategy evolved by Mr Mackay which involved aggressively supervising the professional team and omitting a substantial amount of work whilst leaving WLC with the work which he thought WLC would have difficulty in dealing with in time."[497]

[497] Ibid, [487].

As mentioned previously, WL's work was spread over the three housing units and consequently, it had divided its preliminary costs[498], evenly throughout those units. DMW argued that WL should have undertaken a detailed and contemporaneous analysis of its preliminary costs and allocated then specifically to the individual units. The judge thought this approach "unrealistic" and "immensely artificial" for someone to sit down at the end of the day and carry out this exercise, it was also not based on what actually happened on site. Indeed, DMW's own team had, for a substantial part of the project, allocated the preliminaries as one third to Units A, B and C respectively.

Akenhead J then analysed and commented upon the structure of WL's preliminary claim. The following methodology could be seen as an aide-memoire as to how to set out a claim for preliminaries and staff thickening:

i. Each head of claim was identified;

ii. The Relevant Events relied upon were referenced;

iii. Back up documentation was provided, in prose form, articulating the additional or extended resource utilised and linked back to the delay and/or disruption relied upon;

iv. Staff were picked out to coincide with the delay and/or disruption periods;

v. All of the above was then collated and costed in a document called a "Detailed Analysis of Loss and Expense";

vi. The cost information was taken from WL's COINS system, and DMW's team had been invited to audit the financially sensitive information, to evidence salaries and the like;

vii. The foregoing was supported by evidence from WL witnesses, which was unchallenged.

To illustrate, Akenhead J set out the following example:

"One can take an example, say a site supervisor on Unit C who is on site for an additional 45 weeks by reason of Clause 26 factors; if he spent 100% or 50% of his time on Unit C during this period, the loss or expense incurred by WLC is his salary cost for that additional 45 weeks (in full or half of it as the case may be). Even if one considers the "thickening" preliminary costs, this is not "total" or "global". All that WLC's case and evidence goes to show is that during certain periods as a result of alleged events it had to or did apply a greater level of

[498] Taken from its COINS software system,

resource than originally allowed for; again, if the linkage between the relevant event and the need to provide a greater resource is established, the costing of it is established by showing how many man weeks were consequently necessary and how much the salary cost was for those man weeks."

There was also much debate between the parties, as to whether WL's tender prices were reasonable. Akenhead J was of the view that the preliminary costs at tender were realistic and they had been reviewed by DMW's quantity surveyors. Furthermore, the preliminary costs had been compared to previous projects and on comparison were, if anything, somewhat higher.

Akenhead J, then went onto to evaluate WL's preliminary claims, which can be summarised as follows:

i. Thickening of resource up to March 2006: £118,528 claimed. The sum relates to additional resources borne out of various events which were disrupted, including the piling, the frames, the pre-cast concrete, M&E works and joinery. The sum is calculated during a time when 1508 nr drawings, specifications and schedules were revised, 146 formal Architects Instructions were issued, 121 verbal instructions were confirmed, and 249 questions asked and answered by the design team. The judge carried out a line by line evaluation of the individual heads of claim, including plant, accommodation, scaffolding, staff and labour and the like. The methodology of award appears to be that where evidence has not been proven, the award is zero, where evidence has been adduced, the judge awards amounts in fractions, such as half, two thirds, three quarters and the like. The amount finally awarded totalled £62,778, some 53% of the total claimed.

ii. Preliminary costs up to 16th February 2007: £304,695 claimed. The sum is calculated at a time when, there were no real complaints about WL's performance. Akenhead J considered this conceptually more straightforward than the foregoing claim, as it was merely the prolongation of resources required during a period of time that an extension of time had already been granted. The amount finally awarded totalled £304,695 100% of the total claimed.

iii. Thickening of resource up to 16th February 2007: £243,183 claimed. Additional amounts over and above the preliminary costs set out above, from 13th March 2006. The sum is calculated during a period where DMW's architect had already awarded

various extension of times for many and varied changes to the works, which were concurrent with late instructions relating to flooring, structural glass, steel work, external decoration and M7E among others. In Akenhead J's opinion, all delays, both critical or otherwise, were not the fault of WL. The methodology is again similar to the above. The judge then reviewed each head of claim, either awarding zero or a proportion depending on his satisfaction about the evidence adduced. The amount finally awarded totalled £104,625 some 43% of the total claimed.

iv. Prolongation up to 6th February 2008: £297,046 claimed. Prolongation costs for general preliminaries between 16th February 2007 and 6th February 2008. The sum is calculated during a period of delays to the light wall, leather in the library, stingray doors and barrisol ceilings, among other things which the judge deemed delays due to WL. During this period, Akenhead J identified two events which were the responsibility of WL, although they did not cause "overall delay", namely plastering issues and problems with the lift. During that period, adjudications were carried out and the judge made allowances for WL costs associated with this totalling £30,000 and some £6,778 in relation to sundries not adequately proven. After apportioning the costs between the units, the amount finally awarded totalled £232,929 some 78% of the total claimed.

v. Thickening up to 6th February 2008: £297,910 claimed. Additional amounts over and above the preliminary costs set out above, for the same period for the same events and some additional events including external works, joinery plastering and addition works due to DMW mobilising its own contractors. Also, during this period there were 23 revised drawing, 134 architect's instruction and 94 verbal instructions. Again, Akenhead J referred to two events which were the responsibility of WL, namely the plastering and the lifts. In consequence £20,000 was deducted from WL's thickening costs. Working through the various heads of claim, Akenhead J evaluated the amounts due in terms of zero, full value or fractions. The amount finally awarded totalled £98,837 some 33% of the total claimed.

vi. Preliminary costs incurred after 6th February 2008: £121,450 claimed. Prolongation costs for general preliminaries between 6th February 2008 and 14th August 2008, when Practical Completion was certified, and then up until August 2009. The first period was in relation to delay and the second period was in relation to unjustified and lengthy time spent managing defects. Akenhead J decided that no compensation would be allowed for the second period, as WL would always be expected to provide resources

during the defects period, and entitlement would not usually be established pursuant to clause 26. Again, the judge evaluated the amounts due in terms of zero, full value or fractions. The amount finally awarded totalled £56,850 some 47% of the total claimed.

WL claimed for cleaning costs (the total not provided), however this preliminary item was rejected in its entirety, because it was not obvious related to the delay or disruption averred in the foregoing claims. In total, the judge awarded £860,714 for preliminary costs, 59% of the total claimed, for items which were argued as being global in nature.

Although not asserted or challenged as a global claim, it is of interest to examine WL's claim for loss of head office overhead and profit totalling £276,171.98. On review of the relevant precedent on the matter[499] Akenhead J concluded that a contractor can recover head office overhead and profit as a consequence of employer delay and must prove, on a balance of probabilities, both that future work would have been secured, but for the delays and also that the use of a formula such as Hudson or Emden is a helpful way of calculating those losses. Clarifying a point made by Lloyd J in the *McAlpine* case, the judge reaffirms as per his earlier position that ascertainment of those losses, does not mean that the architect/quantity surveyor has to be certain, that overhead and profit may be lost.

On review of the evidence before him, Akenhead J was satisfied that on balance, WL had proven its case and awarded the sum for head office overheads and profit in its entirety. Any doubt on what can be described as a particularly controversial head of claim were assuaged by WL's Director Mr Corless, who provided detailed evidence proving that key members of the WL Management Team delayed on the current project were not able to assist with future tenders. Consequently, they were unable to secure their normal one in four success rate for tenders bid.

The entitlement to head office overhead is uncontroversial, what requires further analysis is the judge's apparent nonchalance towards the calculation of that loss utilising the Emden Formulae. It is not doubted that in the absence of a formulaic approach, the calculation of head office overheads and profit is notoriously complicated, and it is no doubt a boon to quantum experts the world over, that a standard formula is accepted (at least in principle), by the English courts.

[499] *Norwest Holst Construction Ltd v CWS* [1997] APP.L.R. 12/02, *Whittal Builders Co Ltd -v. Chester-le-Street District Council* (1985) 12 Const LJ 256, (2), *J. Finnegan Ltd v. Sheffield City Council* (1988) 43 BLR 130 (3) *Beechwood Development Company (Scotland) Ltd v. Stuart Mitchell* (2001) CILL 1727. *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd* (1995) 76 BLR.

Quantification methodology aside, there is merit in exploring the courts acceptance of formula from a legal perspective. Specifically, Akenhead J, had this to say:

"The use of a formula, such as Emden or Hudson, is a legitimate and indeed helpful way of ascertaining, on a balance of probability, what that return can be calculated to be"[500]

It is unclear whether simplistic formulae such as Hudson and Emden are an accurate reflection of the actual head office overhead and profit lost, due to project delays. Indeed, it is arguably a highly simplistic method of calculation. Under the circumstances in this case, the loss of overhead and profit is to compensate a contractor:

"…which has suffered delay on compensable grounds seeks the losses which it has suffered as a result of not being able to take on other projects as a result of that delay and disruption (here to Unit C), that loss being the loss of its opportunity to defray its head office overheads over those other projects and the loss of profit from those lost jobs." [501]

It is difficult to conceive that the loss of opportunity (as a result of delay) can be calculated with any degree of accuracy using the standard formulaic approaches such as Hudson, Emden or Eichleay. It is difficult to verify with any consistency, whether this very general approach to the evaluation of loss for overheads and profit can, with any reliability be a reasonable assessment of loss. In summary however, it could certainly be perceived that, on the face of it, the decision and wording of Akenhead J in *Walter Lilly* constitutes a move towards leniency for global claims, notwithstanding the commentary is provided obiter.

5.3 Leniency Repealed?

From the introduction of the Civil Procedure Rules in 1999, defendants in England, began protecting themselves against claims of a global nature, or where they felt the claimant's cases were evidentially weak, making it unclear as to the case they were supposed to answer to, by evoking Part 8 proceedings. Part 8 proceedings is an alternative claims procedures, where it is unlikely that the question will *"…involve a substantial dispute of fact"*[502]with their purpose being to streamline the court process avoiding unnecessary time and cost. For example, in *Transport for Great Manchester v Thales Transport*[503], the claimant, Transport for Great Manchester ('TGM') raised an action to, among other things, request access to additional

[500] Supra note 11 [543].
[501] Supra note 11 [540].
[502] Part 8 – Alternative Procedure for Claims, Civil Procedure Rules, Ministry of Justice (Parts 8.1 to 8.9).
[503] *Transport for Greater Manchester v Thales Transport & Security Limited* [2012] EWHC 3717 (TCC).

information and documentation. Thales had been awarded a £22m contract to design and supply certain monitoring and communication equipment on the Manchester Metrolink network. The project was both delayed and disrupted and Thales claimed for an extension of time of 43 months and £42.3 million in costs.

TGM has asserted that despite 19 files of annexures the claims were "global" in nature and that the delays to the project were caused by Thales principally due to design problems. In October 2012, the parties held a meeting where TGM had requested additional documentation from Thales regarding their claims, Thales had responded and in the main rejected such requests, which moved TGM to state that Thales wanted to:

"...proceed with an adjudication relating to your unparticularised and global claims as quickly as possible in an endeavour to seek an advantage".[504]

On 23rd October 2012, various matters were referred to adjudication, where both parties considered they had won, and in early November 2012, TGM sought an order for specific performance for Thales to provide additional particulars.

Akenhead J set out an analysis of the contract clauses for guidance on the material contractual obligations of the parties and what levels of information Thales must provide. For example, clause 28.1 sets out that Thales must provide information "reasonably" called for, which relates to Thales's records, so not only are records to be provided, but the information behind those records is so be provided. This led the judge to conclude among other things that:

"...the parties were agreeing on the provision not only of source or basic records relating to performance and supply but also of other documents which relate in a broad sense to performance and supply. Thus, there may be a record of hours worked by a team of designers: that is a Record which relates to performance of the design of the Deliverables and is disclosable under Clause 27.1 and 28.2(a). There may however be an internal report or audit done some months later which purports to comment on the performance of the team: that would be discoverable under Clauses 28.1 and 28.2 (b) because it relates to the carrying out of the design obligation."[505]

Clauses 28.2(a) and (B) sets out that TGM are able to request the documentation for the purposes of *"...auditing any information supplied"*. Akenhead J centred on the significance

[504] Ibid [8].
[505] Ibid [24].

and definition of "audit" i.e. to examine accounts, but that *"...auditing any information supplied"* went further and goes *"...beyond verification of financial accounts*".

Akenhead J then set out six propositions namely that Thales were obliged to provide documentation which goes beyond contemporaneous documentation, this can include records of labour, materials plant and subcontractors, it can also include internal audits and records, the request must be reasonable, it must be for vetting or checking purposes only and that confidentiality cannot be used a defence against disclosure.

For the majority of information requested by TGM, Akenhead J decided that it should be provided by Thales. This information included, all internal audit reports, all external audit reports, all internal project reports relating to costs and delay, written procedures and policies relating to time and cost from Thales' Chorus 2 system, all documents relating to the Job Collection Number used to record time and money, all documents used to record time and costs, potentially all records of hours spent against labour rates[506], hard copy internal accounts containing all supplier and subcontractor costs, potentially all contracts and purchase orders between Thales and its subcontractors and it suppliers[507], all invoices from suppliers in respect of the TOS Contract among others.

On comparison between the *TGM* case above and the *Walter Lilly* case, both decided by Akenhead J, there would appear to be a tension between the award of specific performance for the profusion of information requested in the *TGM* case, to the learned judges view in *Walter Lilly* at section 5.2, where he did not consider that the contractor had to:

".. include all the "backup accounting information which might support such detail"[508]

On the face it, it would appear that upon reading the Akenhead J's opinion in *Walter Lilly* above, it is contrary to the levels of information which Thales were ordered to produce. The answer to this contradiction lies in the specific wording of the contract clauses in both cases, which upon interpretation, provides a diverging amount and level, of information to be provided by the party asserting its claim. The quite correct emphasis on the contract clauses, the purpose of which are to reflect the intentions of the parties, has the inverse effect upon establishing settled principles in relation to global claims in the absence of express contractual provision.

[506] A factual dispute meant the judge was unable to comment as this stage, although he acknowledged that once this was settled, it would be considered at a later stage.
[507] Only denied in the current proceedings, because of TGM's unspecific claim.
[508] Supra note 11 [465].

Indeed, if the clauses in a contract predominantly set out what levels of evidence are required to prove claims, then is there any merit in attempting to identify and seek to establish principles in relation to the term global claims found in construction and engineering projects. This question will be explored in more detail at Chapters 6 and 7 of this thesis, however in the Australian case of *Mainteck v Stein Heurty*[509]Leeming JA was moved to say that in relation to a claim for loss:

"…there are no special legal principles that mean that plaintiffs in "building cases" win or lose differently from plaintiffs in other classes of contractual case…… plaintiff seeking damages will fail unless he, she or it stablishes breach, causation and loss. True it is that some decisions on breach of contract in building cases have used the language of "global claim"…. this does not involve any special principles of fact or of law."[510]

Despite, industry commentators opining that the courts are taking a perhaps more lenient view, the courts have still been active in rejecting claims which appear global in nature, or at least granting de minimis awards in this regard. In 2014, in the case of *Bluewater Energy Services BC v Mercon Steel Structures*[511], Bluewater claimed, among other things, an amount €157,570 relating to the cost of rectifying fourteen Non Conformance Reports ('NCR's) which Mercon had failed to correct prior to their termination. Upon review of the evidence Ramsey J had this to say:

"Having considered the individual NCRs I have found that only some of them are justified. Given that the claim has been made on a global basis in the total sum of €157,570.92 and I have no certain basis for knowing the cost of remedying an individual NCR, I am not in a position to assess an accurate sum for the NCRs which I have found to be justified. However by reference to the costs for the other NCRs at an absolute minimum I assess a sum of €8,000.00 to cover the NCRs which I have found to be justified."[512]

He acknowledged that Bluewater were entitled to claim for the remediation of six of the fourteen NCR's, however the judgement provides no more details as to how Ramsey J arrived at the sum awarded.

Bluewater also claimed €1,014,437.20 for project management and engineering, borne out of Mercon's failure to correct certain NCR's. Bluewater had relied upon evidence of their

[509] *Mainteck Services Pty Ltd v Stein Heurty SA* [2014] NSWCA 184 (CA (NSW))
[510] Ibid [186-8].
[511] *Bluewater Energy Services BV v Mercon Steel Structures BV* [2014] EWHC 2132
[512] Ibid [1369].

assistant project manager & contracts engineer, who explained the calculations and provided further evidence in his witness statement. Mercon disagreed arguing that the claim was unparticularised and impossible to allocate time to NCR's, and that the management time related to other matters for which it was not responsible. Ramsey J decided as follows:

"Given my findings on the NCRs, I do not consider that this claim by Bluewater can succeed. It is a global claim and I cannot assess any figure for any project management and engineering which Bluewater might have spent in relation to the limited NCRs which I have held are substantiated. The sum claimed is also disproportionate to the sum claimed for the NCRs and this raises great concerns as to the credibility of the figures claimed. In the circumstances I am unable to assess any figure and Bluewater's claim fails."[513]

Not only has the TCC rejected global claims, in the more straightforward sense and form such as that presented in the Bluewater case above, perhaps even more significantly the courts have recently also overturned global awards made by an arbitration tribunal on the grounds of substantial injustice. The case in point was *The Secretary of State for the Home Department v Raytheon Systems*[514]where once again Mr Justice Akenhead was presiding.

In this case, the claimant sought to rely upon the setting aside of an arbitration tribunal award on grounds of serious irregularity pursuant to Section 68(2)(d) of the Arbitration Act 1996, in that there had been a *"failure by the tribunal to deal with all the issues that were put to it"*[515]. In particular, it argued that, among other things, the defendant:

"…should not be permitted to recover sums on a global basis without any consideration of its own actual or possible breaches of contract"[516]

Upon review of the evidence, Akenhead J rejected the claimant's position on the first two quantum claims, however he considered that quantum ground three was a cause of concern. In making their award in relation to quantum ground three, the tribunal had proceeded to evaluate what it regarded as unjustified enrichment, by awarding the total costs claimed, less the amounts already paid. The central issue held that there was sufficient evidence to suggest that there were at least discrepancies as to who was responsible for the delays, disruption and inefficiencies surrounding this head of claim, which moved the judge to say:

[513] Ibid [1440].
[514] *The Secretary of State for the Home Department v Raytheon Systems Limited* [2014] EWHC 4375
[515] Ibid [3].
[516] Ibid [35].

"At the very least, given the arbitrators" experience and in particular the known experience of at least one of the members of the tribunal in the construction and technology field (and indeed in the TCC), it must have been within their collective horizon of knowledge that Y was arguing that all or at least most of the delay, disruption and inefficiency was the actual fault of Z and that, if one was to base an unjust enrichment award on total costs incurred, at least a credible argument might have been that one needed to take out of the evaluation costs attributable to delay, disruption and inefficiency which was the fault of Z."[517]

and

"The issue therefore comes down to whether there was before the arbitrators an issue that in relation to Claim A4 that, if the arbitrators were to go down the cost route approach to evaluate the unjust enrichment said to have occurred as a result of the transfer of the Assets, account should be taken of the extent to which those costs related to any delay, disruption and inefficiency which was the fault or responsibility of Z."[518]

Akenhead J concluded that the tribunal had not considered the possibility that certain delay, disruption and inefficiency may have been the responsibility of the claimant:

"It follows that the arbitrators overlooked the need to address the issue of Claim A4 being a global claim and therefore to address the fault and responsibility of Z (if any) in relation to the delay, disruption and inefficiencies which it seems to have been common ground had occurred to a significant extent before the termination. They therefore failed to deal with this issue."[519]

In light of the foregoing, in 2015, as part of his judgement on relief and costs, Akenhead J decided to set aside the full award, which was then to be referred to a different tribunal for review.

5.4 Global Claims an Application in Tort

In much of the cases to date which relate to global claims, their content has centred upon what could be termed "traditional" contractual cases of claims for delay and disruption raised either by the contractor, or employer. A review of the recent case of *William Clark v Dock Street*[520] has merit because it relates to claims by a quantity surveying practise, the William Clark

[517] Ibid [58].
[518] Ibid [59].
[519] Ibid [61].
[520] *William Clark Partnership Limited v Dock St PCT Limited* [2015] EWHC 2923 TCC

Partnership, who were appointed to provide cost management services to for a new build primary healthcare centre for the North Lancashire Teaching Primary Care Trust and the Developer, Dock Street.

Clark had raised an action in the sum of £174,500 for the balance of its professional fees which were unpaid. In turn, Dock Street counterclaimed damages for both breach of contract and professional negligence for £195,000 already paid to Clark, a further £733,394.96 for overspend on the project, a sum of £214,557 for unnecessary and avoidable variations, and an undisclosed amount for costs associated with an adjudication brought against it by the contractor, Parkinson.

In arriving at his decision pertaining to the £733,394.96 overspend, which Dock Street alleged was incurred due to Clark's negligence, His Honour Judge Stephen Davies acknowledged the difficulties Dock Street faced, in proving the causal nexus between the losses averred and the events relied upon.

"…establishing causation in construction related professional negligence claims against design professionals such as quantity surveyors and project managers is notoriously difficult precisely because of the difficulty in showing how things would have turned out differently even if the professional had not acted negligently."[521]

and

"One of Dock Street's difficulties in this case is that the Defence and Counterclaim was pleaded without the benefit of expert evidence and on the basis – as it probably had to be in such circumstances – of a global claim on causation."[522]

Notwithstanding these difficulties, and the fact that Davies J conceded that certain aspects of Clark's services were *"seriously deficient"*, upon review of the events, causation and quantum, he decided that Dock Street had not proven its case and did not award any sum out of the £733,394.96 claimed. Davies J provided a specific example to illustrate Dock Street's deficiencies.

During the course of the works, the architect chose an increased specification for the partitions, to satisfy certain sound requirements, which were in turn more expensive than those

[521] Ibid [6.10].
[522] Ibid [6.13 (4)].

originally costed by Clark. Davies J stated that Dock Street should, and could, have done more to forward their case:

"It is readily apparent that in order to make Clark liable for this extra cost Dock Street could and should have investigated the circumstances and, having done so, pleaded and proved the respects in which Clark was at fault and why that caused the loss. If, for example, it was said that Mr Brindle was at fault in not including this nonstandard specification in the BQ from the outset, on the basis that this was always part of the PCT's requirements, that would have needed to be pleaded and established and a case made as to how the extra cost represented a genuine loss, as opposed for example to a cost which would always have been incurred. Alternatively, if it was said that the enhanced specification was not in fact required to comply with the PCT's requirements so that Clark should have rejected it, that would have needed to be pleaded and established." [523]

Since Dock Street made no attempt to demonstrate the reasoning as to why Clark were responsible, and hence had to compensate Dock Street; they had consequently failed to justify that Clark were responsible for those cost increases due to the fact that the partition specifications has been upgraded. Davies J found that it was:

"…not enough simply to identify this as a breach which is likely to cause some cost overrun. At the very least, some concrete examples would be required, to enable the court to see how this breach did cause significant cost overrun in this case."[524]

In his summing up, Davies J stated that a failure to advance a detailed case, when one was available was not in and of itself fatal to a global claim, relying upon Akenhead J's decision in *Walter Lilly* for this conclusion. However, in the case before him, Dock Street had failed to prove on the balance of probabilities that, it would not have incurred cost overruns in any event, that all cost overrun could have been prevented by Clark and that it was not self-evident that the sole reasons for the overruns were the responsibility of Clark.

There is value in considering this case further, because firstly, Davies J considered that, although the claim was essentially one of professional negligence, it had all the characteristics of a global claim in contract. Firstly, we see a judge taking what are principles originating in the law of contract and applying those to the law of tort, and secondly, in criticism of Clark's defence, Dock Street had averred Clark had not put forward any *"coherent"* explanations as

[523] Ibid [6.99].
[524] Ibid [6.12].

to why they were not responsible for the cost overruns, significantly again relying on *Walter Lilly*, Davies J had this to say:

"…there is no burden of proof on Clark to prove that there were other causes of loss for which it is not responsible."[525]

And

"Moreover, I do not consider that Clark's failure to satisfy me that all of its explanations are right is of any particular relevance, forensically or otherwise, to my evaluation of Dock Street's case on causation". [526]

Finally, when deciding upon Dock Street's claim for costs associated with variations it had incurred totalling £214,557, Davies J where it was possible to do so, reviewed the heads of claim systematically and awarded Dock Street a sum of £52,023.46. The foregoing is worth mentioning because it helps illustrate that whereupon analysis from the evidence adduced, Davies J could award quantum based on Clark's breaches. It is suggested that this evidences a balanced and fair approach in relation to their awards of quantum and that the courts will award nothing for claims which are unsubstantiated, even although entitlement has been established.

5.5 Global Claims - Disfavoured

Indeed throughout 2015 and 2016, the courts in England, continued to disfavour claims made on a global basis[527], so much so that in the case of *Frankhurst Developments v Collins*[528]the claimant declined to pursue a global claim despite as suggested by His Honour Judge Stephen Davies, that this solution may be open to them in principle:

"Fairhurst must establish that it is entitled to the payment of the original contract price and to payment for variations. I indicated in my note to the advocates prior to closing submissions that it might in principle be open to Fairhurst to argue that its total costs could be advanced as a "global" claim on the basis that they all related to the contract works and variations and to no other cause. Wisely, it seems to me, given the admissions in contemporaneous emails that there were a number of reasons for the delay and the overspend above and beyond variations, Mr Goff did not take up that invitation, and instead invited me to accept that

[525] Ibid [5206.26].
[526] Ibid [6.26].
[527] *Van Oord UK Ltd & Anor v Allseas UK Ltd* [2015] EWHC 3074 (TCC).
[528] *Fairhurst Developments Ltd & Anor v Collins & Anor* [2016] EWHC 199 (TCC).

Fairhurst was entitled to the contract sum plus the value of the variations as assessed by Mr Bushell."[529]

Another case brought to the TCC in 2016, was the case of *John Sisk v Carmel Building Services ltd.*[530] By way of a Part 8 of the Arbitration Act 1996 application, which fell to be judged by the Honourable Mrs Justice Carr DBE, Sisk challenged an award made in arbitration proceedings to Carmel in compensation for late payment including interest. Sisk were the main contractor on a project to build forty apartments including a New Outpatients Department for the Royal National Orthopaedic Hospital. In September 2008, Carmel were appointed as the M&E specialist subcontractor. The project was delayed and further complicated by the fact that during the course of the works, Carmel went into liquidation and their contract was consequently terminated.

On appeal, Sisk had contended that the arbitrator erred in law in law of the following reasons[531]:

"a) The burden of proof in relation to Carmel's claim under Clause 7.7.4 of the JCT Conditions incorporated into the Sub Contract ("Clause 7.7.4") ("Issue 1");

b) Whether or not Sisk's primary claim to setoff under Clause 7.7.4 was a global claim and thus irrecoverable ("Issue 2");

c) The rate of interest to be applied to sums awarded to Carmel ("Issue 3")."

From the foregoing, Issues 1 and 2 are of interest to the current research.

In relation to Issue 1, Carmel had relied on the fact that in a prior valuation, Sisk had evaluated the work done at a higher amount than its subsequent calculation. The arbitrator decided that whilst the burden of proof rests with the claimant (i.e. Carmel) to prove its case, there is nonetheless an evidential burden that still falls on the respondent to evidence why it had evaluated an earlier valuation higher. In the appeal Sisk contended that it had no burden of proof to explain why a previous valuation had been evaluated higher, that it was irrelevant what had happened previously, and that Carmel must positively prove their case.

Carr J found that in fact there was no material error of law, and that the arbitrator had quite rightly noted that in the main, the burden of proof fell on Carmel to prove its case. In relation

[529] Ibid [333].
[530] *John Sisk & Son Ltd v Carmel Building Services Ltd* [2016] EWHC 806 (TCC).
[531] Supra Note 530, [3].

to Sisk having to prove why it had evaluated a previous valuation higher, Carr J stated the following:

"*Secondly, as for the reference to "evidential burden" facing Sisk, whilst it can be said to be a legal term of art…the Arbitrator was in context doing no more than saying "in practical terms" that Sisk had an evidential hurdle to overcome, given the contents of Valuation No 8 which had been agreed between the parties following a joint site inspection. The valuation figures being advanced by way of defence for Sisk (with a terminal valuation of £2,016,928.03) were significantly below those figures agreed on behalf of Sisk only three weeks before termination and in a neutral pre-dispute context. It was the elephant in Sisk's room."*[532]

In relation to Issue 2, as part of the arbitral proceedings, Sisk had counter claimed for losses it had incurred which were associated with the termination[533], in the sum of £1,344,477.96 *"being the whole of the losses"*[534] or, in the alternative, a sum totalling £1,1145,506.93 *"being the itemised costs"*[535]. Carmel had argued that the former was irrecoverable since it was global in nature. Carr J therefore set out that duty before the arbitrator was to decide, as averred by Carmel, whether Sisk primary claim was a global claim and if answered in the affirmative, was it irrecoverable?

In arriving at his decision, rather than directly answer the question posed by Carr J above, somewhat tangentially, the arbitrator considered that his role was to ascertain what was the most appropriate method to evaluate Sisk's counterclaim (either on the whole of the losses, or the itemised costs). In arriving at his decision, the arbitrator stated, among other things, the following:

"N62 Before considering the two alternatives, I remind myself that my objective here is to determine which of them is the appropriate means of ascertaining, in the words of Clause 7.7.4:' the amount of any direct loss and/or damage caused to the Contractor as a result of the termination and any other amounts payable to the Contractor under this Sub Contract'

N63 The Claimant submits that the Respondent has pleaded its case for set off on a global basis whereas the judgment in Walter Lilley & Co. Ltd v Mackay (2012) 143 Con LR 79 precludes it from so doing.

[532] Ibid [42].
[533] What it termed its Primary Case.
[534] Supra Note 530 [22].
[535] Ibid.

N64 The Respondent argues first that its claim is not a global claim, and second, even if it were, it is not precluded from pleading it on that basis.

N65 So far as the Respondent's first point in issue is concerned, I accept that its total costs claim is not a global claim if for no other reason than, as it correctly notes, each part of its post administration costs claim is purportedly attributed to a single event, namely the termination of the Subcontract as a consequence of the administration.

N66 So far as the Respondent's second point is concerned, I accept that the judgment in Walter Lilley cannot be said to preclude the pursuit of a claim on a global basis.

N67 What can, however, be taken from the judgment is the principle that the burden which befalls a party endeavouring to prove a global, or, for that matter, a total costs claim is greater than the burden it would bear in having to prove the same claim on an itemised basis.

N68 That is because in order to succeed with a total costs claim, a party must be able to demonstrate not only that every element of the actual cost said to have been incurred is valid and has been properly incurred, but also the financial validity of the hypothetical comparative cost.

N69 In this case, I consider, on the basis of, for example, the oral evidence of Mr White, that sufficient doubt has been established by the Claimant as to the accuracy of the 'total costs' alleged to have been incurred by the Respondent to justify the rejection of the claim advanced on that basis.

N70 Accordingly, I have decided that the appropriate way to deal with the Respondent's claim for set off is by consideration of its itemised claim…".[536]

In consideration, the arbitrator had sought guidance from the relevant authorities including the principles set out by Akenhead J in *Walter Lilly*. Sisk argued that *Walter Lilly* was not relevant in the circumstances for the following reasons:

"a) The primary claim was not a global, or total costs, claim at all. There is no distinction between these terms, as the Arbitrator seemed to think. This was a claim for all the costs and losses incurred by Sisk due to a single event, namely the termination. Walter Lilly had no application. The Arbitrator correctly found, at one point in the award, that this was not a global claim but then purported to apply the global claim principles to the claim;

[536] Ibid [24].

b) Alternatively, insofar as the claim was a global, or total costs, claim, the principles set forth in Walter Lilly did not impose a greater burden of proof upon Sisk in seeking to prove the actual costs incurred than any other claim would impose;

c) Walter Lilly did not require a party to demonstrate not only that every element of the actual cost aid to have been incurred is valid and has been properly incurred but also the financial validity of the hypothetical comparative cost."

In consequence, Sisk argued that since the arbitrator had erred in law, the issue should be remitted to the arbitrator to be reconsidered.

There is merit in setting out Carr J's conclusions below:

"The Arbitrator found in Sisk's favour on its primary two contentions of principle in this regard he accepted that Sisk's primary claim was not a global claim and accepted in any event that, even if it were, that would not preclude the claim being brought. He went on (correctly) to say that a party endeavouring to prove a global or total costs claim will carry a greater burden than a party endeavouring to prove the same claim on an itemised basis. This was not to introduce some flawed legal principle, but rather to reflect the comments of Akenhead J at paragraph 486 (d) in Walter Lilly (supra). There are added evidential difficulties in proving a global or total costs claim.

I do not consider that, fairly read, the Arbitrator in fact treated global and total costs claims as separate concepts (and then treated Sisk's primary claim as a total costs claim, even though it was not a global claim). That seems to me to be placing undue emphasis on the words "or, for that matter" in Paragraph N67. It would have been an odd mistake to make, given that the Arbitrator otherwise demonstrated a good understanding of the decision in Walter Lilly. At the very least, it is not clear that the Arbitrator was under the impression that global and total costs claims were different animals, falling to be treated differently. The fact that he went on to deal with the added evidential difficulties relating to global or costs claims is consistent with him doing no more than addressing fully the parties' submissions on the law (in particular, Carmel's submission that, were it to be a global claim, it could not be advanced as a matter of principle). The position is complicated further by the fact that (in paragraph N60) the Arbitrator defined Sisk's primary claim as the "total costs claim" and in paragraph N68 elided the concept of global and total costs claims in the single phrase "total costs claim".

But, even if the Arbitrator was under the misapprehension that a total costs claim was something different to a global claim, I cannot identify any resulting material error of law…

He was there stating that, in order to succeed, a global or total costs claim has to be proved properly, which may be more difficult than in the case of an itemised claim.

... His central finding was at paragraph N69. He found as a matter of fact, on the basis of all the evidence, that Sisk had failed to prove its primary claim (on the facts). As Lord Marks QC pointed out for Carmel, the oral evidence of Mr White, Sisk's financial controller, to which the Arbitrator referred expressly in paragraph N69, was but an example of why the Arbitrator found Sisk's primary claim not to be made out. The Arbitrator had earlier (in section K) found the evidence of Mr White to be useful and reliable as regards costs booked, but of no assistance in establishing the validity of those costs. The Arbitrator had also set out earlier his findings on all of the various witnesses, including the parties' respective programming and quantum experts, earlier in section K of the Award.

For these reasons, I dismiss the claim on Issue 2."[537]

Given that in 2017, there were no cases brought to the TCC or the Scottish courts in relation to global claims, the final case deserving of analysis came before the Manchester District Registry of the TCC in November 2016 between *Amey LG Limited and Cumbria County Council*[538]. In general, the case relates to claims and counterclaims made under a seven year highway maintenance contract between the parties, with Amey as the term service contractor. The judgement runs to some 238 pages; however, the relevant section where (once again) is Honour Judge Stephen Davis provides a commentary on global claims particularly relates to item 14, the Better Highway Impact Costs[539], which is related to the following heads of claim:

i. Claim 14(A): a loss of local area overhead;

ii. Claim 14(B): the additional subcontracting claim;

iii. Claim 14(C): a loss of productivity due to skill diversion; and

iv. Claim 14(D) a loss of under-utilisation of the surfacing and surface dressing gangs.

Prior to taking each head of claim in turn Davies J had four main concerns about the claims:

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[537] Ibid [55-59].

[538] *Amey LG Limited v Cumbria County Council* [2016] EWHC 2856 (TCC).

[539] Amey asserted that the introduction by CCC of a new Better Highways Model, meant that productivity was reduced, there was reduction in uploads, and additional subcontractors had to be introduced, which prior to the model, would have been self-delivered, which returned greater profits. The Better Highways work was routine and cyclical, and Amey averred that its skilled workers could have been profitable on works elsewhere.

i. That the introduction of the Better Highways model was not significantly different to its predecessor;

ii. That the increase of 40 operatives asserted by Amey, was in actuality only 16 operatives, and that the asserted deployment of additional subcontractors was no surprise, as Amey were using their more experienced operatives elsewhere.

iii. No contemporaneous evidence of the claims being made, which would have been expected;

iv. No obvious obligation for CCC to provide Amey with minimal levels of work, and therefore no obvious contractual routs to pursue such claims.

Davies J stated the foregoing reasons were enough to dismiss the case, but for completeness decided to provide a judgement on the individual heads of claim.

In relation to Claim 14(A): These claims were no longer pursued as sufficient overhead allowances were already compensated, accordingly the overall claim amount for item 14 was reduced from £1,883,597.79 to £1,393,226.71.

In relation to Claim 14(B), Amey assert that it incurred increased subcontract costs in years 6 and 7[540] of the contract, borne out of impacts, which Cumbria County Council ('CCC') are responsible. Davies J suggested that the claim was *"vulnerable to criticism"*, as Amey must satisfy the court that on the balance of probabilities, that other causes cannot be separated out from causes which CCC are responsible, then it will fail as an *"illegitimate global claim"*.

In its defence, CCC's counsel had relied upon excerpts from Hudson's at paragraph 6.076, which sets out 3 objections to a global claim as follows:

"(1) It will only be appropriate for the tribunal to make such an inference where it can be satisfied that there are no other reasons apart from the Employer's breach for the cost overrun.

(2) The approach assumes in the Contractor's favour that the tender allowance was adequate, that the Contractor proceeded with an appropriate degree of expedition and efficiency in the circumstances in which it found itself and that there were no other matters affecting progress than those for which the Employer was responsible.

[540] Davies J noted that Amy has also procured additional subcontractors to that planned for years 1 to 5, and there was no reason to believe that years 6 & 7 would be any different.

(3) The total cost approach tends to subvert the basis on which the contract was awarded. It converts a lump sum or remeasurement contract into a cost reimbursable one."[541]

Davies J then referred to the fact that the Editors of Hudson also refer to paragraph 486 of the *Walter Lilly* case, where Akenhead J set out his oft quoted set of principles in relation to global claims.[542] Amey had compared its self-delivered margin of 36.67%, against the margin of 19.84% for utilising subcontractors, based on random sampling of 43 patching works[543], and asserted that they were entitled to be compensated for the differences in margin.

Davies J concluded that the flawed and high-level approach set out above, coupled with the fact that Amey had transferred only 16 operatives and not 40 as averred (who had to be substituted by subcontractors), the claim advanced had not been made out.

In relation to Claim (14C), Amey contended that they had lost productivity due to skilled workers being diverted to Better Highways and claimed the difference between the tender turnover per operative undertaking maintenance work and undertaking self-delivered work. Davies J again referred for the need for Amey to make an adjustment for the fact it was only 16 operatives who were transferred and not the 40 asserted, and importantly that those 16 skilled operatives should be named, *"to establish that they had historically worked on the profitable self-delivered work elements of the contract, so as to be able to establish the basis evidential platform for the claim."*[544] Further, Davies J stated that if he allowed any award on Claim 14(B), then he would have compensated Amey for their alleged loss of margin.

The learned judge concluded that this claim should fail.

Finally, in relation to Claim 14(D), Davies J considered that since there were no contractual obligations for CCC to provide minimal work levels, Amey could not claim for the under-utilisation of their surfacing gangs, measured as standing/idle time. The judge acknowledged CCC's position that there was no evidence of standing/idle time and Amey subsequently admitted that the documentation was "fragmented", and that cause, and effect had not been established.

[541] Supra note 349.
[542] Supra note 538[17.14].
[543] A revised analysis was then done on all the works and the uplift was 24.6%.
[544] Supra note 538 [17.25].

Again, Davies J considered that this claim should fail, as in his view *"this is another claim which has been advanced on a theoretical basis, rather than on a basis which is supported by sufficient evidence to justify it as a real claim in the real world."*[545]

This case, which is the most recent case in this thesis to consider global claims, shows that judges in the English courts are willing and able, to go to significant analytical depths on matters of quantum, when faced with claims argued in a global nature, and perhaps more significantly, they are comfortable awarding nothing to the claimant, if they are not satisfied that the standard of proof has been achieved and the burden released.

5.6 Summary of Case Law

Between 2012 and the end of 2017, it is apparent that for a number of reasons, the UK courts have elected not to award any claims which may contain a global/composite elements to them, and often because the claims in and of themselves are evidentially weak. It would be difficult to conclude therefore that there appears to be a move towards leniency on the matter. There can be no doubt that the seven principles set out in *Walter Lilly* (Appendix 3 refers), may on the face of it suggest a softening of the English courts view of global claims, however in a very similar position to the Scottish Law Lords, a claimant must still satisfy the following three pre-conditions set out in John Doyle for a claim to be successful (Appendix 4 refers).

Indeed, *Walter Lilly* was deemed not to be a global claim, however, in obiter commentary Akenhead J did clarify several matters which had been considered previously contentious. The current position in the English and Scottish courts in relation to global claims will be set out in the next chapter of the thesis.

Finally, for ease of reference Appendix 5 provides a chronology of the relevant case law and the particular matters of interest in tabularised form.

[545] Ibid [17.33].

CHAPTER 6: ANALYSIS AND DISCUSSIONS

6.1 Introduction

Chapters 3,4 and 5 of this thesis have provided an essential chronological analysis of the UK case law in relation to global claims, from its beginnings in the 1960's with *Crosby* until 2016 in the case of *Amey v Cumbria Council*, the last case considered germane to the development of global claims in the UK.

The purpose of this chapter is to identify the key findings from the historical case based analysis, including a review of the key definition(s), how global claims are currently understood by the UK courts, any differences between the Scottish and English courts and the articulation of certain legal principles which are affected by claims plead on a global basis.

6.2 Global claim – A Definition

Upon analysis of the case law, articles and book reviews, it is apparent that there is no definitive and/or reliable definition of what constitutes a global claim. While the definitions set out at section 1.1 are helpful and not incorrect per se, they can only provide an indicative understanding of what constitutes a global claim and how it is to be decided upon. In this regard, it is submitted that Keating's definition is perhaps the most appropriate, however given that global claims are permissible by the courts under certain circumstances, it may be more accurate to suggest that the inclusion of the word "inadequate" is superfluous, an amalgam of Keating and Vinelott J's definition in *Merton*[546] is suggested below:

"A global claim is one that does not provide the causal nexus between the breaches of contract or events relied upon and the alleged loss or delay that relief is claimed for, because it is impractical and disproportionate to disentangle the part directly attributable to each head of claim. In such a claim the claimant does not seek to attribute specific loss or delay to a specific breach or event, but rather alleges a composite loss or delay allegedly the result of the breaches or events relied upon. Causation under such circumstances, must be inferred by the application of common sense."

It is noted however that making slight amendments to well established theoretical definitions is not particularly constructive in practical application. An experienced decision maker will, more often than not, rely upon traditional legal principles of proof and causation to determine

[546] Supra note 124.

whether a claim plead on a global basis is permissible, merits an award or otherwise. In this regard, the factual matrix and evidence adduced will be of paramount importance.

On analysis of the UK case law, it is clear that whilst global claims are allowable in both England and Scotland, there is merit in briefly setting out and identifying both the jurisdictional similarities and differences in how the corresponding courts deal with global claims.

Upon doing so, it becomes apparent that notwithstanding that there are certain inconsistencies with global claims in general, clarity in how the courts decide upon such matters of globality is conflated further when competing (or concurrent) causes arise. Whilst this thesis is not primarily concerned with matters of concurrency, it is imperative that the difficulties are discussed as they are undoubtedly inextricably linked with cases deemed global in nature. The following sections will consider such matters, whilst remaining apposite to the substance of the thesis.

6.3 Global Claims: The Current Position – England

In England the courts current position on how global claims are to be dealt with at trial is provided in *Walter Lilly*. Notwithstanding that the pleadings were found not to be global in nature, in an obiter commentary, Akenhead J set out seven principles provided at Appendix 3.

If a global claim is allowed to proceed to proof, when deciding upon the quantification of the award, the English courts will not undertake an apportionment exercise between the events asserted and the associated losses, where both claimants and defendants cause are *"concurrent and co-effective"*[547]. It is unclear whether apportionment will be available for losses which are not time related, on analysis of the case law above, it may be arguable that apportionment is available under such circumstances.

In relation to how causation operates in concurrent delay in particular, there has been an apparent shift in the English courts from the relying on a dominant and therefore operative cause, to an effective cause. This shift in how causation is considered and tested is discussed later in the thesis.

[547] Supra note 11 [366] – [370].

In summary therefore, where a claim is deemed global in nature, the English courts may endeavour to identify and separate, certain causes and effects where it is able to do so[548], however it will not endeavour to apportion concurrent causes of delay[549]. Importantly, global claims may not contain concurrent causes, however when concurrent causes do arise, the complexity and difficulty of successfully pleading a global claim is of course compounded. Conversely, concurrent causes may not necessarily be global in nature.

Notwithstanding the foregoing, whilst concurrent delay is deemed a separate research topic, it is nonetheless, related in part, to research into the phenomena of global claims, in consequence a more detailed explanation of how concurrent causes are dealt with in the English courts is provided at section 6.6 and 6.7 below.

6.4 Global Claims: The Current Position – Scotland

In Scotland, the courts current position on how global claims are dealt with at trial is provided in *Doyle* and re-affirmed in *City Inn*. In a similar vein subsequently followed by Akenhead J in the *Walter Lilly* case, Lord Macfadyen set out the pre-requisites that must be adhered to in order to establish a claim for loss and/or expense of any kind, not least a global claim[550]:

i. The existence of one or more events which the employer is responsible;

ii. The existence of loss and expense is suffered by the contractor;

iii. A causal link between the event or events and the loss and expense suffered by the contractor[551].

The first two pre-requisites are reasonably uncontroversial, it is the third limb which accords with the difficulties associated with proving a global claim. In relation to causation, Lord Macfadyen went on to say that there must be *"…no material causative factor for which the defender is not liable"*[552]. His position is mitigated by two considerations, namely:

i. Whilst a global claim may fail, if there is a causative factor present which is material and not the fault of the defendant, *"…it does not follow that no claim will succeed"*[553]if there is evidence to support an occasion where causal connections can be established

[548] Supra note 512.
[549] Supra note 14.
[550] Supra note 10.
[551] Ibid [35].
[552] Ibid [36].
[553] Ibid [38].

between certain events and the associated losses which are the responsibility of the defendant; and

ii. In deciding upon what is material or otherwise, is that the causation must be based on common sense, as set out by Bryne J in *John Holland*.

This position was further supported and elaborated on by Lord Drummond Young in the appeal to the Inner House, the essential elements of which are summarised below:

i. It is necessary for the pursuer to discount any tender deficiencies, which would mean that the loss would have been incurred in any event[554];

ii. Drawing from the US case of *Boyajian*[555], he agreed that the following must be adhered to if a global claim was to be tolerated:

- It is impracticable or impossible to determine the total losses with any accuracy;
- The pursuer was not responsible for the added expenses.

iii. It may be possible to link groups of causes with groups of losses where the responsibility is that of the defendants, provided *"…that the loss has no other significant cause"*[556]. In terms of causation therefore, it is suggested that a cause must not be either material or significant (which is not the responsibility of the defendant), if a global claim is to succeed, with the aforementioned caveats taken into consideration;

iv. Furthermore, when attributing causes to losses plead on a global basis, if causes are concurrent and one of those causes can be identified as proximate or dominant, then it will be considered as the operative cause;

v. If there is no dominant cause of loss, then it *"…may be possible to apportion that loss between the causes for which the employer [defendant] is responsible and other causes"*.[557]

vi. In relation to concurrent delay, Lord Drummond Young has stated that unless there is special reason the apportionment of delay, should *"probably"* be divided on an equal

[554] Here, Lord Drummond Young took guidance from Bryne J in *John Holland*.
[555] *Boyajian v United States*, 423 F 2d 1231 (1970).
[556] Supra note 372 [14].
[557] Ibid [16].

basis. The judgement provides no guidance in relation to concurrent causes which are not time related.

In carrying out an apportionment exercise, Lord Drummond Young likened the exercise to that which is carried out in contributory negligence cases. The validity of making such a comparison will be discussed in more detail at section 6.9 below.

6.5 Comparison of Scottish and English Courts

In England, at interlocutory hearings, providing the contract between the parties is not to the contrary, the courts have been reluctant to strike out claims asserted or challenged on a global basis and may only do so under very narrow circumstances[558]. Indeed, TCC judges have been guided by the eminent Australian judge David Bryne who was of the opinion that the court has limited powers to strike out a claim (global or otherwise) unless it is "…*untenable or prejudice, embarrass or delay the fair trail*[559]*"*. It is submitted that this opinion would be followed in both the English and Scottish courts. Rather than strike out a claim, the English judiciary have elected to provide leave in order for the claimant to re-submit its position with better particulars[560]. Again, without any precedent to the contrary it is likely that the Scottish courts would follow suit. In summary, in terms of when a global claim can be brought, the case law would support the view of Day and Cope who consider that *"…the requirements for bringing a global claim are substantially the same in both jurisdictions"*[561]

Where the English and Scottish courts do depart, is at the trial/award stage.

To compare the outcomes at trial between the English and Scottish courts, by way of example, if there were various events for which the claimant and the defendant were responsible, all of which may have an impact on a particular global loss claimed, then it is clear that both courts will, in the first instance, apply the test of causation[562]. According to Day and Cope, both jurisdictions will adopt the following methodology[563]:

[558] *Mid Glamorgan CC v j Devonald Williams & Partner* (1991) 29 Con LR 129 QBD (OR), *Imperial Chemical Industries Plc v Bovis Construction Limited* [1993] Con LR 90, the strike out in *Wharf Properties Ltd v Eric Cumine Associates* (No. 2) [1991] 52 BLR 8 is now seen as the exception.
[559] Supra note 275, 411.
[560] *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* [1995] 72 BLR 26, *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1997], *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd* [1997] 82 BLR 39
[561] Supra note 14, 5.
[562] Supra note 11 [370].
[563] Supra note 14, 12.

i. If there are events which are not the responsibility of the defendant are identifiable, they must be removed from the global claim and the remainder is allowable; and

ii. If there are any events which are not the responsibility of the defendant, cannot be separated and are 'significant', then the global claim will fail.

It is clear that based upon the judgements in both *Doyle* and *Walter Lilly*, notwithstanding that as above, the global claim may fail, both courts will endeavour to separate causes and their effects where it is able to do so. However, once this exercise is undertaken, a departure begins to emerge in how the Scottish and English courts will decide upon causes and their subsequent effects, which cannot be separated. It is submitted that there are essentially two differences, which relate to competing causes:

i. In Scotland, if there are competing causes (either claimant, defendant or neutral causes) and where none can be said to be dominant, then the court may apportion the causes to the losses asserted[564]. In England the ability for the court to apportion is not available for matters relating to delay[565];

ii. In England where competing causes exist, the causative test may not be one of dominance, but of effective cause[566].

Both the ability of the Scottish courts to apportion competing causes and the causative test of either dominance or effectiveness is analysed in more detail below.

6.6 Competing Causes which are Time Related

The occurrence of competing causes which arise in the process of asserting a global claim, is essentially no more than a complicated subset in the exercise of articulating the causative relationship between causes and their effects, required to satisfy a decision maker that an award is indeed due. On analysis, it becomes apparent that competing causes can arise in matters which are either time related, or not time related (such as localised disruption / material price increases and the like). Importantly, competing causes circumstances can arise in claims which are not global in nature.

[564] Supra note 10, apportionment in Scotland was re-confirmed in the City Inn case.
[565] Supra note 14, 18.
[566] Supra note 11 [370].

For completeness however, this section of the thesis analyses the development of competing causes which are time related which are often called concurrent delays and/or matters of concurrency.

Recent jurisprudential developments in the UK have revealed a steady divergence in how the English and Scottish courts deal with concurrency. Indeed in 2012, Mr Justice Akenhead took the opportunity to review the relevant body of precedent on this matter and provided an obiter commentary, as to the English courts approach to concurrency, and how it now departs from the Scottish courts approach:

"The two schools of thought, which currently might be described as the English and the Scottish schools, are the English approach that the Contractor is entitled to a full extension of time for the delay caused by the two or more events (provided that one of them is a Relevant Event) and the Scottish approach which is that the Contractor only gets a reasonably apportioned part of the concurrently caused delay." [567]

6.6.1 Concurrency, a moveable feast?

In the UK, despite a wealth of judicial and professional commentary on the subject, a definitive and workable definition of what constitutes concurrent delay in construction and engineering projects and how it is measured in practice, remains elusive[568]. Learned debate centres on whether concurrency exists when delay events begin at the same time in the project, begin and end at the same time, overlap at the same time, or, as it has been suggested, *"…need not involve delays felt at the same time"*[569] . Indeed, the last 15 years or so have seen many and varied definitions from both the courts and legal commentators alike, none of which have been universally accepted[570] . The difficulty in arriving at a definitive definition has not, however, been a barrier to the courts commenting upon issues of concurrency.

Current literature identifies, at a somewhat summary level, the jurisprudential reasoning as to the underlying reasons why the English and Scottish courts have arrived at their requisite positions. However, it is suggested that more should and could be done to challenge the common law principles / concepts relied upon, such as Prevention, Dominant Cause, The

[567] Supra note 11 [366].
[568] Matthew Cocklin, 'International Approaches to the Legal Analysis of Concurrent Delay: Is there a solution for English Law' A paper based on the first prize entry in the Hudson Prize essay competition 2012, presented to a meeting of the Society of Construction law in London on 9th April 2013, 1.
[569] Franco Mastrandrea, 'Concurrent delay: an alternative proposal for attributing responsibility' CLJ 2014 Vol 30 (3) p 173-181 and Lord Osborne's view in appellate decision in City Inn [49].
[570] Lord Osborne in *City Inn Limited v Shepherd Construction Limited* [2010] CSIH 68 CA101/00 at para 49 provides some guidance on what concurrent delaying events may mean.

Malmaison Approach, Apportionment and Causation, and in particular how those principles interplay with one another in practical terms.

It is important to note that the key common law developments in the UK, in relation to concurrency, have in general, been based on various iterations of the Joint Council Tribunal ('JCT') Standard Forms of Contract[571]. Therefore, it is worth reiterating John Marrin QC's guidance on common law approaches to concurrency when he said:

"….there is one truth which can scarcely be over-emphasised. The answers to the questions raised will depend on the terms of the contract which governs the relationship between the parties."[572]

Finally, it is also significant that, despite a plethora of literature and obiter commentary, the Scottish case of City Inn v Shepherd[573] is somewhat remarkably, the only reported construction case in the UK where concurrency was actually found to exist.

6.6.2 **Concurrency in the English Courts: The Current Position**

Perhaps the most widely accepted definition of concurrency in England, first proposed by John Marrin QC, in 2002[574], referred to in Keating on Construction Contracts[575] and echoed in the case of *Adyard Abu Dhabi v SD Marine Services*[576], is as follows:

"…the expression 'concurrent delay' is used to denote a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency."

There are three important points that can be derived from this definition:

i. The "two or more effective causes of delay", must relate to both employer[577] and contractor events for concurrency to exist[578];

ii. The causes do not have to be concurrent in time; and

[571] JCT is the English version of the standard forms, the Scottish equivalent is the Scottish Standard Building Contracts ('SBCC').
[572] John Marrin QC, 'Concurrent Delay Revisited' A paper presented to the Society of Construction Law at a meeting in London on 4th December 2012, 19.
[573] *City Inn Ltd v Shepherd Construction Limited* [2007] CSOH 190
[574] John Marrin QC, 'Concurrent Delay' A paper given at a meeting of the Society of Construction in London on 5th February 2002, 3.
[575] Supra note 13, 8-025.
[576] *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm), [2011] 384, 136 Con LR 190, [277].
[577] Causes of employer delay are known as Relevant Events in JCT Contracts.
[578] Supra note 11 [366].

iii. Where on examination, the effective causes of delay are not of approximate equal causative potency, i.e. one is effective and the other is not, the minor cause will be treated as not causative[579]. Where an event has greater causative potency, notwithstanding it may be co-critical[580], it has sometimes been referred to as the dominant event or cause. Whether the use of the 'dominant cause' to separate causes, which do not have equal causative potency, but could still be deemed effective causes of the delay, is still good law in England has been subject to increasing debate[581].

The genesis of the current English approach to concurrency was first established in 1999, in the case of *Henry Boot v Malmaison*, where Mr Justice Dyson (as he was then) stated:

"… it is agreed that if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event."[582]

This approach, commonly referred to as the 'Malmaison Approach', has been adopted in subsequent English cases[583], culminating in what can be considered the most recent decision in the UK courts, in *Walter Lilly* already set out at section 5.2 above. Akenhead J confirmed that in terms of 'delay' to the works, where concurrency is deemed to exist, the contractor will be entitled to an extension of time to completion for that period, notwithstanding his own delays which may also have delayed completion of the works by the same period.

How the contractor's 'loss and expense' associated with concurrent delay, is to be dealt with by the English courts, was clarified *in De Beers V Atos Origin*, where Edwards-Stuart J said:

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[579] Supra note 574, 3.

[580] Co-critical – both delay events are identified on the critical path and have the same effect on the completion date when either one is omitted, often calculated using Critical Path Analysis Techniques.

[581] Support for the dominant cause test is found in *Keating on Contracts* 9th Edition, Chapter 8, Section 3, Sub-section (c) 8-022, and *City Inn v Shepherd Construction Ltd* [2010] CSIH 68, [2010] BLR 473 [42]. However there has been increasing criticism of whether the dominant test is still applicable in England, Jeremy Winter, Matthew Tolman and Sunil Mawkin, *Concurrent Delay 2011 at* www.whitepaperdocuments.co.uk/index.php?option=com_docman&task=doc_download&gid =1544&Itemid=2 and John Marrin QC note 574 page 13, Vincent Moran QC *Causation in Construction Law: The Demise of the 'Dominant Cause' Test?* A paper presented to the Society of Construction law at meetings in reading 8th May and Glasgow on 15th May 2014.

[582] *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32, [13].

[583] *Steria Ltd v Sigma Wireless Communications Ltd* [2008] EWHC 3454, *De Beers UK Ltd v Atos Origin IT Services UK Ltd* [2010] EWHC 3276, [2011] BLR 274, 134 Con LR 151, *Adyard Abu Dhabi v SD Marine* Services [2011] BLR 384, *Walter Lilly & Co Ltd v MacKay & DMW Ltd* [2012] EWHC 1773, [2012] BLR 503.

"The general rule in construction and engineering cases is that where there is concurrent delay to completion caused by matters for which both employer and contractor are responsible, the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by the delay." [584] [emphasis added]

Taking precedent into consideration, the following statements can be concluded as to how the English courts will deal with concurrent delay and the associated loss and expense:

i. Where there are two or more effective causes of delay which are the contractual responsibility of both the employer and the contractor but have unequal causative potency, the dominant cause may prevail. Marrin QC, however argues that the lack of judicial support, among other things, may provide room for doubt as to whether the dominant cause approach would be adopted by the English courts[585].

ii. Where there are two or more effective causes of delay, which are the contractual responsibility of both the employer and the contractor, and have equal causative potency, then the contractor will be awarded an extension of time for the concurrent delay. The reasoning behind Akenhead's J decision is two-fold:

   - Firstly, that to deny the contractor an extension of time would amount to an act of prevention[586]; and
   - Secondly, the contract expressly provides that the contractor is entitled to an extension of time, for a Relevant Event[587]. There is nothing in the contract, which states that the contractor will be denied an extension of time, should he be responsible for a concurrent delaying event.

iii. Where there are two or more effective causes of delay, which are the contractual responsibility of both the employer and the contractor, and have equal causative potency, then the contractor will not be entitled to claim loss and expense for that period[588]. The logic here is that the contractor cannot recover damages, because he

[584] *De Beers v Atos Origin IT Services UK Ltd* [2011] BLR 274 [177].
[585] Marrin note 572, 13.
[586] Supra note 11 [370].
[587] Relevant Events are risk events which are the contractual responsibility of the employer, and depending on the circumstances, allow the contractor extensions of time, and or monetary compensation. The specific term 'Relevant Event' is particular to the JCT Standard Forms of Contract, but can and often is, understood in a similar manner, in any of the standard forms, where events/actions are the contractual responsibility of the employer.
[588] This is relevant if the contractor cannot satisfy the "but-for test" of causation that his losses would not have occurred in any event during the concurrent period. Supra note 13, para 9-062.

would have suffered the same loss and expense due to the delays for which he is responsible[589]. Loss and expense in this instance would generally take the form of prolongation costs, such as site management, site accommodation, transportation and the like.

6.6.3 **Concurrency in the Scottish Courts: The Current Position**

In light of recent case law, it is considered that the closest current definition of concurrency as it is understood in Scotland is found in the case of City Inn, as follows: "true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first…"[590]. However, in the appeal to the Inner House to this decision, Lord Osbourne widened the definition of "true concurrency" by saying: *"…the focus of attention has moved, rightly in my opinion, from events themselves and their points and durations in time to their consequence upon the completion of the works"*.[591]

Until 2004, there was no material inconsistency in how the Scottish and English courts dealt with concurrent delay and/or the associated loss and expense. However Lord Drummond Young's judgement in *Doyle* began what is now seen, as a departure between the Scottish and English courts.[592] Although predominantly known as a case concerning global claims, the learned judge had some interesting and diverging opinions on losses incurred due to concurrent delay: *"…even 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."*[593][emphasis added]

In England, at that time, in light of the *Malmaison* decision, the contractor was deemed disentitled to any loss or expense associated with events which were concurrent. It was not until 2007, in *City Inn*, that a Scottish court was clear that it was taking a different approach from that in the English courts. Lord Drummond Young (now a pivotal figure on this matter) had some difficulties in agreeing with the English courts view on how concurrency should be

[589] Supra note 584 [178].
[590] Supra note 573 [18].
[591] Supra note 570 [52].
[592] Supra note 372.
[593] Ibid [16].

dealt with[594], both in terms of loss and expense and extension of time claims. Considering mostly English precedent and taking some guidance from the US courts, he said:

In terms of dominance: *"I agree that it may be possible to show that either a relevant event or a contractor's risk event is the dominant cause of that delay, and in such a case that event should be treated as the cause of the delay"*[595]

In terms of delay: *"Where true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes, obviously, however, the basis for such apportionment must be fair and reasonable"* [596]

In terms of loss and expense[597]: "*In this respect the decision in John Doyle Construction Ltd v Laing Management (Scotland) Ltd, supra, may be relevant. In that case it is recognised at paragraphs [16]-[18] that in an appropriate case where loss is caused by both events for which the employer is responsible and events for which the contractor is responsible it is possible to apportion the loss between the two causes. In my opinion that should be done in the present case."*[598]

His judgement was affirmed by a majority in appellate decision[599], notwithstanding a partially dissenting view from Lord Carloway.

Taking current precedent into consideration, the following statements can be concluded as to how the Scottish courts will deal with concurrency, both from a delay, and loss and expense perspective[600]:-

[594] His difficulties were based on Judge Richard Seymour QC's decision in *Royal Brompton Hospital NHS Trust v Hammond* (No.7), (2001) 76 Con LR 148 at paragraph 31, where he had suggested that should a contractor already be in culpable delay, and an employer's Relevant Event arises (such as inclement weather), is concurrent for a period of time, but does not affect completion, then the Relevant Event should not be considered. Lord Drummond Young, said *"It should not matter whether the shortage of labour developed, for example, two days before or two days after the start of a substantial period of inclement weather, in either case the two matters operate concurrently to delay completion of the works."*
[595] Supra note 573 [21]. His support for the dominant cause approach is found in *Leyland Shipping Company Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350.
[596] Supra note 573 [18].
[597] In this instance, prolongation costs.
[598] Supra note 573 [166].
[599] Supra note 570.
[600] Note to facilitate a comparison, the phrasing of concurrency in this instance has been chosen, to be consistent with the conclusions drawn from the English courts.

i. Where there are two or more effective causes of delay, which are the contractual responsibility of both the employer and the contractor, and have unequal causative potency, the dominant cause will prevail.

ii. Where there are two or more effective causes of delay, which are the contractual responsibility of both the employer and the contractor, and have equal causative potency, again the dominant cause will prevail, and it may be appropriate that the delays will be apportioned between the parties. On analysis of Lord Drummond Young's decision, the reasoning behind his position is as follows:

- Contrary to Seymour J's view in *Royal Brompton*, the employer event and the contractor event, do not have to happen simultaneously and both should be treated as concurrent causes whichever happened first[601].
- The architect should exercise his judgement to determine what has delayed the works, on a fair and reasonable basis[602]. Precisely what is fair and reasonable must turn on the facts and circumstances of the case. [603]
- Apportionment is supported by US law, where he referred to a Board of Contract Appeals case which stated:- "*Where a contractor finishes late partly because of a cause that is excusable under this provision and partly because of a cause that is not, it is the duty of the contracting officer to make, if at all feasible, a fair apportionment of the extent to which completion of the job was delayed by each of the two causes, and to grant an extension of time commensurate with his determination of the extent to which the failure to finish on time was attributable to the excusable one.*" [604]
- Causation in practise works in a complex manner, in ways that does not permit the easy separation of causes, meaning the architect or court must apply judgement, which can take the form of apportionment.[605]

[601] Supra note 573.
[602] Supra note 573. Lord Drummond Young attaches *"considerable importance to these words",* [20].
[603] Supra note 573 [18]. The *"fair and reasonable"* approach is taken from clause 25 of the JCT Conditions, (Private Conditions with Quantities) (1980 edition), with amendments.
[604] *Chas. I. Cunningham Co*, IBCA 60, 57-2 BCA P1541 (1957) the Board of Contract Appeals.
[605] Supra note 573 [22].

- When an apportionment exercise for delay is carried out, the methodology is similar to that found in contributory negligence among joint wrongdoers.[606]
- Contrary to significant emphasis being placed from the English courts, he does not consider the principle of prevention in any meaningful detail.

iii. Where there are two or more effective causes of delay, which are the contractual responsibility of both the employer and the contractor, and have equal causative potency, then the losses may be apportioned between the parties[607]. The logic being similar to that adopted for concurrent delays.

6.6.4 **Concurrency Discussions**

Taking the foregoing into consideration, it is evident that there are differences in how the Scottish and English courts approach the matter of concurrency. In order to find a more consistent and satisfactory direction for both jurisdictions, requires further research and discussion into the following areas:

i. **Definitions:** Unless and until a definitive definition of concurrency can be commonly understood by both the English and/or Scottish courts, then it is likely that difficulties in relation to concurrent delay will prevail. For example, it is still to be understood in practice whether "true concurrency"[608] i.e. employer and contractor delay events which overlap in time, as defined in *City Inn*, will be dealt with any differently to employer and contractor delay events which do not overlap in time, neither of which is dominant, but act together to delay the completion date. If the employer and contractor events are deemed concurrent because they do not overlap in time, but in effect cause delay to the completion date, why are these not merely delay events that are calculated as part of the delay analysis. Furthermore, why would they be deemed "concurrent" at all?

ii. **Dominant Cause v Effective Cause**: The advancement of the "effective cause" approach in England, may suggest the demise of the dominant cause test, although this remains unconfirmed. It is suggested however, that it is possible in many instances for experienced construction professionals and the courts, to identify the dominant cause

[606] Supra note 573 [158].
[607] Although Lord Drummond Young stated that prolongation *costs "need not automatically follow success in a claim for extension of time"*, supra note 573 [166].
[608] Supra note 570 [50].

between two events which may appear to have approximate equal causative potency and appear co-critical in the programme. It is important to maintain a differentiation, because if dominance can be established, then it may be the parties could have chosen alternative mitigation strategies, to avoid their delays impacting the completion date. If that is the case, it is suggested that there is no reason, why the dominant cause approach is not adopted in the first instance. It is also respectfully suggested that the term "effective cause", is too general in description, which may only confuse matters when applied practically. Concurrency should only exist, it is suggested, once dominance cannot be established.

iii. **Prevention Principle:** In England, prevention is the first of two ratios in support of the Malmaison Approach; however, there are conflicting judgments as to whether prevention actually exists in relation to concurrent delays[609]. In Scotland, there is ongoing debate as to whether the judge's ability to apportion concurrent delay and/or loss actually offends this principle in any event?

iv. **Express terms of the contract:** In England the second and main ratio, in support of the Malmaison Approach centres on a literal interpretation of the contract (at least a JCT contract), which expressly allows an extension of time for employers Relevant Events. However, it must be explored as to why the architect or contract administrator should be precluded from taking other events (not expressly stated) into consideration, which also have an impact on the completion date. One must consider the original intention of the parties, and what would the outcome be for standard forms of contract, other than the JCT suite, which requires the architect to act fairly and reasonably? In Scotland it would appear that in evaluating concurrent delay and its effects on the completion date, the architect should do what is fair and reasonable, taking into consideration Relevant Events and events which are not expressly stated in the contract.

v. **Causation:** The standard causation criteria, commonly referred to as "but for analysis" is suspended adopting the Malmaison Approach in England and is also suspended in Scotland if the dominant cause approach is accepted. It must be asked, have the courts decided to suspend the standard criteria for causation as a matter of policy, if so on what basis?

[609] *Jerram Falkus Construction Ltd v Fenice Investments Inc* (No 4) [2011] EWHC 1935 (TCC), [2011] BLR 644, 138 Con LR 21, [2011] CILL 3072.

vi. **Contributory Negligence**: The apportionment of concurrency in Scotland has been likened to contributory negligence between (joint wrongdoers (tortfeasors)[610]. There are conflicting arguments as to why a similar approach cannot be adopted in the law of Contract, which require further analysis? This is considered further at section 6.9 below.

vii. **Obiter commentary:** As mentioned previously, apart from one reported construction case, both English and Scottish courts commentary on concurrency has been given in obiter dicta. Indeed, in *City Inn* the judge merely suggested that apportionment "may" be appropriate. It is obvious therefore that the issue of concurrency is far from settled, although the divergence between the English and Scottish courts may not be as immobile as is generally considered?

viii. **Programme Analysis / CPA:** It is inadequate to consider the legal understanding and application of concurrency without considering the forms of delay analysis which may be adopted to evidence same. It is imperative that more should be done to align how the legal principles will actually work in practice.

ix. **Redrafting of the Standard forms:** Workable definitions could and should be provided by the standard forms of contract, such as JCT, NEC3 or FIDIC suites. Admittedly, it is possible that the definitions of concurrency when included in the standard forms may be different[611], but at least the parties would have more certainty on what terms they were entering into. Furthermore, it would be helpful if the delay analysis methodology was outlined, because it is an integral and perhaps inseparable element in analysing delays to completion.

x. **Policy considerations:** Given the relatively low profit margins of contractors of scale, it may be of benefit to acquire a deeper understanding of whether in matters of concurrency, is it fairer to award time, but no money, or apportion both time and money. For example, in general liquidated damages would be considerably higher than prolongation costs, should that influence the decision making process? This is considered further at section 7.5 below.

[610] Supra note 573 [158].

[611] Indeed, the current common law differences on concurrency between the Scottish and English courts may require a departure between the JCT suite in England and its SBCC equivalent in Scotland.

xi. **Hybrid Solution:** Considering all of the above, is there a viable argument to suggest that the contractor is entitled to an extension of time for employer related delays and the associated loss and expense? This is significant because, by way of example, if a project overruns because of a number of employer events, but only one contractor event, then there is no incentive or control for the contractor to mitigate his delays, if he is in the knowledge that he will not be able to recover or reduce his prolongation costs in any event, due to delays caused by concurrent employer events. A form of pacing delay which brings its own complexities.

6.6.5 Concurrency Conclusions

In light of the foregoing, it is evident that there are jurisprudential differences between the English and Scottish courts, and how they may deal with concurrent delay in construction and engineering projects in the future, and how these differences manifest themselves in the decision-making process.

It is essential that first and foremost the parties involved in construction and engineering projects, must refer to the particular terms of their contract, to understand their immediate rights and obligations in relation to how concurrency is to be administered. More often than not, the parties will have contracted using one of the standard form contracts, which are in general silent on how concurrency is to be dealt with. In consequence, divergences in how the English and Scottish courts deal with concurrency, will prevail and common law solutions will have limited efficacy. It is suggested that unless and until the aforementioned considerations are addressed, it is likely that problems articulating and measuring concurrency will persist for the foreseeable future.

6.7 Competing Causes which are not Time Related

6.7.1 Introduction

The foregoing section sets out the differences between the Scottish and English courts in relation to concurrent delay, which may arise in the assertion of a global claim, although not necessarily so. The assertion of concurrent delay is a tactic adopted by the defendant in order to obfuscate the claimant's position when pursing a global claim, where costs claimed by the claimant are time related and liquidated damages must be defended against.

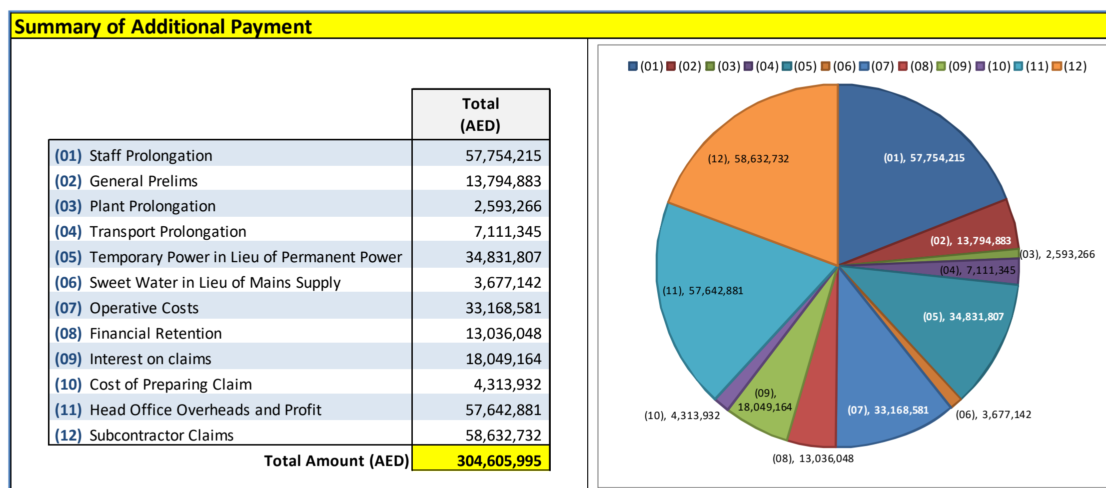
While there has been much written about competing causes which are time related, i.e. concurrent delay, there is a relative dearth of judgement and/or opinion in relation to

competing causes which are not time related, but which nonetheless may feature in a global claim. Under these circumstances, there is merit in analysing, whether the administration of competing causes which are time related can be adopted for competing causes which are not time related.

To reiterate and in summary, where concurrent delay is deemed to have occurred, in England the claimant will be given the extension of time for that delay period but will be unable to recover loss and/or expense. In Scotland, where a dominant cause of delay cannot be ascertained, then the tribunal may apportion both the delays and the associated loss and/or expense between the parties to the dispute.

Can the foregoing determination of concurrent delay be applied to competing causes which are not time related? In order to provide a better understanding of how the law in both England and Scotland may operate under such circumstances, it is helpful to consider the details of an actual dispute, to provide the factual matrix upon which the law may be applied. The following data is taken from an actual dispute, managed by the writer, for an iconic project in Abu Dhabi in 2013.

A dispute arose between the contractor and the employer for an iconic twin skyscraper office development procured under a FIDIC Yellow Book First Edition 1999 with additional Contract Particulars. The Time for Completion was delayed, and the contractor sought an additional 674 days for matters which it considered were the responsibility of the employer. The quantum claim asserted by the contractor totalled AED 304,605,995, separated into the following heads of claim:



Summary of Additional Payment

	Total (AED)
(01) Staff Prolongation	57,754,215
(02) General Prelims	13,794,883
(03) Plant Prolongation	2,593,266
(04) Transport Prolongation	7,111,345
(05) Temporary Power in Lieu of Permanent Power	34,831,807
(06) Sweet Water in Lieu of Mains Supply	3,677,142
(07) Operative Costs	33,168,581
(08) Financial Retention	13,036,048
(09) Interest on claims	18,049,164
(10) Cost of Preparing Claim	4,313,932
(11) Head Office Overheads and Profit	57,642,881
(12) Subcontractor Claims	58,632,732
Total Amount (AED)	304,605,995

Figure 2 – Contractor's Heads of Claim

The twelve heads of claim above, are representative and fairly typical of what may be included in a contractor's claim. The costs incurred are actually losses taken from contractor's profit and loss account and are divided into various time related, financial and subcontract claims. In terms of the non-time related losses, to illustrate the difficulties, there is merit in focussing specifically on Claim 7 "Operative Costs" totalling AED 33,168,581.

The losses for Claim 7 were borne out of the contractor being compelled to procure the services of additional labour only subcontractors, supplying various trades and general labour to support the works. Often, the subcontractor has no responsibility for a particular work package, but instead tends to support the works as and when required. Utilising labour only subcontractors is commonplace in the Middle East, Asia and Africa, where resourcing projects of scale is problematic, and productivity measurements are inconsistent and unreliable due to factors such as poor quality workforce (in terms of training), weather and cultural differences.

In this instance the contractor claimed entitlement to losses associated with the cumulative impact of 529 Engineers Instructions, 29 Agreed Value of Instructions, and 174 Requests for Change. All Engineering Instructions had been agreed between the parties, importantly the agreement set out in the contract provided that the Engineers Instructions would include the direct costs for the work only. The distribution of Engineers Instructions over time is provided below:

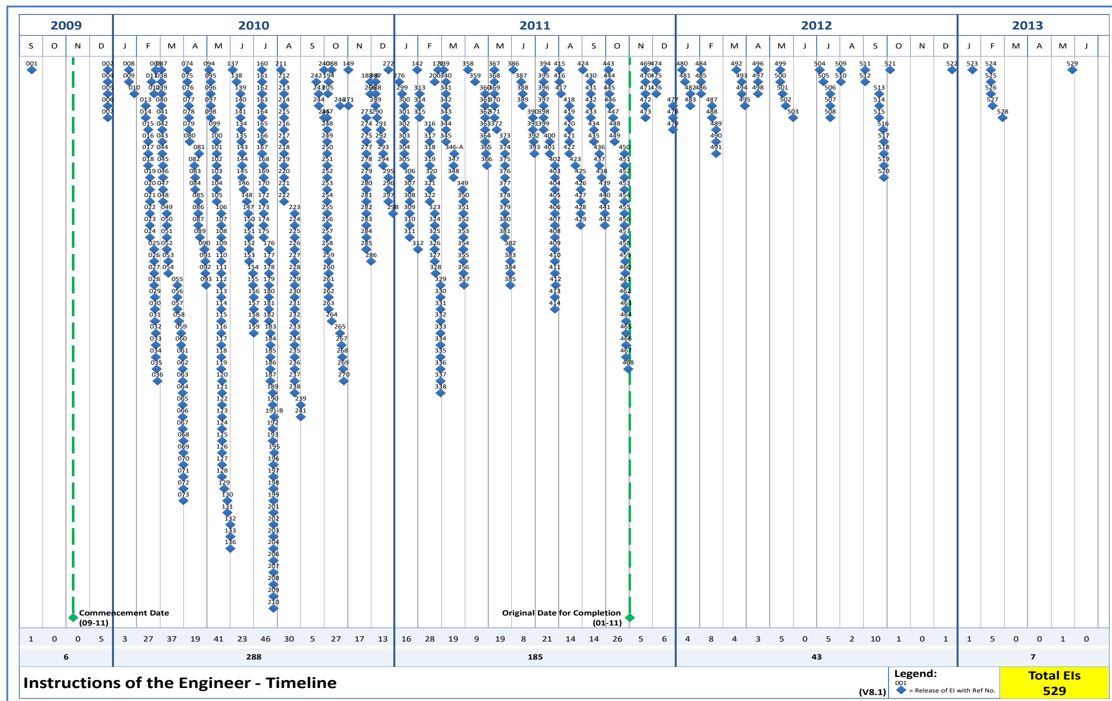


Figure 3 - The distribution of Engineers Instructions over time.

In consequence, the losses associated with claim seven are the indirect losses associated with foregoing changes. The contractor, in its opinion had reduced its losses claim to AED 33,168,581 by deducting monies already covered through various additional payments and matters for which it was responsible.

Importantly, the contractor was able to prove that based upon its vast experience in the region, its contract price at tender was adequate, and it had complied with the contractual notices set out in the contract.

On analysis, it was apparent that, on any measure, it was impossible (never mind impracticable) to connect the causes/events to the amounts claimed because as is often the case on international mega projects, labour only subcontractors' personnel are not deployed based on any particular cause. Rather, the level of delay and disruption on a project often requires that the contractor's project director simply requires additional personnel to be deployed around the works supporting various work fronts. The following graph illustrates the planned versus actual direct and labour only subcontract personnel on the project:

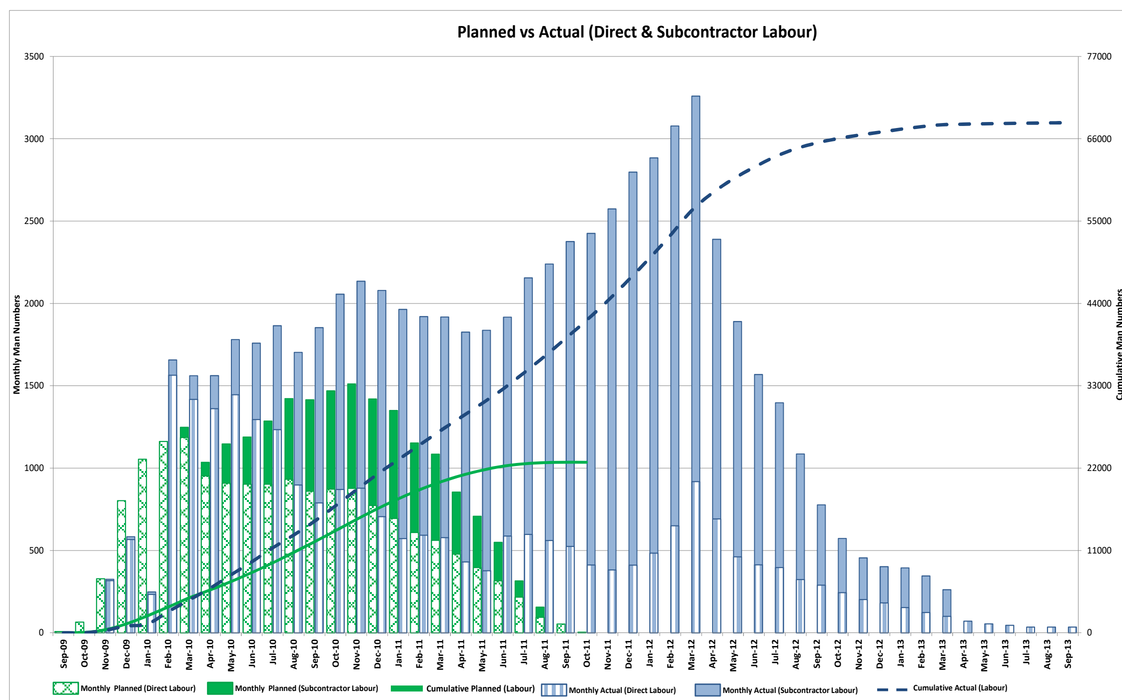


Figure 4 – Planned vs Actual (Direct & Subcontractor Labour)

Under these circumstances, there is a genuine loss to the contractor, there are a myriad of competing causes which are not time related and it is impossible (indeed it would be a contrivance) to associate specific losses to particular events. The information that was

available, identified there were some ten labour only subcontractors all supplying different designations of work force on a monthly basis, through various stages of the Project.

In its defence, the employer argued that there were various causes, which were the contractor's responsibility. Therefore, there was the possibility that competing causes combined and conflated to arrive at the total losses claimed by the contractor.

In summary therefore, notwithstanding the contractor's claim as a whole, it would be reasonable to conclude that Claim 7 is asserted on a global basis, and provides a detailed example of a set of circumstances where competing causes are present, but are not necessarily time related. The purpose of setting out the example above, is that it provides a context for the following sections which consider how the English and Scottish Courts deal with claims of this nature.

6.7.2 **The English Approach to Competing Clauses which are not Time Related**

As set out previously, for any construction claim to succeed in England, as prescribed in *Walter Lilly*, there are three preconditions that must be satisfied[612]:

i. The contractor has to demonstrate on a balance of probabilities that events occurred which entitle it to loss and expense;

ii. That those events caused delay and/or disruption; and

iii. That such delay or disruption caused it to incur loss and/or expense (or loss and damage as the case may be).

For present purposes, it is assumed that points i and ii have been satisfied, leaving point iii to be considered.

In the first instance, precedent in the English courts dictates that the pleadings must satisfy the civil standard of proof, i.e. on a balance of probabilities. In relation to how the civil standard of proof relates to loss and expense claims in construction contracts, Akenhead J had this to say:

"One has to bear in mind that the ultimate dispute resolution tribunal will decide any litigation or arbitration on a balance of probability and at that stage that tribunal will (only) have to be satisfied that the Contractor probably incurred loss or expense…"[613]

[612] Supra note 11 [486].
[613] Ibid.

The tribunal must do so, in a way that a reasonable man would require to come to a conclusion on the matter.[614]

Akenhead J further considered that the contract should not be viewed in a particularly strict way against the contractor, in doing so he disagreed somewhat with the claimant's quantum expert who had reported that he would expect the contractor to provide a long list of prerequisites, including:

"a) Staff allocations and actual costs.

b) Labour allocations and actual costs.

c) Scaffold, utilities, expense and other materials/sundry expenses scheduled with copy invoices and explanatBaggins11

ions for the items in question.

d) Subcontract accounts having already discounted, if appropriate, the matters which were not the Employer's responsibility.

e) Such other data as is necessary to enable the actual costs incurred to be vouched as correct and relevant to the matter(s) the subject of the notice."[615]

He felt that what the claimant's expert was, in effect, saying was that *"…every conceivable detail and back up documentation which may or may not be needed must be provided and all evidence required to prove the claim as correct needs be deployed*"[616].

Taking the foregoing into consideration, a tribunal must consider the causative test to be applied to claim seven and the competing causes whose summation accords with the losses plead and defended against. Applying common sense principles and following the guidance as set out by Lord Hoffman, as set out at section 2.3.4 above.

It is clear therefore that a tribunal must, in the first instance understand how the principles of legal causation, accord with a claim either plead or defended as a global claim. In this regard, the legal causality applied in the English courts requires that in order to become operative or proximate, the cause is either dominant, effective or sufficient. In relation to global claims, it is submitted that the English courts may consider that for a cause to be operative it simply

[614] Supra note 69, 459.
[615] Supra note 11 [466].
[616] Supra note 11 [467].

requires to be an *"effective cause with equal causative potency"*[617]and not dominant, as was once the case.

Furthermore, the tribunal may have to consider whether the breach is reasonably foreseeable[618], although as submitted earlier in the thesis, it should be a relatively straightforward process and perhaps not overly appropriate for claims made on a construction project and particularly in relation to global claims.

Finally, the tribunal must be alive to the possibility of any novus actus interveniens which may or may not have an impact on claims asserted on a global basis[619].

It is submitted that due to the nature of a global claim, it is often ineffective and inappropriate to consider questions of dominance and/or effectiveness, foreseeability and intervening causes. By definition, a claim plead on a global basis will not be capable of such legal dissection. Notwithstanding the foregoing, a tribunal must also consider the appropriate factual test to be applied to a global claim. It is self-evident that applying the test of sine qua non will be of limited assistance, in providing a suitable causative filter when considering the myriad permeation of causes as those described in claim seven above. Under these circumstances, it is submitted that the causative test for competing causes subsumed within a global claim in England, although not expressly set out by the courts, must be one of material or significant contribution as set out in *Doyle*.

This view is accepted by Day and Cope:

"We acknowledge that Mr Justice Akenhead did not refer to 'significant' causes as Lord Drummond Young did, but we are of the view that an English Court is unlikely to find that a global claim would fail unless the event for the employer was not responsible was 'significant'." [620]

In Lilly, Akenhead J simply said that the claimant must demonstrate:

"…that there are no other matters which actually occurred (other than those relied upon in its pleaded case and *which it has proved are likely to have caused the loss)."* [621]

However, Akenhead J then went onto say[622]:

[617] Supra note 638, 1.
[618] Section 2.3.4ii refers.
[619] Section 2.3.4iii refers.
[620] Supra note 14, 12.
[621] Supra note 11 [486(d)].
[622] Ibid [486(e)].

"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. It depends on what the impact of those events or factors is."

In this regard, Day and Cope arrive at the opinion that if a competing cause/event is significant and is found not to be the responsibility of the defendant, where the cause/event *"…cannot be readily identified and omitted"*[623] then the global claim must fail. It is accepted that where the events can be readily identifiable, then they must be separated from the global claim, which is then reviewed separately. If it is found that that upon separating out readily identifiable claims, then provided there is no significant cause, for which the defendant is not responsible, a global claim may succeed in its entirety.

Whilst the foregoing conclusions are not contended, they do throw up interesting scenarios. For example, a defendant may want to assert that a competing cause exists and is significant in terms of the total losses claimed. However, if the defendant quantifies such causes, then according to precedent, these may be separated from the global claim as a whole. If that is the case then there is a risk that according to Day and Cope, the remainder of the global claim could be awarded as a whole, if all significant causes which are not the responsibility of the defendant have already been identified and declared by the defendant.

Under these circumstances, the defendant's strategy should be to assert a significant cause but not quantify it, which would mean that the cause could not be *"…readily identified and omitted"* and accordingly the global claim must fail.

Therefore in England, consistent with the principles set out by Akenhead J in *Walter Lilly*, once a claimant has 1) satisfied the contractual requirements 2) proven the claim as a matter of fact 3) proven that the loss would not have been incurred in any event 4) separated out matters which are not the responsibility of the defendant; it must then satisfy the causative test of significance and whether the significant competing cause can be further separated from the global claim.

If there are no significant competing causes, then it may be open for the court to award the global claim in its entirety, subject to the evidence adduced. Day and Cope's view is that once a global claim is deemed allowable, a tribunal will may make deductions where possible and

[623] Supra note 14, 12.

allow the remainder, or alternatively the claim fails in its entirety because the claimant has not proven their claim as a matter of fact , and *"…the tribunal considers that the employer is not responsible for a significant cause of the contractor's loss, and the costs arising from his cause cannot be readily identified and omitted…"*.[624]

It is submitted that in the vast majority (perhaps all) of the cases in England, the ability for a claimant to recover claims which appear global in nature, have ordinarily failed in their entirety.

6.7.3 **Apportionment of Losses for Competing Clauses which are not Time Related**

It is accepted that where there are competing causes of delay (subsumed within a global claim or otherwise), the English courts will award the claimant an extension of time, but not the associated loss and expense, i.e. the Malmaison Approach. However, it is submitted that the answer to the question, will the English courts allow the apportioning of competing causes with the losses asserted (subsumed within a global claim or otherwise); remains unclear.

Day and Cope are of the view that in relation to competing causes *"…rational apportionment, is only arguable in Scotland and is not available in England."*[625] And that according to Akenhead J who said that *City Inn* did not apply in England; they would *"…consider that this would apply equally to global claims. Indeed, Mr Justice Akenhead did not contemplate apportioning a global claim in his seven propositions"*[626]

It is unclear when Day and Cope state that apportionment would *"…apply equally to global claims"*; they mean global claims which are not time related, however it is submitted that any reference made by Akenhead J in relation to *City Inn*, was set out in the context of concurrent delay, which cannot be apportioned consistent with the Malmaison Approach. Apportionment was not considered in relation to competing causes which were not time related. The English case law set out at Chapters 3, 4 and 5 identifies that apportionment has consistently been considered by the TCC judges.

In *Walter Lilly*, Akenhead J stated that in relation to apportionment of concurrent delays, *City Inn* was *"inapplicable within this jurisdiction"*[627]. In arriving at this decision Akenhead J

[624] Supra note 14, 17.
[625] Supra note 14 [18].
[626] Ibid.
[627] Supra note 11 [370].

relied upon Hamblen J's decision in *Abu Dhabi v SD Marine Services*; where he stated among other things when referring to the appellate decision in *City Inn*:

"In the last of the situations envisaged by Lord Osborne the English law approach would be to recognise that the builder is entitled to an extension of time, not an apportionment – see, for example, Malmaison at para 13." [628]

At paragraph 13 in the *Malmaison* decision, Dyson J describes a scenario of two concurrent delays (both one week critical delay), one being a Relevant Event (weather) and the other being a shortage of contractor's labour, since one delay is a Relevant Event, the architect is required to grant an extension of time of one week. The word apportionment is not referred to in the entire decision, subsequent decisions relying on *Malmaison*, have simply inferred apportionment, since the occurrence of a Relevant Event entitles the contractor to a full extension of time.

In summary, it is apparent that the case law in relation to apportionment of competing causes relates solely to concurrent delay and not to competing causes which are not time related. Therefore, competing causes asserted for what may be deemed a global loss, may still be apportioned in the English courts. This position is yet to be tested, however it may assist in navigating the conflation between concurrent delay/ apportionment / competing causes and global claims, which are often thought of as being the same, but are in fact quite separate.

6.7.4 **The Scottish Approach to Competing Clauses which are not Time Related**

As set out previously, for any construction claim to succeed in Scotland, as prescribed in *Doyle*, there are three preconditions what must be satisfied:

i. The existence of one or more events which the employer is responsible;

ii. The existence of loss and expense is suffered by the contractor;

iii. A causal link between the event or events and the loss and expense suffered by the contractor[629].

In the appellate decision, Lord Drummond Young echoed the sentiment of Lord Macfadyen, in that[630]:

[628] Supra note 463 [288].
[629] Supra note 10. reaffirmed in the appellate decision.
[630] Supra note 372 [8 & 10].

"…the pursuer's global claim might fail because a material part of the causation of the loss and expense was an event for which the defenders were not liable" [emphasis added]

And

"…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" [emphasis added]

In Scotland therefore, if it can be proven that there is a material or significant cause, which is not the responsibility of the defendant, then a global claim may fail. In this regard, Lord Drummond elaborated as follows:

"In determining what is a significant cause, the 'dominant cause' approach….is of relevance."[631]

However, notwithstanding the possibility of a global claim failing, the following mitigations must also be taken into consideration, which may, in fact mean a global claim could succeed:

i. If it is possible to identify a causal link between defendant events and the losses, these must be dealt with separately;

ii. Causation must be dealt with adopting common sense principles. In this regard Lord Drummond Young considered that, by way of example as to how common sense could be applied, it is *"…frequently possible to say that an item of loss has been caused by a particular event notwithstanding that other events played a part in its occurrence. In such cases, if an event or events for which the employer is responsible can be described as the dominant cause of an item of loss, that will be sufficient to establish liability, notwithstanding the existence of other causes that are to some degree concurrent"*[632];

iii. Where a dominant cause cannot be established, it may be able to apportion the loss between the causes the defendant is responsible for and other causes. Where this is associated with delay, unless there is a special reason, the apportionment should be on an equal basis. It is envisaged that the Scottish courts will be required to elaborate what is meant by *"special reason"* in subsequent construction cases, where apportionment is deemed appropriate.

[631] Supra note 372 [14].
[632] Ibid [15].

In relation to competing causes which are no time related, in the appellate judgement of *Doyle*, Lord Drummond Young had this to say:

"Apportionment in this way, on a time basis, is relatively straightforward in cases that involve only delay. 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." [633]

It is submitted that the foregoing opinion contemplates that, in Scotland where competing causes are not time related, but form part of a global claim, the tribunal has an ability to apportion the losses, where it is possible to do so and, in a manner, not dissimilar to how contributory negligence is calculated among joint wrongdoers. Indeed, *Doyle* was predominantly concerned with loss and expense as latterly acknowledged by Lord Drummond Young in *City Inn* where he stated that apportionment in *Doyle* was *"…concerned with claims for loss and expense"*, and therefore had only limited application when considering the concurrent delay before him in *City Inn*.

The Scottish courts also require that claims plead on a global nature (which is actually the same pre-conditions for any pleading), is that the pursuer should give *"…fair notice to the other party of the facts that are relied on, together with the general structure of the legal consequences that are said to the follow from those facts"*[634]. This allows the defendant to understand fully the case it must answer to.

Lord Drummond Young then went onto say that since causation is a matter of inference, *"…so far as causal links are concerned, however, there will usually be no need to do more that set out the general proposition that such links exist."*[635] In Scotland, the contentions of the parties will ordinarily be based on expert reports.

6.7.5 **Jurisdictional Differences between Competing Clauses which are not Time Related**

In conclusion, it is submitted that there is only one significant difference between how the Scottish and English courts deal with competing causes which are not time related and subsumed within a global claim. In England apportionment may be available, whereas in

[633] Ibid [17].
[634] Ibid [20].
[635] Ibid.

Scotland apportionment is most definitely available. If apportionment is unavailable in England, then a tribunal are compelled to adopt an all or nothing approach when deciding upon whether to make an award for a claim for loss deemed global in nature, and its success or otherwise will depend on whether the claimant has proven their case as a matter of fact.

Moreover, in Scotland whether a competing cause is material and/or significant when analysing a global claim, the causative test of dominance is to be applied[636]. This may mean that where there are a number of competing causes, but either the claimant's or defendant's cause(s) are considered dominant, they will therefore be deemed the operative cause of the loss. Where a significant cause can be identified which is not the responsibility of the defendant, and which cannot be apportioned, then in a similar manner to the English approach, the pursuer will have to prove their case as a matter of fact.

6.8 Dominant Cause

6.8.1 Introduction

Where competing causes are present in a case, a tribunal will rummage into its causative tool box, as it is compelled to decide upon the evidence adduced by the claimant, one way or another. In both England and Scotland, the dominant cause test[637] has long been established as one of the causal tests of choice by the courts, when considering whether a cause(s) is operative or otherwise[638]; where competing causes are present. This is relevant to global claims as by their nature it will often be the case that a contractor's claim for an extension of time, and/or monetary compensation, will be met with a defence from an employer, that there were competing causes for which it bore no responsibility, in an attempt to undermine said claim.

Marrin suggests that the rationale for adopting the dominant cause test, lies in the obverse problem[639], i.e. it would be nonsensical for a decision to arise, where from competing causes of delay, on one hand the contractor is entitled to prolongation costs, and in the other, the employer is allowed to claim liquidated damages. If one must succeed, then in the first instance, dominance must be considered.

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[636] Ibid.
[637] Including cases of concurrency.
[638] The historical context is set out conveniently by John Marrin in his article for the SCL titled "Concurrent Delay Revisited", A paper presented to the Society of Construction Law at a meeting in London on 4th December 2012, 12-14.
[639] Supra note 572, 13.

6.8.2 **Dominant/Dominance – Definitions**

The Oxford English Dictionary defines the adjective dominant as[640]:

"Exercising chief authority or rule: ruling, governing, commanding, most influential."

In *Fairweather*, Fox-Andrews J concurred with the foregoing definition and suggested that dominant had several meanings, namely[641]:

"Ruling, prevailing, most influential"

In relation to causation, the dominant cause has been defined in an earlier edition of Keating as follows:

"Which cause is dominant is a question of fact, which is not solved by the mere point of order in time but is to be decided by applying common sense standards." [642]

In the *City Inn* appeal, Lord Osborne shared his own, similar explanation:

"I consider that whether a particular significance is or is not a dominant cause of delay is essentially an issue of fact, albeit one which, for its resolution, may require inferences to be drawn from primary facts"[643]

As noted by Atkinson, this a relative dearth of opinion on how the dominant cause is to be identified and applied, except that it should be tested using *"…common sense as understood by the ordinary man taking a broad view"*.[644]

It is submitted that the application of the dominant cause test, can only be considered when there are competing causes of delay, and does not apply to loss and expense. Dominance is understood by a Project Manager on site as the event or events, which are causing him/her the greatest cause for concern and which, may/will have a critical delaying effect on the completion of the works. For example, it may be that upon analysis, there are two events concurrently delaying the works (both contractor issues), one being the delivery and fitting of the internal door handles, and one being the design, fabrication and erection of the external cladding. Notwithstanding that both events may delay the works (at least that is how it theoretically appears on the programme)[645] it is probably the case that one delay will be of

[640] Oxford English Dictionary: http://www.oed.com/view/Entry/56693?redirectedFrom=dominant#eid.
[641] *H Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106 (OR), 120.
[642] Sir Anthony May, *'Keating on Building Contracts'* 5th Edition, Sweet and Maxwell Ltd, 1991, 195.
[643] Supra Note 469 [54].
[644] Supra Note 162, para 1.42. An adaptation of the findings of Lord Wright in *Yorkshire Dale Steamship Co v Minister of War Transport (The Coxwold)* [1942] AC 691.
[645] Therefore, at least on the face of it rendering the but for causative test ineffective.

more concern to the project manager. It may be that the internal door handles are easily sourced through an alternative supplier, or upon agreement, the employer may agree to a slight change in the design. In other words, the potential delay is relatively straightforward to mitigate. However, the installation of the external cladding is likely to involve co-ordination of design and fabrication drawings, interconnection issues, fabrication timetable, delivery/transportation, erection (including craneage, scaffolding, access and the like). In this example[646], it is clear that the dominant cause of delay on the project is the potential delay of the design, fabrication and erection of the external cladding.

Considering the foregoing, issues of dominance are able to be conceptualised in relation to delay, however, it is arguably not the case when global claims are related solely to loss and expense, and which are not time related. From the actual example provided at section 6.7 above, it is evident that circumstances can arise, where there are proven composite losses for indirect costs associated with a myriad of events where it is impossible (or most certainly highly impracticable) to link cause and effect. So, for example, if you have labour only operative losses (in the example provided totalling 33,168,581 AED), with over 500 change events, where the direct costs have already been agreed, how is one able to logically apply the dominant cause test. It is submitted that the application of the dominance cause test is inapplicable under such circumstances.

6.8.3 **The Dominant Cause Test – The Scottish Courts**

In relation to claims deemed global in nature, where there are competing clauses asserted by the parties and connected to the composite loss/delay, the Scottish courts will review those causes and applying common sense principles, in the first instance, seek to identify a dominant cause. It is submitted that in carrying out such an exercise, dominance can be considered in terms of both positive and negative positions.

The positive position is based upon the notion that the claimant's pleading may well succeed,[647] if it is able to prove that the defendant's cause was the dominant cause of the composite loss/delay. This position was considered by Lord Osborne in the *City Inn* appeal, and influenced by Lord Macfadyen in the first instance decision**:**

"…if a dominant cause can be identified as the cause of some particular delay in the completion of the works, effect will be given to that by leaving out of account any cause or

[646] The example has been provided by the author to illustrate the point.
[647] Subject to satisfactory evidence adduced.

causes which are not material. Depending on whether or not the dominant cause is a relevant event, the claim for extension of time will or will not succeed[648] *"*

In addition to a material cause, dominance has also been considered in terms of significance, where Lord Drummond Young, again in the *Doyle* appeal was influenced by Byrne J's decision in *John Holland*, in that it may be possible to identify a causal link:

"…where it can be established that a group of events, for which the employer is responsible are casually linked with a group of heads of loss, provided that the loss has no other significant loss"[649]

The foregoing accords with the negative position i.e. a defence by the defendant on the notion that it may defeat a claim plead on a global basis if it can prove a:

"…material contribution to the causation of the global loss is made by a factor or factors for which the defender bears no legal liability".[650]

If a significant or material cause is identified either counterclaimed by the defendant, or becomes apparent from the evidence adduced by the parties, then how is to be considered by a tribunal? On the face of it, the connotations of 'significant' or 'material' are contributive to the idea that competing cause which are not the responsibility of the defendant simply have to be of a such a sufficient magnitude, that a tribunal disallows an award for the total composite loss. Of course, in Scotland, if cause(s) are not dominant, and cannot be separated, they may be able to be apportioned. If the cause(s) cannot be apportioned, then the claim must necessarily fail.

In Scotland, Lord Drummond Young, helpfully set out how a tribunal should consider a significant cause:

"In determining what is a significant cause, the 'dominant cause' approach…is of relevance"[651]

It would therefore appear to be the case that a defendant must evidence that a cause for which it is not responsible, must be the dominant cause of the composite delay/loss.

In conclusion, in Scotland a defendant has two limbs where it can undermine a global claim, firstly, by being able to prove that the causes for which it is responsible are not dominant and

[648] Supra note 469 [42].
[649] Supra note 372 [14].
[650] Supra note 10 [36].
[651] Supra note 372 [14].

secondly, it may be able to prove that another cause was dominant, for which it has no contractual responsibility. Since the burden of proof remains with the claimant, the defendant is not compelled to adopt such an approach, but there no is doubt that to do so, may be of benefit if it is to defeat, or at least weaken such a claim which is plead as global in nature.

6.8.4 **<u>The Dominant Cause Test – The English Courts</u>**

In Scotland, it is clear that when competing causes are present, and which may form part of a global claim or otherwise; if a cause can be identified as dominant then it will be considered as the operative cause[652]. In England, the position is less clear.

Whilst the editors of Hudson[653] support the Scottish view set out about,[654] there are commentators in England who consider that the dominant cause test has been supplanted, and that the identification of an 'effective' cause[655] is all that is now required at least in relation to proving competing causes of delay.

Reviewing the English case law on the matter, Moran is of the opinion that:

"*The existence of a dominant cause test of universal application in claims for damages for breach of contract is not supported by authority and, it is suggested, there is no reason to assume that it should be of general application."*[656]

Instead, in his view, the dominant cause test has permeated into the English legal psyche from eminent editorial commentary.[657]He suggests that a *"more relaxed"* test should be established; one of effective, and not dominant cause. The rationale emerges, among other things, from a passage by Akenhead J in Lilly, as follows[658]:

"...where there is an extension of time clause such as that agreed upon in this case and where delay is caused by <u>two or more effective causes</u>, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time" [emphasis added][659]

[652] Supra Note 372 [15]. Also followed by Lord Osborne in the *City Inn* Appeal at para 42.
[653] Robert Clay, Nicholas Dennys, *Hudson's Building and Engineering Contracts*, 13th Edition, Sweet and Maxwell, 2017, para 6-061
[654] With the caveat that if the cause is not dominant, then unlike in Scotland, the competing causes cannot be apportioned
[655] Supra note 581, 8. Moran Article.
[656] Ibid 3.
[657] Reference is made to Anthony May's contribution to the 5th Edition of Keating, p 195, where dominance is identified, the plaintiff may succeed in establishing the cause.
[658] Supra note 11 [362].
[659] Further justification is made, stating that there is no express mention of the dominant cause test.

Moran describes the effective cause test as one which operates either independently or in combination to cause critical delay, and one which *"…had it operated in the absence of the delay event(s) that the contractor is responsible for…"*[660] would have caused the same critical delay period. Notwithstanding the foregoing, despite his dissatisfaction with the current position, Moran does conclude that, despite stating that there is no authority in England to do so, where competing causes are present on matters of delay, a hybrid situation exists, where in relation to competing causes of delay:

"…a preliminary enquiry to see whether the (old) dominant cause test could still apply to negate the significance of one of the effective causes; only if a dominant cause cannot be identified, should the less restrictive Malmaison test be applied to generate an entitlement to relief."[661]

Baatz however, considers that:

"…the courts have set the criteria for causation low because it is only necessary that cause be 'an effective cause', even if only one of a number of effective causes"[662]

In doing so Baatz relies upon various precedent[663], however with respect, it is submitted that there are various difficulties with arriving at the aforementioned conclusion for the following reasons:

i. In Girozentrale, the circumstances of the case were not similar to a delay and/or disruption on a construction project, where both the claimant and the defendant are responsible for delay and/or disruption, and that absence either parties' event, the other would have caused the delay and/or disruption. Girozentrale, related to contributing causes in flotation and underwriting in relation a stock exchange transaction, either cause in isolation was insufficient to cause the loss.[664]

ii. In Borealis, the case related to, among other things, a novus actus interveniens, where Gross LJ stated that in terms of breaking the chain of causation, mere unreasonable behaviour by the claimant will not break the causative link, if the defendants breach remains an effective cause of the loss[665]. Again, it is difficult to associate such

[660] Supra note 581 [90].
[661] Supra note 581 [43].
[662] Supra note 150, 8.
[663] *County Ltd v Girozentrale Securities* [1996] 2 All ER 834, *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm), *Petroleo Brasileiro SA v ENE Kos 1 Ltd* [2012] UKSC 17.
[664] The differentiation is also recognised by Moran - Supra Note 581, paras 15-16.
[665] Supra Note 663 [45].

circumstances where it may be clear upon analysis, and based on the author's experience, that a project manager will intuitively understand dominance in what may appear to be co-critical events, however it may be the case that these events may have a different causative potency, as explained at section 6.8.2 above. Indeed, as suggested by Lord Mance in Petroleo[666]:

"The selection of the proximate, determining or, in the more modern terminology, real or efficient cause for the purposes of an indemnity has traditionally been described as involving a "choice . . . to be made by applying common sense standards as the man in the street or a business or seafaring man would apply them"

At risk of controversy, it is submitted that construction professionals may be more comfortable with the concept of dominance on construction projects than the legal fraternity.

iii. In Petroleo, Baatz relies upon selected phrases by both Lord Sumption and Lord Clark[667]. It is important to consider that context of the question of causation in Petroleo related to whether the terms of a charterparty clause meant that the charterers had to indemnify the owners against any consequences which may arise from the later complying with charterers orders. Lord Clarke's conclusions in the case were as follows:

"As I see it, the question in each case, whether under a contract of insurance or under a contract of indemnity, is whether an effective cause of the alleged loss or expense was a peril insured against or an indemnifying event."[668]

So, if one event was an effective cause and a peril insured, it does not have to be the dominant cause, and from the outset, the tribunal is not required to identify a dominant cause. Once more, the logic applied under these circumstances is different to that where two or more events on a construction programme (which are the responsibility of the contractor and the employer), either of which could cause delay and/or disruption individually. In these circumstances, upon analysis, an event may have been more

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[666] Supra Note 663 [48].
[667] Supra Note 150 , 8. Where he states that *"Lord Sumption explained that it does not matter whether an effective cause was the only effective cause and Lord Clarke explained that an effective cause could be on of a number of effective causes."*
[668] Supra Note 663 [68].

easily mitigated than the other, which may during the course of the project, been known by both contractor and employer alike, to be more significant or dominant.

Notwithstanding the foregoing, at this juncture, there is merit in stating that it is beyond the scope of this thesis to examine (at length) the efficacy or otherwise of the foregoing opinion(s) in relation to the dominant cause test. The purpose of this section of the thesis, is to set out the current judicial thinking in relation to global claims, and the causative test a tribunal may apply in a scenario where competing causes (both claimant and defendant) are present.

It is therefore submitted that the hybrid situation set out by Moran above, is the current approach which would be taken by the English courts in relation to competing causes of delay on construction projects. This view is further supported by case law[669] where as late as 2018 delay experts tasked specifically to identify and provide an opinion on cause and effect on construction projects, continue to apply the dominant cause test when ascertaining project delays, the principle of which goes unchallenged (and are therefore arguably accepted) by senior counsel and eminent judges of the day.

6.8.5 **The Dominant Cause Test - Summary**

It is apparent that when there are competing causes of delay (both from the claimant and defendant) in a claim for an extension of time,[670]both in England and Scotland, the courts will in the first instance consider which cause(s) are dominant. If that can be identified, then those causes(s) are the operative cause(s). Where dominance cannot be established, in England the Malmaison Approach will be adopted (i.e. an extension of time will be awarded but delay costs will be disallowed); if the causes and their effects cannot be separated. In Scotland, apportionment may be applied if the cause(s) and their effects cannot be separated.

What is unclear in both jurisdictions, is what causative test can be applied where a claim is deemed global in nature, for loss and expense (or damage), which is not time related. As set out in the actual example at section 6.7 above, circumstances can arise, where there are pleaded composite losses for indirect costs associated with a myriad of events where it is impossible (or most certainly highly impracticable) to link cause and effect.

In such circumstances, it is submitted that both the ‘but for’ and ‘dominant cause’ tests, although may be applied, are both ineffectual. The logic of such tests does not lend itself to

[669] *The Cultural Foundation & Anor v Beazley Furlonge Ltd & Ors* [2018] EWHC 2185, *PM Project Services Limited v Dairy Crest Limited* [2016] EWHC 1235.
[670] Which may be subsumed within a global claim or otherwise.

assimilation of composite losses. Indeed, in many circumstances, it would be a contrivance to attempt apply such causative tests in this manner. Understandably the legal fraternity either advising the parties, or the tribunal deciding on the matter at hand, will encourage the claimant and/or his expert to establish a link between the event(s)/causes(s) and their effects, however often this is not possible. A project director on a multibillion dollar project may be compelled to mobilise a range of operatives of varying designation (often in their hundreds, sometimes thousands), and deploy such staff to everchanging work fronts, which are not necessarily linked to any individual or obvious event(s). On projects of scale, it is often the case that delay and/or disruption occurs due to a myriad of causes(s) of varying culpability.

If such causative filters are rendered ineffectual and inapplicable for loss and expense claims deemed global in nature, then for competing causes, the next causative step to consider would be whether the defendant can argue that there are causes which relate to the loss and expense, which it is not responsible for, but have materially contributed to the loss. It is unclear in England what ‘material contribution’ may mean in construction law cases[671], but in Scotland, as explained previously, material cause requires consideration of dominance.

Taking the foregoing to its natural conclusion, it is submitted that a tribunal will adopt the following approaches for loss and expense claims where competing causes are not time related and when dominance cannot be established by the claimant:

i. In England: The first exercise is to consider whether the causes and their effects on the composite loss can be separated[672]. If this is not possible, then it is unclear whether apportionment is the next step to be undertaken. If apportionment is not allowed, then the claim will fail, if the claimant is unable to prove the defendant’s cause(s) were dominant. Conversely, if the defendant is able to show that a cause for which it is not responsible is material (i.e. read dominant), then the claim will fail.

ii. In Scotland: The first exercise is to eliminate (or separate) all loss and expense matters which are not the responsibility of the defendant.[673] Then it may be possible to link groups of causes with events[674]. If a dominant cause cannot be established, then apportionment between causes and events may be appropriate[675]. If apportionment is

[671] There is no reason to suggest that the English definition of dominance would not follow that set out by the Scottish courts.
[672] Supra note 11 [486 (d)].
[673] Supra note 372 [14].
[674] Ibid.
[675] Ibid [17].

not possible, then (as in England) the claim will fail, if the claimant is unable to prove the defendant's cause(s) were dominant. Conversely, if the defendant is able to show that a cause for which it is not responsible is material (i.e. read dominant), then the claim will fail.

6.9 Apportionment and Contributory Negligence

6.9.1 **Introduction**

It is apparent that for construction claims deemed global in nature and where competing causes of delay have been identified which are both the responsibility of the claimant and defendant, then the English courts will adopt the Malmaison Approach, in Scotland the competing causes, may[676] be able to be apportioned to the damages plead and the events identified. Where the competing causes relate to loss and expense, it is unclear if apportionment is available in England, whereas this approach has been confirmed in Scotland in *Doyle* and re-affirmed in *City Inn*.

In England, in the *Walter Lilly* case, Akenhead J's predominant position for not apportioning concurrent delays was due to the literal interpretation of the JCT 98 Standard Form Contract used by the parties, which set out that should a Relevant Event be responsible for delays, then an extension of time should be granted, irrespective if there were concurrent delays which were the responsibility of the contractor.

From a jurisprudential common law perspective, in England, there is a school of thought that considers that apportionment when concurrent delays are present, is not allowed because it offends the prevention principle[677] (i.e. in construction terms, an employer cannot levy liquidated damages, for critical delays for which it bears contractual responsibility). In Scotland, in the appellate decision in *Doyle*, Lord Drummond Young supported apportionment and considered that the procedure is not:

"…fundamentally different in nature from that used in relation contributory negligence or contribution among joint wrongdoers"[678]

Whilst the opinion raised by Lord Drummond Young above, is a worthy research topic to be examined on its own, given the relative dearth of literature on the matter, it is useful to

[676] It has been argued that Lord Drummond Young's use of the word 'may' instead of 'should' has avoided creating any rule in relation to apportionment in matters of concurrency.
[677] Supra note 581, para 76. The logic is based on the Walter Lilly case, supra note 11 [370].
[678] Supra note 372 [17]. Lord Drummond Young also echoed this position in the first instance City Inn Case at [158].

consider whether apportioning damages in contract law and in particular global claims is indeed similar, or at least not fundamentally different to the exercise applied in contributory negligence cases.

6.9.2 **The 1945 Law Reform (Contributory Negligence Act) 1945 and the Law Commission Report No. 219.**

It is trite law that prior to the 1945 Law Reform (Contributory Negligence) Act 1945, a tribunal was unable to apportion damages where both parties were partly at fault; and the law operated on an all or nothing outcome. In tortuous/delictual cases therefore, a defendant was able to sustain a complete defence, if it could prove that the claimant was even marginally at fault for the damage. Historically, this led to various inequitable outcomes where for example, wealthy factory owners were able to escape paying their poorer workers for worked based injuries, if they could prove that the worker had even a slight influence on the damage caused. To combat the foregoing inequity, and to *"…temper the injustice of this rule"*[679] the 1945 Law Reform Act was introduced, the thrust of which is conveniently summarised in Section 1(1) of the Act which states:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."[680]

In tortious cases, contributory negligence is assessed in terms of causation and blameworthiness.[681]It is submitted that for the purposes of this thesis, blameworthiness and fault are used synonymously when considered in a legal context.

For England and Wales, Section 4 of the Act defines 'fault' as:

"…means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence"[682]

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[679] Scottish Law Commission Report on Civil Liability – Contribution (Scot Law Com No 115), Part IV para 4.2
[680] Section 1(1) Chapter 28, Law Reform (Contributory Negligence) Act 1945. p 1. H.L.A Hart and Tony Honoré. Causation in the Law 2nd Edition Clarendon Press 1985, p 233. *Davies v Swan Motor Co*. [1949] 2 KB 291, 326.
[681] Law Commission, Contributory Negligence as a Defence in Contract, No. 219. Part II The Present Law para 2.5.
[682] Supra note 680, 3.

For Scotland, Section 5(a) of the Act defines 'fault' as:

"…wrongful act, breach of statutory duty or negligent act or omission which gives rise to liability in damages or would apart from this Act, give rise to the defence of contributory negligence" [683]

Despite the slight differences in definition, fault is therefore defined as firstly, liabilities which arise in tort and secondly, any other liability apart from the Act, that would give rise to the defence of contributory negligence. It was the latter section of this definition that raised the question as to whether the 1945 Law Reform Act could be invoked for breaches of contract.

The position in England was uncertain up until 1989[684] and the decision in *Forsikringaktieselskapet Vesta v Butcher*[685], from which, the current situation has been succinctly summarised by the England and Wales Law Commission as follows:

"…a plaintiff's damages may be reduced on the grounds of his contributory negligence where the defendant is liable in tort, or where he is co-extensively liable in tort and contract, but not where he is liable only in contract." [686]

Or put another way, by Jackson LJ[687]:

"Where C (Claimant) has concurrent remedies available in both contract and tort, C cannot defeat the pleas of contributory negligence by framing his claim in contract alone."

The foregoing was acknowledged by the Scottish Law Commission[688], and it became apparent, both north and south of the border that the Law Reform Act 1945 in its current form does not extend solely to matters of contract and may therefore have to be reformed.

In 1988, the Scottish Law Commission Report on Civil Liability - Contribution, Part IV set out the current position of contributory negligence in Scotland and provided further recommendation as follows:

[683] Supra Note 679, Chapter 28, para 5(a).

[684] Chapter 7 of McGregor on Damages 20th Edition, set out the historical analysis and the conflicting case law on this matter.

[685] *Forsikringaktieselskapet Vesta v Butcher* [1989] A.C. 852

[686] Law Commission, Contributory Negligence as a Defence in Contract, No. 219 Para 1.2

[687] Lord Justice Rupert Jackson, "Concurrent Liability: Where have things gone wrong" A paper presented to the Society of Construction Law and the Technology and Construction Bar Association at a meeting in London on 30th October 2014, No. 191, 17.

[688] Supra note 679, para 4.11 & 4.12 & 4.14.

"Where the defender's liability for breach of contractual duty of care is the same as his liability in delict for negligence, the plea of contributory negligence should be available as a defence whether the action is framed in delict or in contract." [689]

The Scottish Law Commission Report defines contributory negligence as follows:

"...carelessness on the part of the pursuer or a disregard for his own interests which has contributed to the loss which he sustained as a result of the defender's conduct." [690]

In a similar vein and with similar findings to the Scottish Law Commission Report, due to further wide support aimed at extending the defence of contributory negligent in contracts; in 1993, the England and Wales Law Commission published a report titled *"Contributory Negligence as a Defence in Contract"*. Consistent with the Scottish Law Commission Report on Civil Liability, the historical context, rationale, justification and outcomes are extensively and comprehensively set out in the England and Wales Report, however for the purposes of this thesis, it is submitted that certain aspects of the Summary of Recommendations of said Report are most relevant, in particular paragraphs 6.1 and 6.3:

"6.1 Where a plaintiff suffers damage as the result partly of the breach of a contractual duty to take reasonable care or exercise reasonable skill or both, and partly of his own contributory negligence, the damages recoverable by him in respect of that damage should be subject to a reduction" And

"6.3 The criteria for apportioning liability specified....(as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage) should be applicable to the apportionment for breach of a contractual duty to take reasonable care or exercise reasonable skill or both" [691]

In this context, contributory negligence in the England and Wales Law Commission Report is defined as[692]:

"...the plaintiff's failure to take reasonable care for the protection of himself or his interests"

[689] Scottish Law Commission Report on Civil Liability – Contribution (Scot Law Com No 115), para 4.15 [1988]. The Scottish Commission also recommended that in Scotland the 1945 Act be repealed and replaced with a separate Scottish legislation.
[690] Ibid, Part IV 4.1.
[691] England and Wales Law Commission, Contributory Negligence as a Defence in Contract, No. 219. Part VI Summary of Recommendations para 6.1 and 6.3
[692] Ibid, para 6.2.

The conclusions of both Law Commissions suggest that the defence of contributory negligence should be made available in contract, where the plaintiff has breached its contractual duty to take reasonable care for the protection of himself or his interests. This approach has gained support in various quarters, not least that of the former Head of the Technology and Construction Courts, Jackson LJ, who advocated that the 1945 Act should be amended to incorporate a defence of contributory negligence where there is a contractual duty to take care[693].

It is clear that both the English and Scottish Law Commissions envisage that contributory negligence should be available as a defence in contract where the plaintiff has failed to take reasonable care. The outcome of a defence of contributory negligence under these circumstances, has the effect that the tribunal will award damages to the plaintiff and then reduce that amount, if it has failed to take reasonable care. If this is correct, and adopting the position of the reasonable man on the street; why is this assessment of damage dissimilar to apportioning the loss, where both parties have breached the contract and have contributed to the loss? At least arithmetically, the effect is to reduce or apportion the total damages due taking into account contributory failures by the plaintiff. From the foregoing, it would, on the face of it, appear to be the case that Lord Drummond Young's comparison of assessing both apportionment and a defence of contributory negligence, is a reasonable one.

There are of course dissenters to such a view, Winter[694]is of the opinion that the assessment of apportionment is comparable to an assessment in contributory negligence is doubtful. In justification for such a position, he sets out three considerations:

i. The assessment takes place in a totally different body of law, i.e. tort and not contract.

ii. Since there is no contractual relationship between tortfeasor and the claimant (who is partly negligible), there is no system in place for keeping records.

iii. Does the tribunal exercise 'judicial discretion' and simply deduct a percentage from the plaintiff's damage?

Taking each of these valid contentions in turn, the following is noted:

i. In the first instance there is merit in considering the context of Lord Drummond Young's position on the matter set out in *Doyle*. Upon analysis of his judgement, it

[693] Supra note 687, para 6.21.
[694] Supra note 390, 11.

would appear to be the case that the eminent judge was simply comparing the 'assessment' of apportionment with the 'assessment' of contributory negligence, i.e. that the total damages amount claimed is simply reduced, proportionately to the plaintiff's contributive culpability to the losses averred[695]. It is suggested that he was not making any jurisprudential or moral comparisons, in terms of the origin and development of the laws of tort and contract.

Secondly, whilst tort and contract are of different genus under what could be considered the family of the law of obligations, that observation, in and of itself does not present a clear enough explanation as to why a valid comparison should not and could not be suggested. Jackson LJ has helpfully summarised what could be argued as the main difference in both areas of the law:

"The law of tort is based on notions of moral culpability, so that 'fault' is usually a pre-condition of liability. Contractual obligations (having been taken voluntarily) are strict, so that 'fault' is not usually a pre-condition of liability." [696]

It is therefore pertinent to consider whether a reduction/apportionment in damage should be treated any differently where 'fault' is identified as opposed to where a breach is identified.

Despite the general observation that fault is not usually a pre-condition of liability in contract in the UK, civil law systems such as those found in France and Germany do recognised fault as a condition of contract liability[697]. McBryde has suggested that in Scotland there are *"...early references to fault in connection with breach of contract"*.[698] Indeed, one must ask, does it matter if a party is at fault for a duty of care or has instead breached a contract – in relation to whether damages should be apportioned/reduced or otherwise?

It is submitted that there is no practical rationale for assessing damages on a construction project any differently, should the parties be at fault in tort, fault in contract or simply breach and that any attempt to contrive differences between these, in order to avoid apportioning loss is at risk of becoming lost in the obscurity of

[695] Supra note 469 [17].
[696] Supra note 687, 12.
[697] William W. Mc Bryde "The Law of Contract in Scotland" 3rd Edition, W Green & Son, 2007.Chapter 22 Part 3 paras 22-32.
[698] Ibid.

semantics. Indeed, whilst there is active discourse on the matter, an exploration into notions such as the morality of breaching a contract, no-fault negligence, the existence of fault in contract and concepts of wrongdoing and blameworthiness are beyond the scope of this thesis.

Based on equity and as suggested by both Law Commissions, if the tribunal is able to apportion if the plaintiff has failed to take reasonable care, then why should it not do so in both contract and/or tort? A question which may arise, under these circumstances is whether apportionment in contract should be allowed, where the plaintiff has, in fact, taken reasonable care, but has also breached the contract, which has contributed to the losses claimed? Again, an exploration of such a wide reaching question is a research topic in and of itself. Jackson LJ is of the opinion that there is a case for widening the defence of contributory negligence beyond breaches to take care[699].

In any event, the prevailing notion in England appears to suggest that apportionment, no matter whether the plaintiff has taken reasonable care or otherwise, or has contributed to the loss asserted, certainly in matters of delay, may offend the prevention principle. This notion will be considered further at section 6.9.3 below. To reiterate, in Scotland, apportionment is available for delay and/or disruption in construction disputes.

It is submitted that a pragmatic solution, which is sustainable for construction claim damages concerning extensions of time and/or disruption is to follow the guidance set out by the England and Wales Law Commission[700] and in the UK universally accept and adopt the following conclusion:

"Liability for breach of a contractual duty to exercise reasonable skill and care is clearly based on fault…."

Adopting such an approach would free the courts from esoteric and conflating arguments as to whether, in construction projects apportionment should be available where both parties are responsible for the loss and such apportionment can be rationally assessed. If a rational assessment cannot be made, then the claim must necessary fail if the requisite standard of proof has not been achieved and the burden is therefore not released. Indeed, to go further, as will become apparent, there have been no convincing

[699] Supra note 687, para 6.22.
[700] Supra note 691, para 3.23.

arguments as to why apportionment[701] cannot be allowable in contract where the plaintiff has taken reasonable care, but has nonetheless breached the contract, which has contributed in some manner to the damages plead.

The foregoing general approach, however, should not be adopted where strict liability in contract exists. Strict liability should, of course, take primacy over any general contractual or tortious legal principles, which often come into effect with greater force, in the absence of express contractual provisions to the contrary. The courts are in general reluctant to interfere with bargains made and expressly set out by the parties in their contract, for example in the 2018 case of *North Midland v Cyden Homes*[702], the appellate court accepted that contrary to the general position in England, a Relevant Event under this contract did not allow an extension of time during periods of concurrent delay, Coulson LJ had this to say:

"In my view, clause 2.25.1.3(b) is unambiguous. It plainly seeks to allocate the risk of concurrent delay to the appellant. The consequence of the clear provision was that the parties have agreed that, where a delay is due to the contractor, even if there is an equally effective cause of that delay which is the responsibility of the employer, liability for the concurrent delay rests with the contractor, so that it will not be taken into account in the calculation of any extension of time."[703]

ii. It is unclear what is precisely meant by Winter, in relation to there not being an equivalent system in tort, as opposed to contract, for keeping records. In either apportionment per se, or apportionment (or reduction in damage) by way of contributory negligence, the damage will simply be reduced according to whether a rational apportionment can be made or otherwise. In order to administrate justice between parties, depending on the circumstances, the courts have adopted various techniques for assessing the apportionment of damages, where both have contributed to the loss such as the Ogden Tables[704] or simply the evidence adduced, based on the legal standard to be applied. Through precedent, if entitlement to apportionment is established in the first instance, making a rational assessment in construction cases, will establish a common ground as to what is deemed acceptable, or otherwise, based

[701] Of course, it would be inappropriate to call apportionment, on these terms, contributory negligence, notwithstanding the arithmetic result would be the same.,
[702] *North Midland v Cyden Homes* [2018] EWCA Civ 1744
[703] Ibid [22].
[704] Officially titled: Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases.

on common sense principles. If a decision must be made, and indeed that is the primary function of the court, then admittedly this may arrive at a *"...rough and ready result"*[705], but there is an argument to suggest that this is not inconsistent with what is required of the civil standard of proof, i.e. that a claimant proves his/her case on the balance of probabilities, and not the criminal standard, i.e. that a claimant must prove his/her beyond reasonable doubt. The difficulty will be the regulation and consistency of decision making, when the vast majority of decisions made in resolving construction disputes are made through alternative dispute resolution procedures such as adjudication and/or arbitration and the fact sensitivity of complex construction projects.

iii. Winter has suggested that applying percentages associated with culpability in contributory negligence cases is an exercise in judicial discretion, which is different to the quantification of construction claims. This proposition throws up interesting considerations, not least Lord Drummond Young's comments in *Doyle*, where he stated that concurrent delays should be divided equally, unless there was special reason to suggest otherwise.[706]It is submitted that whilst applying percentages to degrees of contributory negligence in cases of personal injury have been used by the courts for decades, it will in the main be inappropriate for assessing complex construction cases, which may be capable of programme or quantum analysis, which affords a more rationale thoughtful approach than simply applying a "feels like" percentage. Winter had suggested that it cannot be as simple as deduction being made from the claimant's damages. In this regard he is correct, and which was reinforced by Akenhead J in the *Cleveland Bridge* case, *"It would be wrong just simply to take the total costs and artificially reduce them by some percentage because that would be simply arbitrary."* [707]Although not stated in relation to contributory negligence, it is clear that the courts will not be prepared to assess damages on such a basis, i.e. on a top down basis.

In connection with the application of percentages, in assessing damage once entitlement has been established, the courts frequently apply percentages to the quantum of delay and/or disruption in construction contracts. For example, in *Walter Lilly*, perhaps the most quoted case in relation to global claims in recent years, Akenhead J consistently uses percentages when assessing damage due, some examples

[705] Supra note 10 [17].
[706] Supra note 10 [16].
[707] *Cleveland Bridge UK Limited v Severfield – Rowen Structures Limited* [2012] EWHC 3652 (TCC) [166].

of the narrative used include: *"A reasonable minimum allowance is half"*[708] / "…*a reasonable minimum allowance is two thirds"*[709] / *"Less allowance of 40% allocation until 28 September 2007 and 80% allocation thereafter"*[710]. There are many instances in the *Walter Lilly* case where upon assessment of the evidence adduced Akenhead J has stated that *"This has been proven in full"* and/or *"It has not been proven",* therefore as well as applying percentages in some instances, Akenhead J is also comfortable applying an all or nothing approach for heads of claim which do not merit a percentage being applied[711]:

"I should emphasise that were I make allowances or adjustments….I will refer to realistic or reasonable minimums or other allowances in terms of percentages of resource or cost to be allowed where appropriate, where these represent the best that I can do on all the available evidence." [emphasis added].

6.9.3 **Contributory Negligence and the Prevention Principle**

As detailed above, straight contractual interpretations aside[712], there is a school of thought that, in England, apportionment in concurrent delay claims (which may be global in nature) is not available because it amounts to an act of prevention[713].

For example, Marrin, is of the opinion that *"…the prevention principle does apply even in cases of concurrent delay"*[714]. The rationale and the argument against apportionment is that in a period of concurrent delay, i.e. a period of critical delay caused by both the employer and the contractor:

"…the extension of time machinery will not be effective to avoid the application of the prevention principle unless the contractor is granted an extension of time for the whole period."[715]

This approach appears to be echoed in the SCL Delay and Disruption Protocol 2nd Edition which states that:

[708] Supra note 11 [552].
[709] Ibid.
[710] Ibid [531].
[711] Ibid [508].
[712] The courts will generally uphold express contract terms agreed by the parties, such as those described in the North Midland case above, (as the parties know best how to balance their risk profiles on a Project).
[713] Supra note 677
[714] Supra note 572, 7.
[715] Ibid, 11-12.

"The Protocol's position on concurrent delay is influenced by the English law 'prevention principle', by virtue of which an Employer cannot take advantage of the non-fulfilment of a condition (for example, to complete the works by a certain date), the performance of which the Employer has hindered." [716]

This view however is at odds with the pre-eminent book on construction law Keating which states that:

"Where, however the employer's and contractor's defaults cause concurrent delay, the prevention principle does not apply since the contractor will be unable to show that but for the employer's default it would have achieved the due completion date." [717]

The history of the prevention principle has been well articulated elsewhere[718], however for present purposes, the essence of the principle is that:

"…the promisee cannot insist on the performance of an obligation which he has himself prevented the promisor from performing. In construction law, that means that the employer cannot hold the contractor to a specified completion date if the employer has, by his own act or omission, prevented the contractor from completing by that date." [719]

From a construction context, in *Multiplex*, Jackson J set out the scope of the prevention principle from a construction context:

"(i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause the delay beyond the contractual completion date.

(ii) Acts of prevention by an employer do not set time at large, if the contract provides for an extension of time in respect of those events.

[716] Supra note 26, para 10.16. However, In *Adyard*, Hamblen J stated that the SCL Protocol is *"…of little assistance in relation to the legal causation issues…"*.

[717] Supra note 13, Chapter 10 Section 2(e) para 10-033. Keating's conclusions are based upon the cases of both *Adyard Abu Dhabi v S.D. Marine Services* [2011] EWHC 848 (Comm); (2011) 136 Con. L.R. 190 per Hamblin J at para 257 to 292 and *Jerram Falkus Construction Ltd v Fenice Investments Ltd* [2011] EWHC 1935 (TCC) per Coulson J [49 – 52].

[718] Morris Ross, "The Status of the prevention principle: good from far, but far from good?" Const. L.J. 2011, 27(1), 15-27. Dado Hrustanpasic "Time-bars and the prevention principle: using fair extensions of time and common-sense causation. Const. L.J. 2012, 28(5), 379-393, *Jerram Faulkus Construction Ltd v Fenice Investments Inc (No 4)* [2011] EWHC 1935 (TCC), *North Midland v Cyden Homes* [2018] EWCA Civ 1744.

[719] *Jerram Faulkus Construction Ltd v Fenice Investments Inc (No 4)* [2011] EWHC 1935 (TCC) [47].

(iii) Insofar as the extension of time clause is ambiguous, it should be construed in favour of the contractor." [720]

On the face of it, the foregoing appears relatively straightforward, however, when concurrency arises in construction delay claims, there appears to be confusion, at least in England, as to whether the prevention principle prevails or otherwise. To reiterate, the connection here is that the prevention principle has been used in justification from various commentators that apportionment is inappropriate.

It is submitted however, that contrary to this view, the main thrust of the case law in this area appears to predicate on the logic that the prevention principle does not apply in certain cases, based simply on analysis of the factual causation, surrounding the matter.[721]

For example, in Faulkus, Coulson J stated[722];

"… for the prevention principle to apply, the contractor must be able to demonstrate that the employer's acts or omissions have prevented the contractor from achieving an earlier completion date and that, if that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the contractor's own default, the prevention principle will not apply."

This approach seems logical, it is difficult to conclude that a contractor can rely on the prevention principle if it cannot prove that in absence of the employer breach, the project would have been late in any event. Under those circumstances, as a matter of fact, the employer did not prevent the contractor completing the works as planned.

In further support of this position, in the appellate decision in the 2018 judgement in *North Midland v Cyden Homes*[723] Coulson LJ, considered that a clause may be rendered inoperable if it offended some *"…overarching principle of law or legal policy."*[724] In his conclusions on the matter, Coulson LJ set out the following rationale relevant to this ratio: [725]

i. The prevention principle is not an overriding rule of public or legal policy;

ii. The prevention principle has no obvious connection with concurrent delay;

[720] *Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited* (No.2) [2007] BLR 195 [56].
[721] Supra note 719 [52], supra note 576 [292].
[722] Ibid *Falkus*.
[723] Supra note 702.
[724] Ibid [24].
[725] Ibid [29] – [36].

iii. Akenhead J's analysis in *Walter Lilly* was unconnected to the prevention principle[726]; and

iv. Parties can decide to contract out of the effects of the prevention principle.

In summary therefore, it would appear to be the case that in England, the argument that apportionment is not possible in matters of concurrent delay because it offends the prevention principle is now redundant. In England therefore, the courts adoption of the Malmaison Approach for matters of concurrent delay, is justified by other considerations, but not the prevention principle. It is submitted that it may be that the lack of support for apportionment in England, may be because of matters of policy, which is discussed further at Chapter 7 below.

6.9.4 **Conclusions**

In light of the foregoing, since both the English and Welsh, and Scottish Law Commissions (as well as Jackson LJ) have advocated that contributory negligence should be allowable as a defence in contract, where the plaintiff has failed to take reasonable care; it would be plausible to predict such a position being adopted in the future, which would of course require either amendment to the existing Act, or the introduction of a new one(s). It is curious however, that since the Law Commission Reports were drafted over 20 years ago, there appears to be no appetite by either parliament or the courts, to incorporate and administer the Commission's findings.

If it were ultimately decided that a defence of contributory negligence in contract was made available, at least in England, such a notion would potentially create a clash of judicial thinking. By way of explanation, say the contractor claimed for an extension of time, but upon analysis of the evidence adduced, it was found that as a matter of fact, the delay was concurrent with the contractor's own events, which were caused because the contractor failed to exercise reasonable care. In such circumstances, would the employer be able to claim a defence of contributory negligence in contract, and be able to sustain an argument that the overall delay period should be reduced, due to the contractor's failure to take reasonable care? If that is the case, then how does this juxtaposition accord with the Malmaison Approach in England, i.e. that the contractor receives a full extension of time for matters for periods of concurrent delay?

[726] In this regard, Coulson LJ was referring to paragraph 370, in *Walter Lilly*.

If the contract expressly states that a contractor is entitled to an extension of time for employer events, such as found in the JCT Suite of Contracts and confirmed in *Walter Lilly*[727] then it may be the case that apportionment is not available, and the Malmaison Approach is sustainable. However, there may be circumstances where the wording and intent of the contract is different to the JCT Suite and does not expressly state that an extension of time will be given for employer events or may that the contract administrator has to act in a manner which is similar but not the same as acting fair and reasonably. Then surely, under these circumstances, the employer would be entitled to a defence of contributory negligence, if adequately plead, which is in essence apportionment through the backdoor in England.

At the very least it is certainly credible to suggest that Lord Drummond Young's comparison of how apportionment is assessed in delay and disruption claims is not, in fact, dissimilar to an assessment of how damages is apportioned in contributory negligence cases[728]. Of course, where it is possible to do so, allocating straight percentages of the damages to each party should be avoided if some other form of rational apportionment can be carried out, although it may be appropriate in certain circumstances. Indeed, in Scotland, following the appellate decision in *Doyle*, concurrent delay between the contractor and employer is to be apportioned equally, unless there are special circumstances. What constitutes a special circumstance has not been articulated; perhaps the definition has been deliberately avoided as it will allow the courts to flex the apportionment assessment in accordance with the fact sensitivity and causative potency of each case plead in such a manner.

Whilst there may be academic merit in articulating differences between the notions of fault or otherwise in tort and/or contract, it is submitted that in the instances of competing/concurrent causes in construction contracts, it is a less important concept. If both parties have breached the contract, similar to both parties having been at fault in either tort and/or contract, why can the matter not be rationally apportioned, and the damages reduced accordingly if both parties have contributed to the loss?

It is trite law that a decision of culpability contributory negligence defences is based upon both blameworthiness and causation. Since global claims in construction contracts, predicate on an analysis of delays on a project and/or the associated losses, it submitted that the

[727] Supra note 11 [370].

[728] Stephen Furst QC has likened the underlying reasoning for apportionment in Scotland to the mesothelioma cases, the underlying appears to be the same, i.e. you cannot allow an employer to benefit from his own wrong. Supra note 16, 20.

apportionment contribution should be predominantly considered in terms of causation. This notion was considered by Lord Drummond Young in the first instance case of *City Inn*:

"...two main elements are important: the degree of culpability involved in each of the causes of delay and the significance of each of the factors in causing the delay. In practice culpability is likely to be the less important of these two factors, Nevertheless, I think that in appropriate cases it is important to recognise that the seriousness of the architect's failure to issue instructions or of the contractor's default may be a relevant consideration. The causative significant of each of the factors is likely to be more important." [729]

How blameworthiness is taken into consideration when assessing damage, is beyond the scope of this thesis.

Given that the prevention principle cannot be relied upon in relation to concurrent delays, it would appear to be the case that the sole rationale of the English courts to avoid apportionment of damage and to follow the Malmaison Approach is by taking the literal contractual provisions, which to date have focused on various iterations of the JCT Suite of Contracts, i.e. if an employer's Relevant Event causes a critical delay which is concurrent, the contractor will be awarded a full extension of time, but no loss and expense borne out of the delay (the prolongation costs), since according to Akenhead J there is nothing expressly set out in the contract which suggests that the extension of time should be reduced. In *Walter Lilly*, Akenhead went further and stated[730]:

"The fact that the Architect has to award a "fair and reasonable" extension does not imply that there should be some apportionment in the case of concurrent delays. The test is primarily a causation one."

It is suggested that with respect, this conclusion is incongruous, with the realities of what is an everyday occurrence on a construction project. If an architect or contract administrator (who are not experts on construction law matters), is obligated to review delay and/or disruption on a project on a fair and reasonable basis, then acting with the guarded discretion of a reasonable man and using common sense principles, why would he/she not take both contractor and employer delay and/or disruption into consideration if they have contributed to the delay/loss. In *Malmaison*, Dyson J agreed with the claimant's counsel in this regard, who stated that the architect is:

[729] Supra note 372 [158].
[730] Ibid.

"…not precluded….from considering the effects of other events when determining whether a Relevant Event is likely to cause delay to the Works beyond Completion.[731]*"*

On analysis of the case, the parties had separately and previously agreed that where there were two concurrent causes of delay, one a Relevant Event and the other not, then a full extension of time should be awarded.

As recognised by Cocklin, it would appear that Dyson J and the English courts have[732]:

"...side-stepped the full effect of this judgement in favour of a restrictive interpretation...premised on an agreement between the parties"

It is submitted that the conclusions of Dyson J, in adopting the Malmaison Approach which sounded the dell knell for apportionment, is at odds with the courts previous thinking, where as late as 2007 in *Maersk*[733]despite not being possible in this instance, Wilcox J stated that apportionment was possible:

"If an apportionment, based on evidence is possible, albeit difficult it would be manifestly unjust to deny a remedy, where there are plain contractual breaches by the defendant."[734]

It is suggested, that in the absence of clear and consistent judicial thinking in relation to apportionment in England, the courts may have decided to adopt the Malmaison Approach for policy decisions. One answer may be that the courts find it unpalatable that (notwithstanding the prevention principle does not appear to apply in periods of concurrent delay between the contractor and employer) the employer is able to levy liquidated damages despite his own breaches causing delay to the project. Perhaps their position is that, on a basis of equity, and as a commercial balancing act, the contractor receives a full extension of time (protecting him from liquidated damages) but, in turn, is not allowed to claim the loss and/or expense borne out of the consequence of such delays. Section 7.5 below, explores the rise of liquidated damages and their appropriateness or otherwise in a construction contract.

If as a matter of policy that the English courts consider this is the fairest way to assess concurrent delays, then it would be very helpful if they would simply say so, rather than having the construction law fraternity, second guessing the correct judicial thinking on the matter, which has most certainly added to uncertainty in this area.

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[731] Supra note 428 [14].
[732] Supra note 568, 3.
[733] Supra note 448.
[734] Ibid [690].

6.10 Burden of Proof

6.10.1 Introduction

This thesis has identified that in both England and Scottish jurisdictions, if a defendant is able to assert that a cause, for which it is not responsible, is material and/or significant, and which cannot be readily separated from the claim as a whole[735], then the claimant's global claim will fail. On the face of it, it would be plausible to suggest that the foregoing statement shifts the burden of proof onto the defendant, who must wedge a cause of significance, into an otherwise opaque and homogenous claim. Putting the defendant in such a position is at odds with the general rule that *"…he who avers must prove"*[736], and must do so on a balance of probabilities, as discussed in Chapter 2, however findings based upon the historical case analysis in Chapters 3,4 and 5, suggests that the courts believe the burden of proof does not shift to the defendant, despite learned commentary to the contrary.

6.10.2 Burden of Proof – The Case Law

The first case in relation to global claims which touched upon a perceived shift in the burden of proof from the claimant to the defendant, was *Wharf Properties*. Wharf had blamed ECA (the architect) for excessive variations and that it would:

"*…be necessary at trial to consider all variation instructed in order to establish which of them were unnecessary or ought not to have been ordered*[737]*"*

And that

"…it will be necessary at trial to consider all variations instructed in order to establish which of them are unnecessary"[738]

However, Penlington J.A. during the Appeal said that given that it would appear the court is being asked to determine what variations have been excessive *"…is enough in my view, to make this speculative litigation which would throw an enormous and quite unfair burden on the defendants and should not be allowed to continue"*[739].

[735] And in Scotland, if it cannot be apportioned.
[736] *SGL Carbon Fibres Ltd v RBG Ltd* [2012] CSOH 19, para 21. Also associated with the Latin maxim *semper necessitas probani incumbit ei qui agit* – which may be translated; as the burden of proof always lies with him who alleges.
[737] Supra note 216, 9.
[738] Ibid.
[739] Supra note 216, 13.

Although not directly concerned with a global claim, per se, here we see the courts challenging claimants who (perhaps tactically) attempt to bring unparticularised claims to trial in the hope that the defendants will be forced to justify their position.

In a similar manner relating to variations, in *Rugby*, the claimant Bernhard had claimed that due to mismanagement, the employer's construction manager had caused it to incur excessive variations, contributing to its global losses. Humphrey Lloyd J agreed with the defendant's counsel who had argued that a pleading without adequate causal nexus was oppressive to the defendant and relying upon a passage from Bryne J in *John Holland* stated that it may;

"…involve the defendant in extensive discovery of documents relating to the performance of the project; it may mean that at trial the defendant must cross examine the plaintiff's witnesses to expose the flaws in a claim which assumes that the defendant is, itself, responsible for every item of the plaintiff's costs overrun; it may mean that the defendant must lead evidence to explain what, in fact, was the impact of each of the acts complained of on the project."[740]

Humphrey Lloyd J gave the claimant leave to provide further particularising, and in doing so had this to say:

"…*A party will not be entitled to prove at trial a case which it is unable to plead having been given a reasonable opportunity to do so, since the other party would be faced at the trial with a case which it also did not have a reasonable and sufficient opportunity to meet."*[741]

In the appellate decision in *Petromec*, the parties had differing views as to how reasonable extra costs were to be calculated for upgrading a vessel to explore a different oil field, than was previously tendered for. The claimant Petromec pleaded that it was entitled to difference in the reasonable costs it may have incurred upgrading the vessels (prior to changes in the specification), and the costs it actually incurred. Petrobas countered stating that a calculation presented on such a global basis, with no casual nexus would, in effect, unfairly reverse the burden of proof and that Petromec should, articulate the differences in the specification and the particular costs incurred. Cooke J found in favour of the defendant and that it was necessary that Petromec attribute the additional costs to the effected changes between specifications.

[740] Supra note 304 [104].
[741] Ibid [137.2].

In *Doyle*, Lord Macfadyen confirmed that notwithstanding the evidential difficulties attaching to a claim plead on a global basis:

"...does not, however, absolve the pursuer from the need to aver and prove the casual connections between the events and the loss and expense." [742]

In *Walter Lilly*, Akenhead J stated that it when a party asserts a global claim, it is wrong to suggest that the burden of proof transfers to the defending party:

"...It is of course open to that defending party to raise issues or adduce evidence that suggest or even show that the accepted tender was so low that the loss would have always occurred irrespective of the events relied upon by the claimant contractor..." [743]

The logic of the courts in regard to the burden of proof, also holds for defendants counter claiming (of course a common tactic in any action), so in *Clark* for example, Davies J reminded the defendant who had claimed for breaches of contract and professional negligence against the claimant that *"...there is no burden of proof on Clark to prove that there were other causes of loss for which it is not responsible."*[744]

In *Sisk*, Carr J had to consider a challenge to an arbitrator's decision where he had suggested that despite the burden of proof resting with the claimant, there is nonetheless and evidential burden on the defendant. The circumstances were that the defendant had previously evaluated the work done by the claimant at a higher value to that finally awarded. In this instance Carr J found no material error of law by the arbitrator and stated that in the particular circumstances the arbitrator was simply saying in "practical terms" that the defendant may have an evidential burden to explain why it had previously valued the work done by the claimant, at a higher value.

6.10.3 **Conclusions**

It is clear that the courts have went to some lengths to clarify that the burden of proof rests with the claimant, indeed in *John Holland*, Bryne J recognises that in an adversarial court system, it is accepted that litigation "*...inevitably imposes burdens on the parties*"[745],

[742] Supra note 10 [35].
[743] Supra note 11, [486 (d)].
[744] Supra note 520 [6.26].
[745] Supra note 294 [22].

however the court must *"…ensure that, as far as possible, these burdens are not unreasonable and are not unnecessarily imposed"*[746].

Bryne J elaborates pragmatically on the matter in his article from 1995 which is still relevant today.[747]The article is sympathetic to a defendant who, at an interlocutory stage finds itself told that the claim may ultimately fail, however the claim will not be struck out, and of course there is no certainty on the outcome when a decision is finally made at trail. Bryne J states that the perhaps the only way a defendant can be protected is by a:

"…meticulous insistence on this need for adequate particularisation that the spurious claim can be exposed at an early stage and that the defendant and the court may know exactly what it is that the claimant is contending for."[748]

Whilst it is generally accepted that as a matter of law the burden rests with the claimant, if a claimant meets its burden, it is trite law that the burden then shifts to the opposing party. Notwithstanding that a case plead on a global basis, has various hurdles overcome, before a tribunal will consider an award; this thesis has identified that one way to defeat a global claim, is for the defendant to prove that within the composite whole claimed, there existed a cause which was material and/or significant, and which was not the responsibility of the defendant. If this can be proven and cannot be reasonably separated (or in Scotland further apportioned), then a global claim will fail.

Of course in adopting such a strategy, there is work to be done by the defendant, who, as stated above may find itself in the incongruous position of asserting that a cause is significant and/or material but will not want to quantify such a cause; because as soon as it is quantified, and can be easily separated, then the remainder of the global claim may be allowed to stand.

It is submitted however, that this tactical approach (which is one of many) does not exonerate the claimant from proving its case as a matter of fact.

In 2007 Winter stated based on the decision in *Doyle* it was now *"very easy"*[749] for a claimant to plead it meets the requirement of a global claim. His rationale for arriving at this position was borne out of Lord Macfadyen's commentary in *Doyle* at paragraph 33; where he stated

[746] Ibid.
[747] Supra note 275.
[748] Ibid, 416.
[749] Supra note 390, 13.

that it is not an issue of whether the circumstances are such to permit a claim, as the pursuer had stated;

"Despite the Pursuers best efforts, it is not possible to identify casual links between each such cause of delay and disruption, and the costs consequences thereof."[750]

Borne out of those averments, Lord Macfadyen then stated:

"That averment having been made, the defenders accept that the pursuers are in principle entitled to advance a global claim. I prefer to reserve my opinion on whether such an averment is essential to the relevancy of a global claim, on what the pursuers need do to establish that averment, and on what the consequences would be if they failed to do so."[751]

Winter is of the opinion that such averment is essential and led him to conclude that if *Doyle* was adopted by the English courts it would;

"… shift the balance of risk from defendants to claimants in respect of global claims, because the safety-net would make it much less likely that there will be a total failure of a claim. As the effect of that would be likely to encourage global claims, the author respectfully suggests that the balance of risk should not be shifted."[752]

It is submitted that in *Doyle* while there may have been merit in Lord Macfadyen expanding upon what averments are essential and the consequences of failing to do so, he simply reserved his position on the matter. However, it cannot be the case that simply because a party states that it is not possible to link cause and effect, this automatically engenders entitlement to the global losses. Indeed, post 2007 case law (including Akenhead J's guidance in *Walter Lilly*), indicates that a claimant will also have to;

i. Prove its case as a matter of fact: events entitle it to delay and/or disruption, those events caused the loss and that the delay and disruption causes loss and expense (or damage);

ii. Satisfy any conditions precedent in the contract;

iii. Prove the losses would not have been incurred in any event;

iv. Prove (or at least defend against) that no other significant or material cause is present and cannot be disentangled; and

[750] Supra note 10.
[751] Supra note 10, [33].
[752] Supra note 390, 17.

v. Make a considerable effort to show that could not disentangle the global cause and effect asserted.

Winter goes onto say that any expert *"worth his salt"* should show linkage between cause and effect, given the "right records" and "sufficient time". Ordinarily of course, the expert carrying out the initial exercise would not be an independent expert. The first blush analysis would be carried out by a party's claims consultant.

It is submitted that the burden of proof should not and does not shift to the defendant. Whether a claim is plead on global basis or otherwise, it is common practise in dispute resolution forums that both claimant and defendant will appoint claims consultants and independent expert's in support of their case. In doing so the defendant's team will, in any event, carry out their own analysis to either articulate its defence, or assert its counterclaim. If a claimant asserts an unparticularised claim, then the tribunal will decide whether the burden of proof has been released, based on a balance of probabilities and the evidence adduced from that claim. It is understood that doing so is a risky enterprise, but it does not mean that the defendant must work harder to articulate its position, simply because the claimant has failed to do so.

Winter cites Dr Nael Bunni in support of his position, who considers that:

"Global Claims invariably avoid indicating the precise case to be met and enable the claimants to shift the practical onus of proving the extent of their damage, or lack of it, to the defendant or to the tribunal, if the tribunal insists on a proper particularisation and detailed and critical analysis of quantum." [753]

If the tribunal insist upon proper particularisation and detailed critical analysis of quantum, and this is not forthcoming by the claimant, then decisions post *Walter Lilly* would suggest that the global claim will fail, very often in its entirety[754].

Finally, as has been set out previously, in Scotland, when evaluating a global claim, if a cause(s) cannot be deemed dominant, and when once all other causes and effects can be readily separated from the whole, the tribunal may carry out an apportionment exercise, which

[753] Nael Bunni, *The FIDIC Forms of Contract*, Oxford, Blackwell (3rd Edition, 2005), 337.
[754] *William Clark Partnership Limited v Dock St PCT Limited* [2015] EWHC 2923 TCC, *Amey LG Limited v Cumbria County Council* [2016] EWHC 2856 (TCC).

may produce a *"rough and ready"*[755] result. Winter has suggested that a tribunal cannot carry out that apportionment as follows:

"…start with the global figure asserted by the claimant and deduct from it the sums it considers are not the responsibility of the defendant? If that were right, then the burden of proof passes almost entirely to the defendant…"[756]

Under these circumstances, it is agreed that a tribunal cannot start with a top down approach, there must be some rational way of apportioning the losses equitably or not at all. If apportionment is not possible, then a tribunal must decide to award either all/or none of the global claim, based on the significance or otherwise of the competing causes, and whether the case has been proven as a matter of fact.

6.11 Quantification of a Global Claim

6.11.1 **Introduction**

The previous sections of this chapter have examined various legal principles / rules, such as dominance, contributory negligence in contract, concurrency, and the prevention principle which can be considered as part of a tribunal's armoury, when deciding upon matters which are potentially global in nature. Once the judicial triptych, set out in section 1.1 above has been established, i.e. entitlement, the existence of loss and a causal link between these is identified; then legally, the cause is deemed to have occurred and the subsequent assessment of damage incurred, must now be established.

In claims of a global nature by absolute definition, there are a number of events present, a body of loss, and a lack of causation between the events and the losses. If the claimant establishes an entitlement to loss, it becomes readily apparent that the assessment of that damage becomes problematic for a tribunal. In many instance's causation will have to be inferred and of course the assessment of the loss will then have to be made on the balance of probabilities. Notwithstanding these inherent difficulties, Townend is of the opinion that:

"Just because it is not possible to ascertain damages precisely, so long as the Claimant does his best then that is sufficient". [757]

[755] Supra note 10 [17], Inner House.
[756] Supra note 390 [11].
[757] Samuel Townend, 'Certainty and the Loss of Chance in the Assessment of Damage (Or the Uncertainty: Loss of Chance' A seminar by Keating Chambers 31st May 2005.

It is submitted that, what Townend is referring to is that a tribunal has to satisfy itself, on balance what the assessment of the loss may be[758], even if the claim is not fully made out; of course, if the claimant has done his best, then while that is sufficient for himself, it is another matter whether it is sufficient for the tribunal. This section of the thesis will examine the wording of both the Scottish and English courts in relation to how damages are assessed when deemed global in nature and where it has been possible to do so[759], record some examples of how the courts have assessed such damage.

6.11.2 <u>**The Measure of Damage - Value or Cost Based**</u>

When a claim which is deemed global in nature is presented by the claimant[760], how it is plead can take many and varied forms. As this thesis is concerned with the legal development of global claims, it does not examine and comment upon the efficacy or otherwise of the various delay analysis methodologies and/or the various ways in which disruption or loss and expense can be calculated[761].

As has been identified earlier in this chapter, global claims can be related solely to delay, loss and expense and/or both of these matters. However, since global claims are ultimately concerned with pecuniary damage, this section will focus on how the courts assess such damage, which is either time related or otherwise.

It is often the case that as part of its damages claim, a claimant may provide a tribunal with a mixture of value based calculations and/or direct and indirect costs. Value based calculations are ordinarily based upon a pre-agreed schedule of rates, bill of quantities rates, daywork rates or a new rate created by the claimant which is not included in the original contract appendices or pre-agreed by the parties. By their nature, value based calculations will contain an element of profit. A value based approach is a convenient and conventional way for the parties to evaluate additional work during the course of the contract, especially where the contractor is contractually entitled to use the pre-agreed rates. Indeed, in addition to the evaluation of changes, it can often be the case that the parties will resort to the pre-agree rates in the contract

[758] As set out previously, future losses are based on an assessment by the decision maker, and not on a balance of probability.
[759] There is a dearth of court information as to the assessment of loss in claims deemed global in nature, never mind how such assessment is arrived at.
[760] Although not necessarily plead as a global claim.
[761] Supra note 26, SCL Core Principles 7, 10, 11, 12, 14, 16, 17, 18 and 20 – provide helpful guidance in relation to how claims for delay and or disruption should be calculated.

for the evaluation of prolongation costs[762], if extensions of time have been granted by the contract administrator; this was acknowledged by Akenhead J in *Walter Lilly*[763] and its assessment is catered for in most standard form contracts[764].

However, when a claim is to be decided by the courts, since pecuniary damages are bound by the doctrine of *restitutio ad integrum,* i.e. to restore the injured party to the position it was in prior to the breach[765] - a value based assessment will be inappropriate (unless expressly stated in the contract), and the claimant will be required to pursue a cost based approach[766]. These costs may well be an amalgam of direct and/or indirect costs. At this juncture however, before direct and indirect costs are examined, it is important to differentiate between parts of a global claim which may simply be claims for additional work which the employer refuses to pay, and prolongation or disruption claims, which are claims where it is the original work which has been carried out less efficiently.

This differentiation is recognised by Winter[767], and it will therefore be important for the courts to assess what may simply be changes to the work, differently to claims which may form part of a global claim[768]. Since global claims are normally based upon claims for extensions of time and/or disruption, the remainder of this section will focus on claims deemed global in nature.

In essence, a traditional construction claim (which may be global in nature) will ordinarily be calculated on the basis of indirect costs. Indirect costs can be contrasted with direct costs,

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[762] Christopher Ennis, 'Entitlement to Time-Related Costs in Prolongation Claims – What Needs to be considered'. A paper presented at the African Society of Construction Law conference in Johannesburg on 20th November 2018. December 2018 D216.

[763] Supra note 11 [467].

[764] Including the FIDIC, JCT and NEC Suite of Contracts.

[765] *C&P Haulage Co Ltd v Middleton* [1993] EWCA Civ 5 – *"It is not the function of the courts where there is a breach of contract knowingly to put the plaintiff in a better financial position than if the contract had been properly performed."*

[766] Depending on contract drafting, a claimant may be entitled to overarching loss of business profit. The wording of the contract clauses is significant as to whether profit is deemed a direct loss or otherwise, see *British Sugar v NEI Power Projects Ltd* [1998] 87 BLR 42, *Deepak v ICI* [1999] 1 Lloyd's Rep 387 and *Pegler Ltd v Wang (UK) Ltd* [2000] BLR 218, *GB Gas v Accenture* [2010] EWCA Civ 912. Also, the loss of head office profit may also be allowable, if it is can be proven that the breaches meant that the claimant's employees could have been employed elsewhere. Although a formulaic approach such as Emden have been approved by the courts, there is still a high hurdle for the claimant to prove loss of opportunity – see *Walter Lilly* at para 540 onwards.

[767] Supra note 390, 7.

[768] The main differences between a change/variation and a claim is that a variation will ordinarily be valued ex ante, entitlement will be accepted by the contract administrator, evaluation is normally straight forward and the procedure is well defined in the contract. A claim is normally valued ex post, an assertion of the contractor's rights, normally for delay and/or disruption to the original scope, difficult to calculate and resisted by the contract administrator.

which are the cost of the labour, plant and materials, specifically incurred to carry out a discrete work activity, which is either the original contract work, or additional works. Indirect costs are generally understood as being the non-productive costs of carrying out either the original contract work and/or additional work. Ordinarily, indirect costs take the form of either prolongation costs, which are the time related and associated with critical delay (i.e. site establishment, time related staff / operatives, transportation, cost of finance, overheads, interest etc); or disruption costs (i.e. more labour/plant to carry out the original works, possibly acceleration and/or non-critical work activity based work taking longer) which relate to carrying out the same work less efficiently[769].

Undoubtedly, perhaps the pre-eminent solution to maximise a claimant's chance of successfully pleading a global claim for delay and/or disruption will be its ability to rely on its site records. This proposition is scarcely novel, and for decades the construction fraternity have revelled in the regurgitation of Max Abrahamson's sage words that a party to a dispute will learn three lessons too late, *"…the importance of records, the importance of records and the importance of records"*[770]. Examples of the kinds of records a claimant should maintain are conveniently set out in the 2nd Edition of the SCL's Delay and Disruption Protocol[771].

Indeed, it is further recommended that during the contract negotiation, the parties should meet and agree the methodology and types of records which will function as satisfactory proof, of delay and/or the associated losses. This approach is also acknowledged in the Core Principles of the SCL Protocol, although not legally binding, it provides excellent guidance as to what will ordinarily be expected by the courts, and/or expert witnesses.

Often a construction contract will be based upon a standard form (with some particularisation). Whilst the standard forms may provide some indication as to what will be expected of the contractor, in terms of proof when evidencing delay and/or disruption on site, the wording will unfortunately be indicative only. For example:

i. NEC 3[772]: The Core Clauses do not actually expressly set out the details which are to be used either in an extension of time claim and/or disruption. Ordinarily clause 60.1 (18) will often be relied upon, and a compensation event for delay and/or disruption maybe pursued for a breach by the employer which is not one of the other compensation

[769] Indirect costs in this context can be contrasted with consequential losses – see *Pegler Ltd v Wang* (UK) Ltd [2000] BLR 218.
[770] Max W Abrahamson, *Engineering Law and the ICE Contracts*, 4th Edition Applied Science Publishers 1979.
[771] Supra note 26, Appendix B Record Types and Examples.
[772] New Engineering Contract (NEC3) June 2005.

events, set out in the contract. However, Clause 61.6 allows a retrospective amendment to a compensation event, if what has been forecasted in terms of extension of time and the associated losses, is different to that actually realised, if certain assumptions are included in the original quotation pursuant to Clause 65.2. Plus, given that NEC 3 is known to be highly administrative and collaborative, with provisions such as the requirement for risk reduction meetings, maintaining a risk register, the compensation event procedure, what the contractor is obligated to show in its programme baseline and revised (Clauses 31 and 32 refers), and the payment mechanisms set out in the various Option choices, it naturally amalgamates a body of contemporaneous documentation. In fact, in a survey carried out by Kingston University in 2016, it was found that in the adjudication dispute forum, disputes under NEC 3 contained a greater volume of site records than any other contract.

ii. FIDIC[773]: Clause 20.1 titled Contractor's Claims sets out that if a contractor considers itself entitled to an extension of time and/or additional payment, it must *"keep such contemporary records as may be necessary to substantiate any claim, either on Site or at another location acceptable to the Engineer"*.

iii. JCT[774]: Clause 4.23 (.2 and .3) titled Loss and Expense the contractor must *"submit to the Architect/Contract Administrator upon request such information as should reasonably enable the Architect/Contract Administrator to form an opinion…"*and *"provide details of the loss/or expense as are reasonably necessary for such attainment"*. For an extension of time, the contractor must pursuant to Clause 2.27 (.1, .2 and .3) , *" …give written notice…of the material circumstances, including the cause or causes of delay"* and *"give particulars of its expected effects, including an estimate of any expected delay in the completion of the Works…" and supply further information as the Architect/Contract Administrator may at any time reasonably require"*.

Prior to pursuing an extension of claim and/or loss and expense claim, which may be global in nature, a claimant would be wise to ensure that it has, in the first instance satisfied its obligations expressly set out in the contact. For example, in *Falkland Islands v Gordon Forbes Construction (Falklands) Limited*[775]the contractor's claim failed because it unsuccessfully

[773] FIDIC 1999: For Building and Engineering Works designed by the Employer
[774] JCT 2005: Standard Building Contract with Quantities for use in Scotland. (SBCC)
[775] *Attorney General for the Falkland Islands v Gordon Forbes Construction (Falklands) Ltd* (No 2) [2003] WL 21729237.

plead that the requirement for *"contemporaneous records"* as expressly set out in their 4th Edition FIDIC Contract, could be substituted for witness statements, or used to fill the gaps. Acting Judge Sanders said that they could not, and that *"It would be perverse, I believe, if a Contractor who fails to comply with the terms of the contract, should then be allowed to introduce non-contemporary records (this is to say a document with is neither a record nor a contemporary document) to support a claim, particularly as this cannot be properly investigated by the Employer"*[776] and *"A witness statement cannot be a substitute for contemporary records, therefore, but the arbitrator could take account of a witness statement which seeks to show when and how a contemporary record came into being.*[777]*"*

Acting Judge Sanders defined "contemporary records" as *"original or primary documents, or copies thereof, produced or prepared at or about the time giving rise to the claim, whether by or for the Contractor or Employer"*[778] and that a claim will fail, if the contract expressly requires such documentation to be produced, although inference can be drawn to support gaps which may be present in existing contemporaneous records.

6.11.3 **Construction Claim Damages – Causation**

When assessing either prolongation and/or disruption costs, a judge or tribunal will therefore be primarily concerned with the indirect costs allegedly incurred by the claimant, which are associated with the events and losses evident of a claim deemed global in nature[779]. By definition, given that it is either impossible or impracticable for the claimant to disentangle the events and the losses claimed, the matter then falls on the judge(s) to determine the value of the claim. As set out in Chapter 2 – at least in theory, a judge will be guided by the rules of causation, both legal and factual. In a global claim environment, unless a judge(s) can separate cause and effect, it will often be the case that a causal nexus between event(s) and or loss(es) will have to be inferred.

As set out at section 2.3.4 above, when assessing a global claim, a judge will be governed by the test of remoteness set out in *Hadley v Baxendale*, therefore it may be that upon analysis not all damages will be recoverable. Of course, the evaluation of a global claim will not be an exact science and indeed that law does not require it to be so. Therefore, upon considering

[776] Ibid [29].
[777] Ibid [30].
[778] Ibid [33 (7)] – [33 (8)].
[779] Supra section 3.6. Refer to Rugby case where counsel differentiate between variations and claim costs.

whether to make an award where costs may be known or for future estimates of the losses associated with the breaches asserted, the courts will look for an:

"…*intelligent assessment of the legal issues and an assessment of what can be proved or not, on a balance of probability. That latter assessment will be partly objective, for instance corroboration by other witnesses or contemporaneous documents, and partly subjective as to the chances of key witness being believable."*[780]

It is therefore pertinent to note that the courts will place considerable weight on the credibility of the key witnesses of fact, when assessing a claim which may be global in nature. Ordinarily however, as set out in *Falklands*, this will ordinarily be to draw causative inference from contemporaneous documentation should there be gaps in the evidence and to allow the tribunal to satisfy itself on balance of probability on an unsubstantiated element of the claim.[781]

Importantly, as identified by Day and Cope, in *Walter Lilly*, Akenhead J was keen to emphasise that a tribunal should not adopt a *"…mechanistic or ritualistic approach"*[782] to issues of proof.

In the event a construction claim progresses to the courts, it is unlikely that any of the foregoing matters of quantification will be lost on the independent quantum expert witnesses, who will ordinarily be setting out their opinion to their party, the opposing side and the court, both prior to and during the hearing.

6.11.4 Quantification – Reported Examples

In order to conceptualise the various legal principles and rules which have been applied to claims where globality has either been argued, or where quantification has been considered, there is merit in selecting examples of case law where judges have provided a commentary on the quantum plead. Although this is of course fact sensitive, it could be a useful rule of thumb as to how the law may be applied in similar factual circumstances:

i. *Bluewater Energy Services BC v Mercon Steel Structures* (2014)[783]: Whilst awarding £8,000 for six NCR's from a fourteen plead totalling £157,570, Ramsey J rejected the claimants global claim for "project management and engineering" costs totalling

[780] Supra note 92, 10-11.
[781] Supra note 775 [33 (9)] – [33 (10)].
[782] Supra note 14, 8.
[783] Supra note 511.

£1,014,437.20, as they were unsubstantiated and disproportionate to the sums claimed. Claims for management costs such as those plead in Bluewater are commonplace. In order to be successful, claimants must therefore attempt to link and articulate the management time spent on the claims and ensure that they are proportionate the amounts actually claimed[784]. Management costs were also awarded by Akenhead J in Lilly[785].

ii. *Ronald Smith v Honda Motors (2007)*[786]: When quantifying a global claim, the courts will generally favour a "bottom up" as opposed to a "top down" approach. Top down calculations are akin to total cost or total modified cost claims, which are less likely to succeed.

iii. *William Clark v Dock Street*[787]: When claiming losses associated with professional negligence, such issues with design, quantity surveying and the like, is *"notoriously difficult precisely because of the difficulty in showing how things would have turned out differently even if the professional had not acted negligently".*

iv. *Walter Lilly v McKay*[788]: The details of Lilly are set out at section 5.2 above, however in relation to quantum, Akenhead J set out why the claimant's case was not global in nature, therefore conversely, this acts as a guide as to what to include when pleading a case for quantum, to avoid any notion of globality:

- The claimant's case for additional preliminaries and profit and overhead is related solely to the periods of delay asserted. It identified the number of weeks of delay which was the responsibility of the defendant (variations and late information) and then set out the time related costs related to those delay periods.
- The claimant was able to evidence actual cost in relation to each and every member of time related staff so deployed during that extended period. For additional staff, i.e. a thickening of resources, it provided an explanation as to why the additional

[784] There are however no hard and fast rules in relation to management costs. In the case of *Phee Farrar Jones v Connaught Mason* [2003] CILL 2005 – management costs were disallowed because the claimant must show discrete connection between the management and the breaches, such as overtime. However, in *Try Build Ltd v Invicta Leisure Tennis Ltd* (2000) 71 Con LR 140, Bowsher J allowed a general award on management, notwithstanding he acknowledged that overtime was generally not available to managers. See also *Tate & Lyle v Greater London Council* [1982] WLR 149, *Babcock Energy Ltd v Lodge Sturtevant ltd* [1994] 41 Con LR 45, *Riverside Property Investments Ltd v Blackhawk Automotive* [2004] EWHC 3052 (TCC), *Bridge UK.Com Ltd v Abbey Pynford Plc* [2007] EWHC 728 (TCC).
[785] Supra note 11, both thickening of the defendant's management and its Subcontractor's.
[786] Supra note 462.
[787] Supra note 520.
[788] Supra note 11.

resources were required, what was included in the original price and why the defence related events entitled it to additional loss and expense.

- Once delay was proven, the claimant was able to show that its preliminary resources could have been applied profitably on other projects during the period of extension. Akenhead J was satisfied, that this was the case and was then content for the assessment of overheads and profit being calculated using the Emden Formula.
- The sub-contractor claims were in the main based upon the critical delay periods and the claimant could evidence that the sums were actually paid or were due to be paid.

As stated at section 5.2 where he was able to do so, Akenhead J (doing the best he could) assessed certain damages as due in their entirety, not proven or as percentages of the damages claimed. It is unclear why certain percentages were applied, however it would appear that it was simply a common sense estimate, based on the evidence adduced and the surrounding circumstances.

v. *Cleveland Bridge v Severfield*[789]: Although not plead or considered global in nature, Akenhead J goes into considerable detail in relation to the quantum asserted. On various instances, he is moved to say that both the claimant, and in their counter claim, the defendant have failed to prove their case. However, his assessment of Severfield's ('SRS's') counter claim in relation to disruption is of interest. SRS had, among other things, claimed for increased steelwork erection labour costs for its subcontractor Steelcraft, totalling £94,500, for intermittent working, borne out of a delay in steel supply from Cleveland Bridge ('CBUK'). SRS could not say *"... which individual events caused which individual periods of disruption" but that the "delayed and piecemeal delivery by CBUK to SRS at Thirsk of all pieces of steel to each particular phase to SRS resulted in disruption to progress and inefficient workings of the steelwork subcontractor and the metal deck installation subcontractor".*[790] The quantum experts were unable to carry out a measured mile approach or earned value analysis. It was apparent that disruption did occur, but that assessing such disruption was problematic, and that the timesheets did not provide enough detail to calculate downtime. Akenhead J concluded the following, "*What the Court can and should do in circumstances where it is satisfied on a balance of*

[789] Supra note 707.
[790] Ibid [152].

probabilities that some (more than de minimis) disruption must have occurred as a result of CBUK's breaches is to make a reasoned assessment albeit based on the minimum probably so attributable. I am satisfied that a minimum of 40 man shifts" worth of time must have been wasted."[791]This is a relatively rare example of the courts, making an assessment for disruption, where there is difficulty in matching the causative events with the losses asserted. In this instance, the 40 man shifts represented about half of one week's worth of man shifts during the delay period, when compared against the planned resources. Where a court is prepared to make such an assessment, it will be based at a much lower amount than that plead, i.e. based on the *"minimum probably so attributable"*.

vi. *John Doyle v Laing Management*[792]: Lord Drummond Young provided some helpful guidance as to how quantification could be set out by the claimant, *"…it is obviously necessary that the events relied on should be set out comprehensively. It is also essential that the heads of loss should be set out comprehensively, although that can often best be achieved by a schedule that is separate from the pleadings themselves. So far as the causal links are concerned, however, there will usually be no need to do more than set out the general proposition that such links exist. 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. ….What is not necessary is that averments of causation should be over-elaborate, covering every possible combination of contractual events that might exist and the loss or losses that might be said to follow from such events*[793]*."* This is interesting as this sentiment is echoed, to a degree, by Akenhead J in *Walter Lilly*. In *Doyle*, despite the claimant/pursuer stating that it is *"…not possible to identify causative links between each cause of delay and disruption and the costs thereof…"*[794] they did compare labour productivity for core work based on allocation sheets, actually achieved in a period free from disruption (normal work), with labour productivity when work was disrupted, (disrupted work). The claimant then measured productivity over several weeks to smooth out productivity fluctuations, which were applied throughout the works to estimate the total man hours as contemplated at the start of the works. This was then compared with the actual hours expended, with adjustments made for labour agreed in

[791] Ibid [156].
[792] Supra note 10 – Inner House.
[793] Ibid [20].
[794] Ibid [5].

variations, hours agreed elsewhere and therefore the remainder was as a result of matters which the employer was liable. His Lordship favoured this approach saying it:

- Avoided the need to consider the adequacy of the tender, or programme optimism;
- Makes a reasonable allowance for disruption during normal work; and
- Is unrelated to the earned value analysis, a method which the defendants were critical.

CHAPTER 7: FURTHER CONSIDERATIONS AND SUGGESTIONS

7.1 Introduction

This Chapter 7 builds upon the findings of Chapter 6 and aims to address the proposition set out in Chapter 1, which can be separated into two considerations:

Proposition:

Consideration 1

"The apparent trend for the UK courts to take a more lenient approach in their interpretation of global claims …

Consideration 2

…has established greater certainty in the UK legal system".

Sections 7.2 and 7.3 of this chapter therefore address the apparent perceived trend towards leniency and in consequence whether a greater certainty has been established in the UK legal system in relation to global claims.

Sections 7.5 and 7.6 of this chapter will consider some of the overarching socio / legal influences on time and money claims (of which global claims forms a part) and attempts to offer positive suggestions for potential solutions moving forward.

7.2 Leniency

7.2.1 **Introduction**

In the first instance, it is submitted that the word *"leniency"* may not be the most appropriate way of articulating the jurisprudential development of legal principal and doctrine, including the development of global claims. Indeed, the initial impression the word promulgates is that global claims somehow require leniency. This notion perpetuates the pejorative[795] manner in which global claims are often perceived.

Definitions for leniency, or the act of being lenient abound. The Oxford English Dictionary Online, defines the adjective lenient as:

"Indisposed to severity, gentle, mild, tolerant." [796]

[795] Supra note 23.
[796] The Oxford English Dictionary Online: http://www.oed.com/view/Entry/107267.

The Collins English Dictionary defines the adjective as:

"Showing or characterised by mercy or tolerance."[797]

Taking the foregoing definitions into consideration, perhaps it is better to say that global claims are simply accepted by the courts and that there are certain pre-conditions which have to be satisfied in order for a claim to be successful.

7.2.2 **SCL Delay and Disruption Protocol - Leniency**

As discussed in Chapter 1, there is a growing perception that the UK courts may be relaxing their approach to the permissibility of global claims[798]. The apparent shift has been identified by the Society of Construction Law. In the 1st Edition of its Delay and Disruption Protocol released in October 2002, it stated that global claims were "*rarely accepted by the courts."*[799]*";* however, the 2nd Edition of the Delay and Disruption Protocol released in February 2017, sets out the following important amendment to its original proposition, i.e. that the courts appear to be taking "a *more lenient approach towards global claims*[800].

Between the release of the 1st Edition in 2002 and the 2nd Edition in 2017, there been a fairly limited number of cases, both north and south of the border, dealing with claims of a global nature. It is submitted that the pre-eminent cases which may support a perceived view towards leniency, are the Scottish case of *John Doyle* (2002 & 2004) and the English case of *Walter Lilly*.

7.2.3 **Global Claims post John Doyle - Leniency**

The decisions in *Doyle* has been considered a *"watershed case*"[801], and moved Winter to suggest that:

"…the overriding impression one has from these decision and commentary on them [i.e. the *Doyle* cases] *is that they are regarded as having made pursuing global claims easier for claimants".*[802]

[797] The Collins English Dictionary Online: www.collinsdictionary.com/dictionary/english/lenient.
[798] Supra note 24.
[799] Supra note 18, para 1.14.1.
[800] Supra note 26, para 17.
[801] John ME Lyden, 'Global Claims in Common Law Jurisdictions' A paper presented to the Society of Construction Law and the Society of Chartered Surveyors (Southern Region) at a joint meeting in Cork, Ireland on 25th November 2007, 11.
[802] Supra note 390, 1.

Winter then, upon analysis of the judgements of both Lord Macfadyen and Lord Drummond Young, sets out three reasons, why claims may be encouraged to advance their claims on a global basis, firstly, if a claimant can prove that all the events are the responsibility of the defendant, it is unnecessary to demonstrate causal links between the causes and losses, secondly, if the global claim fails, it still may be possible to make a rational apportionment and thirdly, a claimant should not be denied a remedy where the defendant is plainly culpable.

Pennicott had stated that whilst it would be an exaggeration to assert that *Doyle* has changed the law on global claims, he also set out three principle changes, which he considered may encourage claimants to pursue a global claim. Firstly, the "*Exocet"*[803] defence has been modified. It was previously considered that if a defendant could prove any event, or at least one which was "*…not merely trivial"*[804] was also responsible for the loss, then the global claim would fail. Secondly, apportionment may be possible, and thirdly, a global claim is unlikely to be struck out at an interlocutory stage.

Lyden was also of the opinion that there has been a judicial softening towards global claims, since Mid Glamorgan. His justification included guidance from Saville LJ in British Airways pensions, where he said that global claims need not be embarrassing, or should be struck out, as had been set out in the 11th edition of Hudson[805].

There can be no doubt that the language of the case law from the 1st Edition of the SCL Delay and Disruption Protocol, until *Walter Lilly* has indeed softened in relation to the case judgments and the particular influence of the *Doyle* decisions. Perhaps the two most important aspects borne out of these decisions, in relation to leniency are as follows:

i. **The Death of the Exocet Defence:** Although not expressly derived from the case law, it was commonly understood that if the defendant was able to prove that it was not responsible for *"any"*[806]event which had contributed to the global loss, then the claim must fail. Lord Macfadyen clarified that in order for the global claim to fail, the event must be a material causative factor, and in the appellate decision Lord Drummond Young, stated that the event had to be significant. However, even if that were the case, Lord Macfadyen set out two mitigating circumstances, firstly, that there may be sufficient

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[803] Ian Pennicott QC, 'Global claims' Keating Chambers Seminar to the Society of Construction Law, 8th June 2006, 5.
[804] Jonathan Cope, 'Global Claims after Walter Lilly v Mackay' Practical Law Construction Blog, [2012]. The term "Not merely trivial" is derived from paragraph 8.204 of Hudson supra note 234.
[805] Supra note 234 para 8.200.
[806] Supra note 801, 13.

evidence to establish causal connections and/or a rational apportionment, and secondly, that causation must be treated as a common sense matter;

ii. **Rational Apportionment:** The *Doyle* cases finally clarified that in Scotland, an apportionment exercise could be carried out where it was possible to do so. As stated at section 6.7.3 above, in England it is still unclear whether apportionment is possible for a global claim were competing clauses are not time related. In 2002, in *Amec* apportionment was considered by Thornton J:

"*So long as there is some evidence which allows a court to conclude, by way of general assessment, that a particular proportion of the work was MHI work, for example one third, a court can apportion the number of hours claimed for a particular week accordingly, namely two thirds to be paid for, one third to be rejected."*[807]

As late as 2007 in *Maersk*[808]despite not being possible in this instance, Wilcox J stated that if apportionment was possible:

"*…it would be manifestly unjust to deny a remedy, where there are plain contractual breaches by the defendant."*[809]

Despite the language appearing to be soften in relation to global claims, there were no decisions in either England and/or Scotland post the *Doyle* and up until *Walter Lilly* in 2012, that could be said to treat global claims any differently or more leniently than prior to the *Doyle* decisions. In Scotland, *City Inn* in 2007 and the appeal 2010 upheld a decision to apportion competing causes (following *Doyle*), but there were no cases which specifically relied on *Doyle* and where the claimant was provided a supplemental award for either delay and/or loss and expense for losses which could not be disentangled from the composite whole. Furthermore, there is merit in noting that even prior to *Doyle*, there were no court decisions where a global claim was denied, because the defendant could prove that "any" event (never mind material and/or significant) could not be separated from the composite loss.

Analysis of the case law post 2004, notwithstanding the foregoing respected commentaries that the UK courts were moving towards leniency, other learned construction professionals, such as Frame, were (in hindsight) correctly of the opinion that despite the *Doyle* cases being

[807] Supra note 323.
[808] Supra note 448.
[809] Ibid [690].

important they were by no means "…*an unqualified endorsement of global claims or a ticket to easy recovery by contractors."*[810]

7.2.4 **Global Claims post Walter Lilly - Leniency**

This thesis has in previous sections, set out at length Akenhead J's decision in *Walter Lilly*, and his obiter commentary[811] which, among other things, provided seven principles relating to global claims[812], based upon an historical analysis of the case law to date[813]. Reading the case in detail, reveals the somewhat discomfiting details surrounding the defendant's key factual witness, and the employer on the contract in dispute[814], Mr Giles Mackay. His behaviour towards the contractor and both his and opposing construction professionals, could only be described as wholly unreasonable (at best) during the execution of the project, and will no doubt have influenced Akenhead J's judgement (to a degree). However, it is prudent to look beyond the emotive language of this *"…full bloodied conflict"*[815] and its substance is properly reviewed, in order to consider whether, in fact, it is a move towards leniency in the law and which will encourage claimants to plead delay and/or loss and expense on a global basis.

Building, on *Doyle* et al, parts of Akenhead J's judgement on the face of it appears to move towards leniency, some of which are simply re-worded from previous judgements:

i. A claimant does not have to claim it is "*impossible*"[816] to plead cause and effect in the normal way, and must simply prove its case on the balance of probabilities[817];

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[810] Shona Frame, 'Scottish Court Balances Global Claims' Construction Law (2004) 15 7 Cons. Law 14, 1 August 2004, 4.

[811] Akenhead J decided that Walter Lilly's claim was not global. This has been challenged by Ben Patten QC, in his article titled "Pleading Global Claims" A paper presented to the Society of Construction Law at a meeting in Oxford on 27th June 2013, p 1 – where he suggests that Walter Lilly was indeed global, as it *"sought to attribute particular losses to groups of the defendant's defaults, rather than attach individual loss to each default."*

[812] It was decided that the claimants claim was not in fact global in nature.

[813] *Crosby v Portland UDC* (1967) 5 BLR 121, *London Borough of Merton –v- Stanley Hugh Leach* (1985) 32 BLR 68, *Wharf Properties Ltd –v- Eric Cumine Associates* (1991) 52 BLR 1, *John Holland Construction & Engineering Pty Ltd –v- Kvaerner RJ Brown Pty Ltd* (1996) 82 BLR 81, *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd* 82 BLR 39, *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [20012] BLR 393, *Petromec Inc v. Petroleo Brasilerio SA Petrobras* [2007] EWCA Civ 1371

[814] In addition to Mr Mackay, Mr Daniel and Mr West were the owners of the other two properties and directors associated with DMW Developments. By way of a variation, the three properties/plots were subsequently separated into three separate contracts.

[815] Supra note 11 [486 (a)].

[816] Ibid.

[817] Since *Crosby*, there has been no judgement that has required the claimant to prove it is impossible to prove cause and effect, in *Crosby*, Donaldson J uses *"difficult or even impossible",* in *Merton*, Vinelott J uses *"impracticable",* In his article 'Total Costs and Global Claims', Bryne J considered the US cases (see footnote 275 to 277), where a tribunal is not relieved is difficult, it does not have to be impossible

ii. There is no set way for a claimant to prove their case as a matter of fact[818].

iii. Akenhead J expressly stated that there *is "…nothing wrong in principle with a total or global cost claim"*.[819]

iv. The fact that an event(s) caused or contributed to the loss, does not mean the claimant recovers nothing[820].

v. Akenhead J clarified that a claim may be allowed, even if the claimant himself created the *"…impossibility of disentanglement"*[821]subject to fact and proof.

vi. The requirement for the contract administrator to ascertain a contractor's claim for loss and expense, does not mean he has to be certain[822].

vii. If the contract administrator doesn't have to be certain, it must consider the claim in a *"…sensible and commercial way"*[823], and that the tribunal will *"…only have to be satisfied that the Contractor probably incurred loss or expense as a result of one or more the events listed…"*[824].

In relation to apportionment, in *Walter Lilly*, Akenhead J had stated that *City Inn* was *"…inapplicable within this jurisdiction"*[825]and therefore apportionment was unavailable in England, it is submitted that this is isolated to concurrent delays only and perhaps not related to competing causes which are not time related, as discussed previously. Indeed, there appears

[818] Supra note 11 [486 (c)]. In *Bernhard's Rugby*, Humphrey Lloyd J has stated that *"a party is entitled to present its case as it sees fit"*. No previous case law has demanded that a claimant set its claim out in a particular way. A Scott Schedule has been suggested, however there has been no compulsion from the courts that this form of presentation must be adhered to.

[819] Supra note 11 [486 (d)]. Akenhead was simply reinforcing that since *Crosby* the courts have supported the notion of a supplemental award being made, where it is impracticable to separate cause and effect from the global loss plead. Indeed, Akenhead J qualified his statement by acknowledging that there are nonetheless *"evidential difficulties"* to overcome.

[820] This principle accords with the decisions in *Doyle*, where both the outer and inner decisions, set out mitigating circumstances, where a competing cause/event proven to have an effect on the global loss would not be fatal to the claim as a whole.

[821] As he goes onto say in his judgement, Akenhead J clarifies that the defendant's analysis of precedent is incorrect and that Vinelott J in *Merton* was referring not to creating the impossibility of disentanglement, but that a delay in making a claim could result in a time bar due to conditions precedent, and that Bryne J in *John Holland*, was simply reiterating this position.

[822] Supra note 8, [543 (d)]. This position accords with Dyson in *How Engineering*, stated that in relation to ascertainment, it does not mean that "find out for certain", the civil standard of proof applies.

[823] Supra note 8 [468]. It is submitted that there is nothing controversial or new in this statement. Reference is given to Chapter 2 and the standard of proof to be applied, based on the reasonable man, and on the balance of probabilities.

[824] Supra note 8 [468]. Wording the sentence in this way, i.e. that the tribunal have to be satisfied that the contractor "probably" incurred loss and or expense, on construction sounds fairly benign hurdle to overcome, however is simply again referring to the civil standard of proof to be applied.

[825] Supra note 11.

to be a lacuna between Wilcox J's opinion in *Maersk* in 2007 and what appears to be an acceptance of apportionment in the English courts for competing causes which are not time related and Akenhead's decision in *Walter Lilly* in 2012.

Again, in a similar vein to *Doyle*, despite the language appearing to be soften in relation to global claims, there were no decisions in either England and/or Scotland post *Walter Lilly* until 2017, that could be said to treat global claims any differently or more leniently than prior to the Doyle decisions. It is submitted that the opinion of Gillies, is with hindsight correct, where in 2013 she arrived at the opinion that the decision in *Walter Lilly*:

"…does not actually mark any great sea change for those dealing with global claims…"[826]

This position echoes Patten who stated that the decision in *Walter Lilly*:

"…does not make it any easier for claimants to plead and prove global claims."[827]

7.2.5 **Summary - Leniency**

Upon analysis of the case law germane to global claims, it is apparent that due to the softening of the judicial language, the drafters of the 2nd Edition of SCL's Delay and Disruption Protocol in 2017, could be forgiven for arriving at the conclusion that there is a trend towards a more lenient approach to global claims.

However, it is submitted that in actuality the UK courts have not taken a more lenient approach when assessing what could be regarded as global claims. As stated by Pickavance, even if a claim is plead on a total cost basis, arguably the most extreme version of a global claim, it does not relieve the claimant of:

"…*essential evidential burden of establishing liability, causation and damage"*[828]

This approach is echoed in both *Walter Lilly* and *Doyle*, who have stated that, notwithstanding that a claim may be plead on a global basis, it must still be proven as a matter of fact. There is therefore no judicial shift in how a judge or tribunal will assess a global claim. More will be said about this matter in the conclusions.

Finally, if apportionment is denied in England, for competing causes which are not time related, then there is an argument that the Scottish system is indeed more lenient (or fairer)

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[826] Jenni Gillies, "Global Claims in Adjudication after Walter Lilly v Mackay: is it now open season?", March 2013, http://www.adjudication.org/globalclaimsadjudicationafterwalterlillyvmackayitnowopenseason.
[827] Supra 809, 12.
[828] Supra note 265, 19-043.

because the courts may apportion the losses, which would not be available to English claimants, who will be susceptible to an “all or nothing” award. The courts in England would appear to favour the latter the “nothing” or at best a de minimis approach to claims plead which appear global in nature.

There appear to be no reported cases in the UK, where the courts are willing to award composite losses for a number of events, where there is no discernible causal nexus between the two, however difficult it may be to disentangle the matter. Despite what may appear to be on the face of it the adoption of a more palliative language, the courts remain steadfast in their requirement to assess global claims in accordance with the judicial triptych set out at section 1.1i of the introduction of this thesis.

7.3 Certainty

7.3.1 Introduction

This section of the thesis addresses the second consideration i.e. whether the apparent move towards leniency in global claims has established greater certainty in the UK legal system?

It is important to clarify that what is meant by legal certainty or uncertainty in the context of this proposition, i.e. it does not relate to the overarching fundamental principle of “legal certainty”, common to the majority of the worlds legal systems (both civil and common), in terms of regulation, transparency and predictable for citizens in a general sense.

Given that it is trite law that a global claim will in general be allowed to proceed to trial provided that the conduct of the claimant is not contumacious and, in the confidence, that it will not be struck out unless it is plain and obvious to do so; it is intended that legal uncertainty as stated in the proposition, is to be considered in a much narrower context and specifically relates to whether a claimant can be reasonably confident that, upon trial, should it follow certain preconditions and guidance set out by the UK courts, then it stands a good chance being successful in its claim, should it elect for it to be plead on a global basis.

It is suggested that the question of certainty, in the context set out previously, can be divided into two separate categories, firstly, do the UK court’s decision consistently follow the general principles established for global claims based on precedent, and secondly, is there any more certainty in the English courts or the Scottish courts in relation to global claims.

7.3.2 English Law – Certainty

Since the clear majority of the case law relating to global claims in the UK is dealt with in the English courts, it is understandable that a significant proportion of the inconsistencies are identified within this jurisdiction. The points below, by way of example, summarise some decisions (or parts thereof), which appear to a lesser or greater extent, incongruous or at least unclear, from and in accordance with precedent:

i. As stated previously, where competing causes are time related, in JCT Contracts, the English courts will adopt what has been termed the Malmaison Approach[829] and award an extension of time for events which are the contractual responsibility of the employer, however the contractor will not be entitled to loss and expense for that delay period. However, it is unclear whether this approach will be applied to contracts which are not procured under the JCT Suite. In Lilly, Akenhead J stated that the primary reason for adopting such an approach, is the literal interpretation of Clause 25 of the 1998 Edition Private without Quantities, with amendments[830]:

   "…which points very strongly in favour of the view that, provided that the Relevant Event can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question."[831]

   It is suggested that if other contracts (standard and/or bespoke) include clauses which specifically cater for extensions of time for employer related events[832], then it is probable that the Malmaison Approach will be applied, depending on the associated clauses, which may already articulate how the parties will operate, if competing causes are deemed to have delayed the project. It is however, by no means certain and the courts will give primacy to the wording of the contract in question, which reflects the intention of the parties and may govern their rights and obligations in relation to competing causes.

ii. It is uncertain whether the English courts will allow apportionment for loss and expense which is borne out of competing causes, which cannot be disentangled and are not time related and are not concurrent. It is submitted that there is no literature or court decisions which specifically addresses this area. As set out section 4.9 as recently as 2007, in

[829] Supra note 11 [370].
[830] Modified by the Contractor's Design Portion Supplement without Quantities 1998 Edition (Revised November 2013)
[831] Supra note 11 [370].
[832] Similar to the wording of the Relevant Event Clauses in the JCT Suite.

Maersk, the TCC considered apportionment as a possible remedy for global claims with competing causes, which are not related to extension of time claims. Here Wilcox J had concluded that where a cause or group of causes are not dominant, and cannot be apportioned, then the claim must necessarily fail:

"In the event that the contractor cannot identify 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. In such a case it is obviously necessary that the event or events for which the employer is responsible should be a material cause of the loss. Provided that condition is met, the apportionment of loss between the different causes is possible in an appropriate case." [833]

In *Walter Lilly*, Akenhead J was of the opinion that *City Inn* (where apportionment was upheld, relying upon *Doyle*) is inapplicable in the English courts, however his conclusions relate to concurrent delays, not to global claims where competing causes exist, but which are not time related. This then begs the question: *"In England, if there is no dominant and/or effective cause(s) of loss and expense, and it can be proven that the Employer has made a material and/or significant contribution to the loss and expense, which cannot be separated by direct causal connections, then is there facility to apportion?"* It is submitted that pursuant to the decision in *Maersk*, apportionment may be available to an English court for competing causes which are not time related. Again, pleading a claim based upon that principle and predicting the outcome (even on principle) is far from certain.

In 2011, in the case of *Hi-Lite Electrical v Wolseley UK Ltd* Ramsey J considered that there was *"…no general ability to apportion damages between parties",* [834] however it is submitted that he was referring to a situation where one party had a strict contractual liability on the one hand, and the other party had been negligent[835]. It is unclear whether this notion extends to a situation where both parties are in strict contractual breach with the other.

iii. As set out at section 6.8 above, in England, the test of dominance has long been established as the causal method of choice by the English courts, when considering

[833] Supra note 448 [688].
[834] *Hi-Lite Electrical Ltd v Wolseley* UK Ltd [2011] EWHC 2153 (TCC) [238].
[835] Referring to the case of *W Lamb v Jarvis & Sons Ltd* (1990) 60 Con LR 1 – where he considered Hicks J erred in judgement.

whether a cause(s) is operative or otherwise[836]. However, recent opinion in some quarters, has begun to consider that the dominant cause test is (or should be) phased out, and replaced with an effective cause[837].

iv. As stated previously at section 7.2.3, despite not being expressly addressed in the case law, it was thought that any event/cause, which could be proven not to be the contractual responsibility of the defendant, would mean that a global claim must necessarily fail. Whereas in Scotland, a defendant's cause must be proven to be significant or material which will undermine a global claim, it is unclear in England, what the causative potency of the defendant's event must be.

v. As set out at section 6.9.3, when concurrency is identified within a global claim (or otherwise) it is unclear whether it is sustainable to argument that apportionment offends the prevention principle and is therefore inapplicable.

7.3.3 **Scots Law – Certainty**

As stated above, there is a dearth of case law relating to how global claims are dealt with in the Scottish courts[838], it is understandable therefore that there is less inconsistency and uncertainty identified within this jurisdiction. The points below, by way of example, summarise some decisions (or parts thereof), which appear to a lesser or greater extent, incongruous or at least unclear, from and in accordance with precedent:

i. As set out in section 6.8.3 above, in *Doyle*, Lord Macfadyen concluded that a global claim will fail if the defendant can prove that there was a material contribution to the global loss, for which it bears no legal liability. In the appellate decision Lord Drummond Young echoed the Lord Ordinary's approach, with the minor change that a 'significant' cause and not 'material' contribution was what was required of the defence to ensure a global claim must fail. In terms of the definition of 'significant cause' Lord Drummond Young stated that the 'dominant cause' approach was of relevance. Later in his judgement[839], his Lordship stated that it may be possible to apportion loss, provided that the defendant's (employer's) event(s) are a material cause of the loss. It is unclear how a material cause of the loss is to be considered. It cannot relate to dominance, as once this

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[836] Supra note 86, 12-14.
[837] Supra note 581.
[838] Indeed, this thesis identifies only four Scottish decisions which are worthy of commentary in relation to global claims. The total number does not count the appellate decisions in both *Doyle* and *City Inn*.
[839] Supra note 10 [14]. Appellate decision.

is determined, it becomes the operative cause and cannot be apportioned. It is submitted that 'material' may be similar to that found in negligence cases as defined by Lord Reid:

"What is a material contribution must be a question of degree. A contribution which comes within the exception de minimis non curat lex is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the de minimis principle but yet too small to be material."[840]

There is no doubt that there is uncertainty about the language surrounding material contribution in global claims. Perhaps what is meant in both *Doyle* judgements is that, the total or 'global claim' may fail, however they may be elements of the claim that can be apportioned, notwithstanding their materiality.

ii. A global claim may fail if it is proven that a material contribution to the loss is attributable to the claimant and it cannot be apportioned or separated. If this is the case, then should the defendant simply plead that there are events, which materially contributed to the losses, but do not quantify this. As soon as the defendant quantifies the loss, it sets up the possibility that the court will discount that amount from the global claim and award the rest? If it does not quantify the loss, does it then fail to prove materiality. It is suggested that this matter requires further clarity and explanation by the Scottish courts.

iii. The difficulty in assessing global claims is compounded when competing causes are present. It is clear that in England concurrent delays follow the Malmaison Approach and in Scotland, if possible, the delays, may be rationally apportioned. As set out in this thesis, the definition and consistent application of how the courts consider concurrency is problematic, particularly in relation to causation. In Scotland, in both the first instance and appellate decisions, Lord Drummond Young and Lord Osborne considered that Seymour J's decision in *Royal Brompton*, set out at section 4.12 (i.e. where he stated that concurrency does not mean an occasion where a contractor is already in critical delay and a Relevant Event occurs, then as a matter of causation, the Relevant Event would have no effect on the completion date), was an arbitrary criterion[841]. Lord Osborne agreed with the Lord Ordinary, when he stated that:

[840] *Bonnington Castings Ltd v Wardlow* [1956] AC 613, 621.
[841] Although in both Royal Brompton and City Inn are related to clause 25 of the JCT 1980 Suite of Contracts, it is submitted that unless the contract expressly states otherwise, the thinking of both England and Scottish judges would be adopted in subsequent cases.

"It should not matter whether the shortage of labour developed, for example, two days before or two days after the start of a substantial period of inclement weather; in either case the two matters operate concurrently to delay the completion of the works. In my opinion both of these cases should be treated as involving concurrent causes, and they should be dealt with in the way indicated in clause 25.3.1 by granting such extension as the architect considers fair and reasonable."[842]

Analysis of the foregoing in isolation, occasions certain difficulties. For example, when does the time duration between competing causes either beginning and/or ending cease to be concurrent? Should four days before or four days after, be considered concurrent? What about two weeks before and two weeks after, and so on? It is unclear where the durational limits between competing causes, then renders the event non concurrent.

Lord Osbourne then sets out five criteria in relation to the proper approach to an extension of time under clause 25.3 of the standard form conditions. His first pre-condition states that "…*it must be plainly shown that a relevant event is a cause of delay and that the completion of the works is likely to be delayed…*"[843]. It is apparent that if a contractor is already in critical delay, and a delay due to a Relevant Event, arises and is resolved during that period of contractor critical delay, then the Relevant Event cannot be said to be the cause of the delay to the completion of the works.

Conversely, it is also evident as recognised by Lord Osbourne, that true concurrency, i.e. that considered by Seymour J where events are 'chronologically coincident' is extremely rare and 'unnecessarily restrictive'. It is suggested that both views require clarification.

In England, the matter was clarified by Akenhead J in *Walter Lilly*, who confirmed that a *"...straight contractual interpretation of Clause 25"*[844] should be adhered to, i.e. if the Relevant Event, in isolation, could be said to delay the works, then an extension of time, should be granted for that period. Akenhead J went onto say that the extension of time should not be reduced, because of *'any sort of proviso'*[845], in this regard, Akenhead J was referring to a situation where other delaying events, perhaps those of a contractor, were already delaying the works.

[842] Supra note 10 [36]. Appellate decision.
[843] Supra note 10 [42]. Appellate decision.
[844] Supra note 11, [370].
[845] Ibid

In Scotland, the position is less clear. Whilst it is understood that competing/concurrent causes can be apportioned, given the definition of concurrency is not settled, as explained above, it is difficult to predict what periods will actually be apportioned.

7.3.4 **Summary - Certainty**

In light of the foregoing, it is suggested as considered at section 7.2.5, the UK courts have not become more lenient in their assessment of global claims, moreover, it is arguable that there is also no greater certainty in this area, as explained in the examples above. Whilst it is unclear if the dominant cause test prevails in lieu of an effective cause in England, it is certainly clear that apportionment in concurrent delays is not available. However, it is unclear in England if that is the case for competing causes where the losses are not concurrent and not time related. In Scotland it is clear that apportionment may be available for both concurrent delay and/or delay and disruption but is unclear how causation will be managed. It is submitted that the current rationale set out after *City Inn* (in disagreeing with Seymour J in *Brompton*) does not reflect how construction experts determine critical delay on a project.

Where global claims are identified (independent of competing causes), there is no evidence from the UK case law to suggest that the courts will make an assessment any differently to other civil cases relating to breaches of contract. When it comes to the assessment of loss (almost separate to the wording of the judgements), it is suggested, that there is no greater certainty surrounding how global claims will be dealt with in the UK courts[846], than there was since Donaldson J's decision in *Crosby* in 1967.

7.4 Framework

7.4.1 **Introduction**

Upon analysis of the previous chapters of this thesis, it is apparent that a claimant's ability to successfully plead a global claim, is influenced by many and varied legal rules and principles. In consequence, when pleading a claim which may include global elements, the main objective of the claimant should be to persuade a decision maker that the case before them is capable of being positively decided upon. In this context, the parties dispute team must assist the decision maker in realising that the claim is above zero. Once this significant psychological hurdle is overcome, then the argument is centred around the quantification of the claim.

[846] With the exception of the confirmation that losses may be apportioned in Scotland.

Under these circumstances there is merit in setting out some guidance for a claimant who is required to navigate the legal rules and principles which affect a global claim. In this regard, a framework is well suited to this exercise. A framework can be defined as:

"...a particular set of rules, ideas or beliefs which you can use in order to deal with problems or to decide what to do"[847]

The structure of the framework is based predominantly upon the case law analysed in the previous chapters and is intended to be of value to claimants in both English and Scottish jurisdictions. Appendices 1 and 2 set out diagrammatically, a Framework Checklist and a Decision Making Flowchart, both of which should be read in conjunction with the framework set out below.

7.4.2 **Prior to Action**

Prior to action, if a party is considering whether to plead a claim which may contain global elements, it must ensure that it has considered the following:

i. **Party Negotiations:** Where it is possible to do so, the importance of exhausting all avenues of negotiation with the defendant cannot be underestimated. In this first instance, in the event of a dispute, the conditions of contract will ordinarily obligate the parties to meet (ordinarily the company's senior representatives), in an attempt to resolve the matters where their appears to be a difference of opinion. The primary benefits of negotiating are that it is a cheap, and expeditious way for the parties to their resolve their differences. In the absence of a third party decision maker, the parties can be creative about how arrive at a compromised positions and this may preserve the business relationship. The secondary benefit of such negotiations is that the claimant should take the opportunity during the negotiations, to fully explain its position to the defendant. If it is able to do, then if the matter proceeds to trail, it will be difficult for the defendant to rely upon the defence that does not know the case it has to answer to[848]. If the claimant is able to set out its position during the negotiation stage and minimise any changes to its position then it should be able to rely upon Saville LJ's reasoning in *British Airways,* where he voiced his dissatisfaction for the apparent trend of defendants to tactfully protest

[847] https://www.collinsdictionary.com/dictionary/english/framework

[848] *Wharf Properties Ltd v Eric Cumine Associates (No. 2)* [1991] 52 BLR 8, *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* [1995] 72 BLR 26, *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1997] no 6844/95, *London Underground Ltd v Citylink Telecommunications Ltd* Rev 1 [2007] EWHC 1749 (TCC)

that they are unclear as to the case they must answer to when they are, in reality, fully aware of the case presented by the claimant.

ii. **Submit Claim Timeously:** If it becomes apparent that negotiations have concluded, and a dispute has crystallised, then it will be in the interest of the claimant to submit its claim timeously, to avoid creating difficulties for itself both through any conditions precedent which may be set out in the contract and to satisfy the law generally as considered by Vinelott J in Merton[849].

iii. **Reasonable Cause of Action:** From the outset, it is imperative that the parties are able to prove, the existence of event(s) which the defendant is responsible. The existence of a loss by the claimant. A causal link between the loss and the event(s).[850]

iv. **Causation:** Whilst it is important to make a concerted effort to provide a causal link between the loss and event, the claimant should be mindful that causation does not have to be overly elaborate and may be inferred[851]. Often the causative test of sine qua non will be inapplicable, and an assessment of whether a cause is material and/or significant will be required[852]. In the presentation of critical delay, in the first instance the dominant cause of delay should be relied upon.[853]When considering causation pertinent to delay analysis, in England a claimant would do well to consider the guidance set out in *Royal Brompton*[854] and in Scotland, that of *City Inn.*[855]

v. **The Assessment of Loss:** When assessing its losses, a claimant must be able to prove its case on the balance of probabilities, however future losses are evaluated upon an estimated assessment, based on the evidence.

vi. **Records:** If it is possible to do so, as recommended by the SCL Protocol[856]it is helpful if the parties have been able to agree an appropriate and proportionate set of records to be kept, prior to contract formation. If the parties have been unable to do so, then in conjunction with its advisers, the claimant must make an honest appraisal of the records

[849] *Merton LBC v Stanley Hugh Leach Ltd* [1985] 32 BLR 51.
[850] *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2002] ScotCS 110, *Walter Lilly & Company Limited v Giles Patrick Cyril McKay and DMW Developments Limited* [2012] EWHC 1773 (TCC)
[851] *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2002] ScotCS 110 [20].
[852] *John Doyle Construction Limited v Laing Management (Scotland) Limited* [2004] A806/01.
[853] Section 6.8.5
[854] Where delays arise during a period of critical delay, then they may have no effect on the completion date.
[855] *City Inn Limited v Shepherd Construction Limited* [2010] CSIH 68 CA101/00
[856] Supra note 26, Guidance Part B, 1.3.

they are intending to rely upon. Whilst in principle, the courts are willing to consider a case which is plead on a global basis, the claimant is often unsuccessful, due to either a lack of records/evidence, or a lack of description showing at least some connection between the losses and/or delays claimed and the events which caused such losses and/delays. As stated previously, examples of the kinds of records a claimant should maintain are conveniently set out in the 2nd Edition of the SCL's Delay and Disruption Protocol[857].

vii. **Impracticable to Disentangle:** Upon review of the records, the claimant must try to be objective about the factual matrix which forms the basis of its claim. In this regard, it should be relatively straightforward to quantify the direct losses associated with an event. Ordinarily the global element of a claim is associated with the indirect losses associated with a number of events (in the main, disruption and prolongation costs). If that is the case, the claimant, must endeavour to separate any elements of the claim for which it bears responsibility. Even if these exercises prove fruitless, it is imperative the analysis is maintained, because it will assist the claimant's case in satisfying the criterion that it is impracticable to disentangle and that that it sincerely attempted to provide the causal nexus between the event(s) and the losses asserted.[858]

viii. **Presentation of Claim: Scott Schedule:** Once the records have been fully analysed and where possible to do so, direct losses and indirect losses have been separated, then although not exhaustive, the courts have favoured the production of a Scott Schedule in which a claimant may present its claim.[859]If the claimant chooses to present its claim in such a form, then it would do well to be guided by the guidance provided by May LJ in *Petromec*[860], where the work content should be sufficiently described, the authority relied upon, and an explanation as to why the losses are reasonable. May LJ went onto say that it may be that indirect costs may have to better describe the causal link between the event and the losses.

ix. **Tender must be reasonable;** If a claimant is to successfully plead loss and/or delay due to breaches made by the defendant, it must be done so on the comparative basis of what it had planned to recover, in the absence of that breach. In order to satisfy such criterion,

[857] Supra note 26, Appendix B Record Types and Examples.
[858] *J. Crosby & Sons v Portland UDC* (1967) 5 BLR 121 (QBD), *Merton LBC v Stanley Hugh Leach Ltd* [1985] 32 BLR 51
[859] *Mid Glamorgan CC v j Devonald Williams & Partner* (1991) 29 Con LR 129 QBD (OR).
[860] *Petromec Inc v Petroleo Brasileiro SA Petrobas* [2007] EWCA Vic 1371.

it is essential therefore that the claimant is able to convince a decision maker that its tender price and tender programme were reasonable[861].

x. **Losses which can be separated:** Where it is possible to do so, the claimant should separate any losses, which can be separated from the global claim, both in terms of whether the losses are caused by its own actions, or the defendants actions[862].

xi. **Quantification:** Since pecuniary damages are bound by the doctrine of *restitutio ad integrum,* i.e. to restore the injured party to the position it was in prior to the breach[863] - a value based assessment will be inappropriate (unless expressly stated in the contract), and the claimant will be required to pursue a cost based approach. Of course the claimant remains entitled to pursue the original profits planned for the project (on the premise that the project is running to plan), however, for breaches and the associated losses which occur in the course of the project, these must be calculated based on cost. The most effective way to extract this information will be to use the claimants accounting system, which will provide a decision maker with the comfort that the claim is based on actual cost. The assistance of an independent quantum expert to sample and interrogate those costs, will also help to satisfy a decision maker in this regard. It is important to distinguish the quantification of loss explained above, and claims for loss of future opportunity, which may incorporate forecasted profit losses[864].

xii. **Cost / Benefits Analysis:** Prior to a claim being plead at trial, it is critical that the parties, at least in England, give credence to and undertake, a cost benefit analysis in order to discern whether their case can be properly supported by the evidence, is cost effective, proportionate and, to a degree, sustainable. Indeed, the Review of Civil Litigation Costs

[861] *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 8 VR 681, 2 and 3.
[862] Section 4.3 refers.
[863] *C&P Haulage Co Ltd v Middleton* [1993] EWCA Civ 5 – *"It is not the function of the courts where there is a breach of contract knowingly to put the plaintiff in a better financial position than if the contract had been properly performed."*
[864] Depending on contract drafting, a claimant may be entitled to overarching loss of business profit. The wording of the contract clauses is significant as to whether profit is deemed a direct loss or otherwise, see *British Sugar v NEI Power Projects Ltd* [1998] 87 BLR 42, *Deepak v ICI* [1999] 1 Lloyd's Rep 387 and *Pegler Ltd v Wang (UK) Ltd* [2000] BLR 218, *GB Gas v Accenture* [2010] EWCA Civ 912. Also, the loss of head office profit may also be allowable, if it is can be proven that the breaches meant that the claimant's employees could have been employed elsewhere – often called loss of opportunity. Although a formulaic approach such as Emden have been approved by the courts, there is still a high hurdle for the claimant to prove loss of opportunity – see *Walter Lilly* at para 540 onwards.

(or Jackson Review) set out that [865]a cost benefit analysis must play a part in civil justice. This notion is expanded upon by Lord Justice Jackson:

"…a cost benefit analysis requires a claimant to present his claim with sufficient particularity. Where that cost benefit analysis is defensible and can demonstrate the advancement of a global claim is cost effective so that the trial would be fair, a global claim should be the norm for all claims. This is particularly so where it can be demonstrated that all the events complained of are the fault of the defendant."[866]

It is submitted that the foregoing is to be encouraged and a sensible, honest and objective review of a claimants claim prior to submission to trial, can only facilitate and better, how the mechanics of a global claim are managed and subsequently plead.

7.4.3 At Trial Stage

Once the claimant has satisfied itself that it has addressed the pre-trial conditions set out above and is willing to proceed in the knowledge that elements of its claim may be considered global in nature; in order to maximise its chances of receiving a positive result at trial, it would be prudent to review the Decision Making Flowchart provided at Appendix 2. The flowchart sets out diagrammatically, how a decision maker is led to at a conclusion on matters of globality, based on the factual matrix of the case plead, and jurisdiction.

When a claim progresses to trial, the evidential difficulties in proving a global claim in relation to loss and expense will in the main, centre upon the indirect costs associated with prolongation and/or disruption costs (examples provided in the checklist at Appendix 1). To articulate such losses is fraught with difficulty, as it is often the case that a singular event and not attributable to discrete losses incurred under the guise of prolongation and/or disruption. Furthermore, as identified in the examples provided at section 6.11.2, the standard form contracts are not prescriptive as to how such losses are to be calculated. Patten's informative article titled *"Pleading Global Claims"*[867]provides excellent guidance as to how experienced counsel would advise their client in particularising their claim as much as possible, in order to avoid the risk of putting all of their eggs into one basket of composite loss.

[865] Review of Civil Litigation Costs 2010, Part 1 Chapter 3 [5.17]
[866] Wayne Lord and Thomas Edward Gray, 'Cost benefit analysis approach to global claims' International Journal of Law in the Built Environment, (2011) 3(3), 235.
[867] Supra note 811.

However, this section of the research is more concerned with a situation where a global claim exists after claimant has exhausted such particularisation, in this regard Patten suggests that:

"…the guiding tactic should be to provide as much information as possible as to how the claimant will make good the link between breaches and loss".[868]

By definition, a direct causal relationship between event(s) and delay/loss is absent in a global claim, if such a relationship existed, or was found to exist, then either the claimant (under the guidance of its claims consultant and expert) or the tribunal should/would separate this event(s) from the composite whole. Patten helpfully identifies that a claimant's lawyer will (or should) have addressed the following, prior to pleading: i) which losses have been caused by a number of events, which cannot be separated ii) why is that the case iii) can the claimant explains why the composite loss has been caused by these events iv) looking objectively, are there errors inherent in the analysis.

Once the foregoing preliminary measures have been addressed, what must then be done in order for a claimant to leverage a position where the decision maker, may be motivated to consider that 'some' compensation is merited?

Prior to considering this question, the claimant should be aware the general guidance, set out in *Walter Lilly, Doyle* and/or *City Inn* (as set out at Chapters 4 and 5 above), depending on the jurisdictional seat of the dispute. Once those pre-conditions have been satisfied, it is helpful that the claimant is able to set out an account of why the event(s) conflated to arrive at the composite losses claimed. This form of storytelling is akin to how a tribunal and/or judge will often narrate the chronology of the project when setting out their award. This approach allows the claimant to conceptualise and rationalise the operative events, when those arose, who was responsible for them and why they combined in such a manner as to cause the composite loss. In doing so, it is clear that a loss must be established. The loss has to be as fully explained as possible, essentially the loss will be broken down into labour, plant and materials. The claimant will have to set out a narrative explaining the nature of the events, and how they caused additional costs/losses, which were not reasonably foreseeable, and were therefore not provided for at tender stage.

If it is possible to do so, it is better to particularise, group and separate the claim, into individual trades or designations, such as groundworks, steel fixers and the like. It will not be

[868] Supra note 811, 8.

enough to simply list out event(s) and state that they caused £x amount of loss. A plausible and cogent narrative will have to be provided, to articulate the reasoning. Whilst the narrative will be fact sensitive, there is merit in providing an example to illustrate the point. Say a defendant had designed wiring to a bathroom area, which was not to specification; the claimant would be advised to narrate the occurrence of such a design error, why it is entitled to additional time and/or monetary compensation through the contract and then tell the chronological story as to the impact of such a design error. Rather than state that the defendant's design error, caused £x number of loss, a claimant should contextualise its claim. On [insert relevant date], it was discovered that the defendant had erred in the design of the wiring to the bathroom areas. Upon awareness of the event, the claimant duly notified the defendant that it was contractually responsible for such a design error and that since the bathrooms had already been installed, there would be considerable rectification work to be carried out, which would critically delay the project and in consequence, the claimant's losses will have to be compensated.

If possible, using the project schedule to articulate the impact of the design error on the completion date, the claimant would then proceed to explain the additional prolongation and/or disruption costs. If critical delay was evident, then the claimant would align its additional prolongation costs, with the critical delay periods identified. If disruption was experienced, the claimant would, preferably by trade, chronologically explain the impact of the design error (the event), and the associated losses/inefficiencies. For example, in the first instance, the electrical subcontractor would have to remove the "not to" specification wiring, damaging the plasterboard walls in the process. The correct specification wiring would have to be ordered and installed. Once the new wiring was reinstalled, the plasterboard subcontractor had to be remobilised to repair the walls, while repairing the walls, in order to mitigate the critical delay, the electrical subcontractor and the plasterboard subcontractor were compelled to work in the same locations. Such trade stacking caused productivity to be reduced, from the industry norms, which meant that additional costs of £x were incurred. Once completed, the tiling subcontractor had to remobilised, given the piece-meal patch repairs, the work could only be priced on a daywork basis, at a cost of £x. Once completed, the painting subcontractor had to remobilise and in effect repaint the entire area, as patched painting was not acceptable. It would also be prudent for the claimant to reduce the losses claimed, to take into consideration any matters for which it was responsible during the rectification works.

The explanation of the example above, sets out how such an event(s) had an impact on the claimant's performance, supported by a project schedule and perhaps a Scott Schedule of costs relating to such critical delays and loss of productivity. Of course, the foregoing is an oversimplification of how only one event can delay and disrupt a project, but it does begin to tell the story how such an event, led to the claimant incurring losses. The crux of successfully pleading a global claim is in overcoming the initial and critical hurdle of convincing a decision maker, that the award is not zero and that all that must be done is to assess the final amount due to the claimant.

As set out in the pre-trail section above, Patten considers that there are *"two cardinal principles"*: [869]

i. *"....the particulars must show disclose a reasonable cause of action"*[870] referring to *Doyle*; and

ii. *"....the pleading must tell the defendant the case it has to meet"*[871] – referring to both *Wharf Properties* and *John Holland*.

If there are numerous events which contributed to the delay and/or disruption, say for example, in an around the time the design of the wiring was found to be flawed, there were access issues due to scaffolding, delays in procuring the wiring and labour shortages, then a claimant will, have to meander around the events deciding what is dominant or effective or concurrent and explain why in its opinion it arrives at the causes and effects and losses claimed. As explained by Patten:

"It is usually possible for a claimant to give some explanation as to the respective efficacy of the events and, where their contribution is material, how and in what ways particular events interacted. The more relevant detail that can be provided, the harder it will be for the defendant to complain that the pleading does not disclose the claimant's case." [872]

And concluding that:

[869] Ibid, 4.
[870] Ibid, 5.
[871] Ibid.
[872] Ibid, 10.

"Pleading even the most difficult global claim is possible provided the pleader keeps sight of the objective: provide the claimant's route map of how it proposes to link events to loss and tell the defendant the case it has to meet." [873]

Notwithstanding that global claims are permissible, it is suggested that this means that once direct delays and/or losses are quantified, and the claimant has tried where it can to articulate the indirect losses (once proven), then the decision maker is expected on the balance of probability, by inference to the evidence adduced, to make a finding as to the losses incurred borne out of the lack of nexus between each and every activity. It would appear to be case that upon analysis of the case law, whilst the law allows that causal leap to be made in principle, it would appear that what tends to happen in practise is that a decision maker still endeavours to look for a nexus, that exists but cannot be articulated. This is evident in the case law post *Walter Lilly*, where reported claims deemed global in nature have essentially failed. It is yet to be determined whether a court will in fact award a claim which contains global elements, i.e. a composite award, however following this framework above (and the diagrams set out in Appendices 1 and 2), will go some way to improving a claimants chances of success.

7.5 Socio Legal – the effect of Liquidated Damages

7.5.1 **Introduction**

As identified in Chapter 1, not only is the construction industry a major contributor to the UK's economy, it also shapes our urban and rural landscape, provides and maintains transport links between business, friends and family and creates innovative structures designed for Healthcare, Education, Housing, Civic Pride, Business and Crime. There is no doubt that the construction industry is at the very heart of UK society. Notwithstanding its importance however, UK contractors are struggling to maintain profitability[874], a data compilation undertaken by Hews and Associates in 2018 for Building Magazine, identified that the top 10 contractors in the UK make a combined margin of just 0.38% relative to turnover. These meagre returns have moved Jan Crobsy, managing director of KPMG UK to say[875]:

"Ultimately contracting feels like hard graft for the return you get….How can these margins be sustainable when there are such large levels of risk transfer to contractors."

[873] Ibid.
[874] Ernst & Young, 'UK Construction: Margin Pressure' 2017 Report.
[875] Hamish Champ, Dave Rogers "Top 10 contractors under the cosh as margins slip to less than 0.5%" Building July 2018.https://www.building.co.uk/news/top-10-contractors-under-the-cosh-as-margins-slip-to-less-than-05/5094799.article.

Profitability does not increase significantly outside of the top 10 contractors, with the top 150 averaging just 1.7% profit margin.

Whilst there is a myriad of macro-economic, political and commercial reasons why contractor's profits are declining, it is submitted that an element of the risk transfer inequity in contracts identified by *Crosby* and which, has a negative impact on a contractor's profit margin, relates to the ubiquitous presence of liquidated damages in construction contracts. Indeed, it is suggested that the rise of various legal principles some of which have been identified and explored in this thesis, such as the prevention principle, liquidated damages as a penalty, and the Malmaison Approach to concurrent delays, have been introduced by the courts to control the effect and levying of liquidated damages[876].

7.5.2 **Liquidated Damages**

It is not the purpose of this thesis to provide the historical context and development of liquidated damages, which can be traced back to at least the 16th century[877] with the introduction of penal bonds; or to examine the well-worn discourse on whether liquidated damages are unenforceable if deemed a penalty[878]. The purpose of this section of the thesis is to consider whether the inclusion of liquidated damages in construction contracts is in fact equitable and/or appropriate, because it is suggested that their existence, has to some degree facilitated the rise of various legal principles set out in this thesis, which have been devised by the courts to re-balance contract risks which may be present in a global claim environment and where liquidated damages are often at the core of the dispute at hand.

In summary, liquidated damages in a construction contract can be defined as:

"…a liquidated (i.e. fixed and agreed) sum shall be paid as damages for some breach of a contract. A typical clause provides that if the contractor shall fail to complete by a date stipulated in the contract, or any extended date, it shall pay or allow the employer to deduct

[876] Michael Cope, Ian Heathwood et al "Liquidated Damages can destroy your profit….and your business" Mackay Solicitors 2015: https://www.lexology.com/library/detail.aspx?g=04e01a3f-e2bc-4422-ab78-56fe49b278f3.

[877] Harvey McGregor QC, *McGregor on Damages* 19th edition: Sweet and Maxwell 2016, Chapter 15, Section 1 para 15-003. See also judgement in *Cavendish Square Holding BV v Talal El Makdessi & ParkingEye Limited v Beavis* [2015] EWCA Civ 402, from para 3 onwards.

[878] The judicial test as to whether liquidated damages were enforceable or otherwise is set out in century old case of *Dunlop Pnuematic Tyre Co Ltd v New Garage & Motor Co Ltd* [1914] UKHL 1 and has been recently updated in the Supreme Court cases of *Cavendish Square Holding BV v Talal El Makdessi & ParkingEye Limited v Beavis* [2015] EWCA Civ 402.

liquidated damages at the rate of £x per day or week for the period during which the works are uncompleted."[879]

In petrochemical and oil gas contracts in particular, liquidated damages clauses can also be used where a contractor fails to meet the pre-agreed performance criteria, such as plant output.

It is common for the total liability of liquidated damages to be capped *ex ante*, at 10% of the contract price[880], and for a 2 year project duration, total damages often max out around 4 months after planned completion[881], although it will of course be dependent on the type of project under construction.

Liquidated damages can be contrasted with unliquidated (or general) damages, which can be defined as *ex post* pecuniary compensation for breach of contract[882], and, as much as money can, they bring the aggrieved party to the commercial position he/she was in prior to the occurrence of the breach[883]. The inclusion of liquidated damages clauses in construction contracts have significant benefits to the employer including;

i. Losses do not have to be proven. Once either the key milestone or completion date has expired, the liquidated amounts become due. If upon the levying of such damage, the contractor considers that it is entitled to an extension of time, which will in effect insulate it from liquidated damages, it will have to provide the employer with evidence that such delays were not its responsibility. The contract administer will then be obligated to fairly assess the contractor's extension of time claim and either grant such extension or insist that liquidated damages are levied. Ordinarily, this will take the form of set off either a contractor's interim or final payment application.

ii. The fact that losses do not have to be proven, saves the employer the time and cost of proving its losses, in the dispute forum(s) set out in the contract.

iii. A degree of certainty, as prior to the construction period, the employer will be able to make contingent allowances in its commercial risk profile, which may be a requirement of project funders and/or insurers.

[879] Supra note 13, para 10-001.
[880] Brian Eggleston *Liquidated Damages and Extensions of Time: In Construction Contracts*, 2009 Wiley Books, 60.
[881] Prodosh K. Mitra "Liquidated Damages and Incentive Provisions in Construction Contracts", Contract Management March 2013.
[882] Supra note 877, Chapter 1, Section 1 para 1-001.
[883] Based on remoteness and measure of damage.

iv. The courts general acceptance that liquidated damages are a commercial reality in construction contracts[884].

There has been suggestion that liquidated damages clauses are also of benefit to the contractor[885], however, upon analysis it is apparent that there is only one reason posited with any merit, and even then, it is difficult to concur with such conclusions, namely a limitation of liability. Since the contractor knows the amount it will have to pay (for example, 10% of the contract price, levied daily (or weekly) over a 4 month period); if it is responsible for delaying completion of the project, it will be able to make provision for same at tender stage. However, the limitation of liability can still be predetermined and controlled between the parties, but the damages can be unliquidated. It is submitted that incorporating such an agreement into the contract would provide a more equitable risk balance, where either party would have the burden of proving their losses.

Upon analysis, it is difficult to discern what other benefits there are to a contractor when agreeing to the inevitable insistence by the employer to the inclusion of a liquidated damages clause. Indeed, in many of the standard form construction contracts, liquidated damages are already a default clause making it even more difficult to resist. It is suggested that, as recognised by Salmon LJ, liquidated damages clauses are *"…inserted by the employer for his own protection."*[886]. It is unclear why there is a universal acceptance that in the majority of construction contracts, an employer is not required to prove his losses if the project is delayed, but the same cannot be said for the contractor. In the first instance, the contractor is normally obligated to notify the employer when it becomes aware that the project will be delayed. Often this is set as a condition precedent[887] in the contract and failure to notify in the timescales provided, disentitles the contractor to an extension of time, even though it may not be responsible for the delays. Secondly, post notification, the contractor must then evidence an entitlement to an extension of time. It is often the case that a contract administrator will require some form of delay analysis, which can be distracting and costly for a contractor – even when it is ultimately awarded an extension of time, it will not be compensated for the preparation of its delay claim. Thirdly, given the contract administrator is paid by the employer, it is

[884] Supra note 878, *Trollope & Colls Ltd v Northwest Metropolitan Regional Hospital Board* [1973] 1 WLR 601
[885] Supra note 880, 42.
[886] Supra note 427.
[887] For example, in the FIDIC suite of contracts.

difficult to accept that he is truly independent and objective in his reaction to such claims made by the contractor.

The foregoing scenario often leads to a phenomenon called constructive acceleration. The SCL's Delay and Disruption Protocol defines constructive acceleration as:

"Acceleration following failure by the Employer to recognise that the Contractor has encountered Employer Delay for which it is entitled to an EOT and which failure required the Contractor to accelerate its progress in order to complete the works by the prevailing contract completion date. This situation may be brought about by the Employer's denial of a valid request for an EOT or by the Employer's late granting of an EOT". [888]

In such circumstances, the employer uses the leverage of liquidated damages to compel the contractor to accelerate the works. Unlike in the US[889], the courts in the UK have been slow to acknowledge the existence of constructive acceleration, however in *Cleveland Bridge UK Limited v Severfield*[890] Akenhead J referred to the well-known dictum in *Banco De Portugal v Waterlow*:

"Where the sufferer from a breach of contact finds himself in consequence of that breach, placed in the position of embarrassment the measures, which he may be driven to adopt in order to extricate himself, ought not be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, he will not be held disentitled to recover the costs of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken." [891] [emphasis added]

In light of the foregoing, perhaps the courts are beginning to recognise the very real problem of constructive acceleration, which can be borne out of the ever-pervading presence of liquidated damages. Although it appears to be slow in being accepted or approved by the UK courts. Acceleration is a major contributor to contract claims, not only is the *"…body of*

[888] Supra note 26, 61.
[889] The US require that 5 criteria are satisfied: Excusable Delay, Timely Notice, EoT request refused, employer gives either express or implied instruction to complete by original completion date and contractor must accelerate
[890] Supra note 707.
[891] *Banco De Portugal v Waterlow & Sons Ltd* [1932] AC 452

knowledge in the fields of construction management, construction economics or law in the UK contains little reference to acceleration";[892] out of 91 Construction Projects sampled by Champion - 15% of the cost claims were in respect of acceleration.

It is self-evident that an employer exercising tactic leverage of liquidated damages and/or actually levying liquidated damages can nullify and/or significantly reduce a contractor's head office overhead and profit, for critical delays which he is not fully culpable. Notwithstanding, these apparent risks to the contractor, who may have worked on a project for two years for minimum return if at all; in general, the employer will still be in possession of their new building/plant/highway, however late. It is suggested that the inequitable balance of risk which liquidated damages bring to a construction project, may be one of the reasons why the English courts have opted to favour the Malmaison Approach for concurrent periods of delay, which may exist and compound the outcome of a claim deemed global in nature. If the courts in England are of the opinion that as a matter of policy, it would be inequitable for an employer to benefit from its own wrong, either in cases deemed global in nature, and which may contain concurrent delays, it would greatly assist the construction industry if it expressly said so. Throughout the centuries, the courts have done so, and in the recent mesothelioma cases have set out how they will proceed with cases, where causation is essentially suspended, it is submitted that, and as acknowledged by Furst; although it is difficult to compare construction contracts with degenerative injuries to a person(s) due to negligence, "*the same underlying reasoning appears to be present"*[893]. Furthermore, given the pivotal role of contractors in the construction industry, more should be done to facilitate a fairer balance of the contract terms, which will, to some degree, facilitate reasonable profits for the contractor.

It is suggested therefore that as a matter of social and legal policy, it should be recognised that liquidated damages should not be included as a standard provision in construction contracts. It is submitted that the most equitable approach would be to limit liability for unliquidated damages. If damages were unliquidated, given the significant time and cost associating with proving its case, an employer may therefore be more amenable to a negotiated and perhaps fairer settlement, with the dispute initially mediated between the parties, a forum already

[892] Ronan Champion, 'Acceleration in Construction and Engineering Contracts, a study of the Management, Economics and Law of Acceleration in Construction and Engineering Contracts' PhD Thesis, Kings College London, March 2005, 3.
[893] Supra note 16, 20.

actively encouraged by the English courts[894] and which has an extremely high settlement rate[895].

There is no doubt that an employer and/or developer will wholly oppose the omission of liquidated damages for a variety of reasons, such as their ability to leverage funding, if there is no certainty of compensation upon lateness, the cost of litigation and the fact that if unliquidated damages are claimed by the employer and the evidence is not substantial, then the courts tend to underestimate the losses[896]other industries such as IT and Employment use liquidated damages in their contracts and therefore circumvent the inherent difficulty of proving the loss.

Whilst these are valid concerns, perhaps a societal re-education is required, because like in any business contract, an intelligent, mature client, will disfavour entering into an agreement with a material supplier, consultant and/or contractor who is operating at such dangerously low profit margins. For a relationship(s) to be sustainable, and for the benefit of society as a whole, there should be a vested commercial and contractual interest, that both sides share the risks equitably, in order to maximise the chances of a win-win in a construction contract.

7.6 Way Ahead / Solutions

7.6.1 **Introduction**

Analysis of the case law over the last 50 years or so, confirms that global claims are permissible in both the English and Scottish courts, notwithstanding that there are *"…evidential difficulties"*[897] and that pleading in such a manner is indeed a *"…risky enterprise"*[898]. The very nature of a global claim holds that a claimant will set out an array of events which are the contractual responsibility of the defendant and subsequently claim that they have caused a composite delay or global loss. The key difficulty facing a claimant is that it will then have to provide some form of explanation in an attempt to prove a casual nexus, between the events and the delays/losses asserted, in order to persuade the court or tribunal that it should award some form of compensation. In the first instance, the primary goal of the claimant (either drafting its claim internally, or with the assistance of a claims consultant), will be to persuade the court or tribunal, that the award is not zero. It is a pivotal that a claimant

[894] Civil Procedure Rules, Ministry of Justice, Part 35.
[895] In 2016 CEDR reported an agreement settlement rate of 86%.
[896] Gerrit De Geest, *Encyclopaedia of Law and Economics*, Chapter 4610 "Penalty Clauses and Liquidated Damages" 2000, 145.
[897] Supra note 11, [486 (d)].
[898] Supra note 10, [37].

is able to convince a decision maker that there is "something due", and once this is intellectual barrier is overcome, it is then a question of maximising the decision makers assessment of the amount due.

A claimants success in proving a global claim and maximising a decision makers assessment, is compounded by the fact that, despite the language adopted by both the English and Scottish courts, as concluded at section 7.3.4 above, when it comes to the assessment of either an extension of time, and/or the associated loss and expense, a judge will still make his/her decision in accordance with the following requirements, i.e. a claimant must prove the existence of an event as a matter of fact, that a loss and/or delay has been incurred, and that event(s) which were not the responsibility of the claimant causes the delay and/or loss and expense. In fact, the English and Scottish courts have desisted from making any global or composite award. Germane to this position is the recent Australian case of *Mainteck v Stein Hurty*[899] , where the triumvirate of Ward J, Emmet J and Leeming J concluded that there are *"…no special principles"*[900] which differentiate global claims from any other contractual claim, it is "not sufficient merely to establish a causal connection between some breaches and disruption,"[901]and a claimant must *"…establish breach, causation and loss"*.[902]

Under these circumstances, a claimant will have to spend considerable investment in ensuring that there is a sufficient casual nexus between the event(s) asserted and the delay/losses incurred. As already stated at section 6.11.2, given the legal nature of this thesis, it does not analyse the various delay and disruption techniques adopted in proving a global claim, however, there is merit in considering how a claimant can effectively plead its case in this regard.

7.6.2 **Rebalancing the Contractual Risk**

As set out at Chapter 1, despite its significant influence in the UK economy, the construction industry still experiences an unacceptably high percentage of construction and engineering projects which are delivered late. Under these circumstances and given that the profit margins of the top 150 UK contractors, are on average 1.7%, it is evident that the status quo is undesirable. Although not a direct comparison, it is interesting to juxtapose the worrying low profit margins of contractors against say the top five housing developers in the UK, whose

[899] Supra note 509.
[900] Ibid [186]
[901] Ibid [182].
[902] Ibid [187].

profit margins average around 20%[903.] Whilst there is of course a myriad of reasons for the disparity in profit margins between the relative business models[904], it is submitted that a rebalance of the contractual risks during the construction phase, may go some way to addressing a more equitable share of the profit in the construction industry.

It would be naïve and incorrect to suggest that the following suggestions will be the panacea for contractors attempting to successfully plead claims which are casually problematic, however it is submitted that they may go some way, to at least addressing the contractual imbalances which persist in construction contracts, and in the long term, perhaps contribute to how a contractor is more able to take control of its own profitability[905].

i. **Liquidated Damages:** As set out at section 7.5.2, it is submitted that the ubiquitous inclusion of liquidated damages into construction contracts, should re-evaluated. It is suggested that a more equitable solution would be for the contract to limit liability for either party, based on general or unliquidated damages. It would be relatively straightforward to draft a clause into the standard forms, with the following wording[906], subject to the amendment of defined terms:

   "If the Contractor fails to complete the Works by the Completion Date or a Key Milestone Date, the Employer shall issue a notice in writing to the Contractor to that effect. The notice will be given as soon as practicable, and not later than 28 days after the expiration of the Completion Date or Key Milestone Date. If the Employer fails to give notice within the 28 day period, then it shall not be entitled to any losses associated with such delays.

   The Employer shall keep such contemporaneous records as set out in Appendix XX and as may be necessary to substantiate the critical delay and/or the associated losses. The keeping of such contemporaneous records should continue throughout the duration of the Works. The Employer must allow the Contractor access to such records and (if requested) shall provide copies to Contractor. Failure to keep such contemporaneous

[903] Building Talk: http://www.buildingtalk.com/blog-entry/uk-top-developers-build-fewer-homes-to-make-bigger-profits/ - figures are based on 2016 margins.
[904] For example, in relation to the developer, the price of Land, Efficiency in the Procurement Supply Chain, Financial Leverage and Sales Value of the End Product, will all influence the profit margin, independent of the construction phase.
[905] The matter of a contractor being able to control its own profitability, will be considered further in the concurrency section below.
[906] Based upon wording taken from the JCT and FIDIC Standard Forms.

records as set out in Appendix XX, will have a detrimental effect on the Employers ability to substantiate its losses.

Within 28 days after the notice, the Employer shall provide the Contractor with a fully detailed claim in the format(s) provided at Appendix XX, identifying the event(s) which caused the critical delay and/or the associated losses, with supporting explanations. If the event(s) or circumstances are ongoing as to have a continuing effect:

(a) The fully detailed claim shall be considered as interim;

(b) The Employer shall send further interim claims at monthly intervals, giving the accumulated delay and/or losses incurred, and such further particulars as the Contractor may reasonably require;

(c) The Employer shall send a final claim within 28 days after the end of the effects resulting from the event or circumstances, or within such other period as may be agreed between the Parties.

Within 28 days after notification, the Independent Contract Administrator shall respond with approval or disapproval and provide detailed comments. He may also request any necessary further particulars and, in any event, finalise his position within 42 days of the notification.

Each Payment Certificate shall include such amounts for any loss as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the critical delay and/or the associated losses, the Employer shall be entitled to payment for such part of the loss as he has been able to substantiate.

The Independent Contract Administrator shall proceed in accordance with Sub-Clause XX [Determinations] to agree or determine (i) an extension of time in accordance with Sub-Clause XX [Extension of Time] (ii) the addition actual losses proven in accordance with Sub-Clause XX [Loss and Expense].

These delay damages shall be the only damages due from the Contractor for such default, other than in the event of termination under Sub-Clause XX [Termination by Employer] prior to the completion of the Works. The total amount of delay damages as per this Clause XX, shall not exceed ten percent (10%) of the Original Contract Price.

These damages shall not relieve the Contractor from his obligation to complete the Works, or any other duties, obligations or responsibilities which he may have under the Contract"

ii. **Independent Contract Administrator:** In order to ensure an objective and fair administration of the contract, it is suggested that an Independent Contract Administer is appointed. If an employer wishes to enter into a construction contract with a contractor, then it must appoint an Independent Contract Administrator directly from an internationally recognised professional body, such as the Royal Institution of Chartered Surveyors, the Engineering Council and/or Chartered Institute of Arbitrators. Rather than individuals being employed in private practise consultancies, who happen to be members of a professional institute, the individual would be employed from the institute directly. The pre-conditions of the requirements for such an appointment, would be based on size, complexity and value, perhaps in a similar manner to that set out in The Construction (Design and Management) 'CDM' 2015 Regulations.

iii. **Concurrency:** It is suggested that the law around concurrent delay is unresolved, unclear and unfair. There is unequivocal disparity between the Scottish and English positions and with no settled or workable definitions, the law remains uncertain. Under these circumstances, it is submitted that the rationale of Lord Carloway[907] in the City Inn appeal should be adopted in part, although it is not without its complications. Lord Carloway is of the opinion that where a Relevant Event (or an employer event) is expressly set out in the contract, which affords the contractor an extension of time, then it does not matter if there is a competing cause of delay by the contractor, an extension of time should be granted for the delay associated with employer event:

"Where there are potentially two operative causes of delay, the architect does not engage in an appropriate exercise. Where the contractor can show that an operative cause of delay was a Relevant Event, he is entitled to an extension of time to such new date as would have allowed him to complete the Works in the terms of the Contract." [908]

On the face of it, his opinion is consistent with that set by Akenhead J in Lilly:

[907] Currently Lord Justice General and Lord President of the Court of Session, which makes him the most senior judge of the Supreme Courts of Scotland,
[908] Supra note 10 [114]. Appellate decision.

"…the English approach that the Contractor is entitled to a full extension of time for the delay caused by the two or more events (provided that one of them is a Relevant Event)…" [909]

Where the judge's divergence, is that Akenhead J defines concurrent or competing causes as relating to a *"...period of delay [that] is found to have been caused by two factors"*. Although there was no reference made to it, it is suggested that in deciding whether events were concurrent, he would have adopted the causative approach taken by Seymour J in *Royal Brompton*. The approach taken by Seymour J was recognised by Lord Osborne in City Inn, i.e. that the English judge was referring to *"…two events productive of delay, one a relevant event and other not, occur simultaneously with chronologically coincident starting points"*[910]. Lord Osborne found this approach too restrictive and suggests that if a project is already delayed by a contractor event, and a Relevant Event arose, if it did not impact the completion date as a matter of causation, then the contractor would be allowed an extension of time. Lord Carloway adopts a totally different approach. He is of the opinion that traditional causative methods are to be suspended, because the contract expressly states that a contractor is entitled to an extension of time for a Relevant Event, it is of *"…no moment"* that the contractor may also be experiencing delays during that time. The express agreement between the parties, in effect, allows causative principles to be superseded.

The suspension of causative methods is also apparent in the English Malmaison Approach applied to concurrent or competing causes. The logic is that during periods of concurrent delay[911], the contractor is entitled to an extension of time, but not the associated loss and expense, because the contractor would have incurred the losses in any event, due to its own delays. However, maintaining the same logic, the contractor should not be allowed an extension of time, because it would have been late anyway (in a similar construct to that uses for disallowing loss). But for causation is suspended for one, but not the other?

Under these circumstances it would appear therefore that the English and Scottish courts are able to suspend the factual causative potency of concurrent events on the completion

[909] Supra note 11 [366].
[910] Supra note 10 [36]. Appellate decision.
[911] It is suggested that this relates to true concurrency, i.e. where delay occur simultaneously, and have the same impact on the completion date.

date, if there are express clauses which allow an extension of time for an employer event, but the contract is silent on contractor delays – as is the case in all of the standard form contracts in the UK.

It submitted that if Lord Carloway's opinion on concurrent delay is to be accepted, then a further rebalancing is required. Although Lord Carloway omitted to mention loss and expense, he clarified that on one view (in relation to delay), the matter ought to be approached *"...as an architect would assess the situation at the time and not by a judge using his perception of legal causation"* [912]. In this instance it was not possible, due to the approach of the Lord Ordinary during first instance trial and the fact that the architect did not provide evidence, however, it is suggested that he was alluded to the notion that the architect (or contract administrator) should interpret the contract as a construction professional, given ordinary meaning to the contract wording. If that is the case, then if there is a contract clause which allows loss and expense for delays associated with Relevant Events (as per the JCT Suite of Contracts used in City Inn), then, in the absence of guidance to the contrary, there would appear to be no reason, why the contractor would not also be entitled to the loss and expense, associated with extension of time granted due to an employer's Relevant Event, claimed as a Relevant Matter.

This approach has not been considered either by the courts or from academic commentary. On one hand it is susceptible to the argument that it impugns against notions of causation, however, causation is not necessarily followed by the UK courts (or effective) in any event. Furthermore, adopting such an approach may allow a contractor to control / manage its original contract work with greater efficiency. The cumulative and negative impact that multiple employer changes on the contractor's ability to manage the original contract works, cannot be underestimated. A contractor will ordinarily be reimbursed for the direct costs for employer changes, however when these changes become significant in number and scope, the indirect costs associated with such changes can be difficult to evidence and calculate; and therefore, reimbursement becomes problematic. In addition, multiple changes, can dilute key resources on site, which can limit a contractor's ability to mitigate / manage its own delays, be that through redirection of work fronts, to deciding to adopt accelerative measures.

[912] Supra note 10 [103]. Appellate decision.

Finally, it is suggested that an express provision in the contract, would avoid circumstances where the parties are left to the common law, to subjectively interpret where the stand in relation to concurrent delays and the associated costs. The following suggestion captures the narrative set out above:

"Where an Employer Event has an impact on the Completion Date, then notwithstanding that there may be a competing Contractor Event, concurrent or otherwise, the Contractor is entitled to an extension of time, caused by the Employer Event.

Furthermore, the Contractor is entitled to the loss and expense associated with delays, critical or otherwise, which are proven to have been caused by Employer Events."

iv. **Global Claims:** It can be concluded from the case law set out at Chapters 3 to 5 above, that the UK courts are reluctant to make composite awards against multiple events, which may be an amalgam of contractor and employer responsibility. Indeed, whilst there it is acceptable by the courts that a global claim can be plead under certain preconditions, it does not *"…absolve the pursuer from the need to aver and prove the causal connections between the events and the loss and expense*[913]*."* and the contractor must still prove:

"*…events occurred which entitle it to loss and expense...that those events caused delay and/or disruption….that such delay or disruption caused it to incur ….loss and damage as the case may be."*[914]

There is no doubt that there are significant evidential difficulties in pleading a claim which may contain global elements and if a tribunal is sceptical, then, a contract administrator paid by an employer, will be even more so. The pejorative nature of a global claim and the fact that it often requires a tribunal to come to a decision, based on precedent – means that a contract would have to be highly prescriptive, in order for a contractor to stand any chance of obtaining an award from a contract administrator (in say an interim valuation); when asserting a claim which is global in nature (or in part).

Given the uncertainty surrounding global claims, an experienced contract administrator, whose paymaster is the employer, would be disinclined to award a composite award to a contractor, where causation may have to be inferred and the multiple events cannot be disentangled from the composite sum rewarded. Post discussions with the employer, it may be the case that a commercial compromise may be reached with the contractor

[913] Supra note 10, [35]. First Instance decision.
[914] Supra note 11 [486].

(despite the lack of evidence), however it would be delusory to expect a contract administrator to independently make composite awards where no (or little) causal nexus is present. Indeed, there is nowhere in the case law that suggests that the UK courts, are overly critical or disapproving of contract administrators who do not make such an award. There appears to be an acceptance that a decision of such complexity, be left to the courts and the parties' experts to examine, provide an opinion and then decide that an award is due.

Experienced construction professionals understand that a contract administrator will always err on the side of caution when evaluating change who always has the employer's interests at the forefront of his mind. Contractors will opine that it is a difficult enough task persuading a contract administrator to make awards for variation, delay and/or disruption which are transparent and where the event is linked to the loss asserted, never mind attempting to prove a claim which is complex, may concern multiple (sometimes hundreds of events) and the associated composite losses. A contract administrator will consider it ultra vires to his role and push the matter to the dispute resolution clauses.

Under these circumstances, it is difficult to see how contract drafting could solve this problem. It may be that appendices could be drafted which would ensure a contractor prescriptively follows the principles set out by the court, however, the nature of a global claim, will still mean that; despite a contractor satisfying the initial legal/contractual preconditions, the fact remains that a contractor administrator will still have to expose him/herself to awarding losses to a contractor based on inference. It seems like at time of writing, this position is untenable and unrealistic.

It may be the case that as technology develops, it will in turn facilitate a deeper understanding of the causes of loss on a construction project, making it easier to a contractor to prove its loss and for a contract administrator to accept it, and that advances in technology render insufficient and inaccurate contractual wording redundant.

7.6.3 Technological Advances

The low profit margins of the largest UK contractors have left their financial capitalisation on a "knife edge"[915]. Toby Hunt, Chief Business Development Officer of HKA considers that:

[915] Supra note 22, foreword.

"The fitness for purpose of existing procurement and operating models is being questioned. The expectation to deliver more, quicker and for less is asked of an industry that has arguably failed to respond to calls for change for decades."[916]

The apparent failure for contractors to respond, is compounded by the fact that they are often unable to evidence the negative impact multiple changes can have on their productivity and therefore, their profitability. This position is apparent upon review of the case law, where judges have difficulty awarding composite losses for multiple event(s). As mentioned above, it would be futile to develop definitive clauses and prescriptive appendices, in a well-meaning but misplaced attempt to present a panacea as to effectively plead and assess global claims, both at Project, Adjudication and Arbitration and Litigation levels; however, there is merit in exploring how recent developments in technology may have a practicable and positive affect in assisting a contractor to identify losses associated with project change.

Perhaps the greatest difficulty in proving delay and/or disruption on a project, is the articulation of the efficiency or inefficiency of the labour force and its evolution, expansion and displacement through the duration of the works. It will often be the case that a contractor will possess daily site records, which identifies the total numbers of labour on site on any given day, and the working hours spent on that day. Foreman and/or supervisors may have their own diaries; however, looking retrospectively a claimant will find it difficult to articulate and link, particular work fronts, with the labour on site. The claimant will know the number of labour force on site, but, particularly on projects of scale, it will not fully understand the output and the location of that labour force on any given day. The difficulty in monitoring the labour force is compounded by the inevitable changes to the project schedule, which will be caused by both contractor and employer.

HKA's Digitalisation Report has concluded that the digitalisation of project data, should improve project controls, facilitate commercial negotiations and therefore assist in reducing the number of disagreements and disputes. Perhaps the largest technological growth area relates to Building Information Modelling ('BIM'). Although the idea originates from the 1970's, it is only in the last couple of years or so that the Government have realised the importance it may play in the efficient construction and administration of construction projects, particularly projects of scale. In March 2016, the Infrastructure and Project Authority

[916] Ibid.

released a report titled *"Government Construction Strategy 2016-2020"*, with one of its principal objectives to:

"…embed and increase the use of digital technology, including Building Information Modelling ('BIM') Level 2."[917]

BIM can be defined as:

"BIM is essentially value creating collaboration through the entire life-cycle of an asset, underpinned by the creation, collation and exchange of shared three dimensional (3D) models and intelligent, structured data attached to them."[918]

Linking design data to create a 3D special model (height, width and depth), can create a powerful visual tool for decision makers on construction disputes, who's expertise will often not be in analysing construction drawings. Once the model is established, then additional information can be added:

i. **4D:** Time;

ii. **5D:** Cost;

iii. **6D:** Environmental and Sustainability; and

iv. **7D:** Lifecycle facilities management.

It is beyond the scope of this thesis, to explore the impact that BIM and its potential impact on assisting a contractor evidence a claim where causation is problematic. How the technology interplays with the contractual obligations of the parties is yet to be seen, however as recommended by the SCL Delay and Disruption Protocol 2nd Edition, it important that the parties are clear about their role from the outset:

"The effective use of BIM requires specific agreement between the parties regarding its content, use and ownership". [919]

There is a myriad of thought provoking articles as to the role BIM will play in construction projects, and there can be no doubt that its usefulness will become increasingly pronounced

[917] Infrastructure and Project Authority, Government Construction Strategy 2016-2020, March 2016.
[918] RICS Guidance Note: BIM for cost managers: requirements from the BIM Model. 1st Edition August 2015, p 5. Extracted from the UK Government's BIM Task Force Website.
[919] Supra note 26, p 14 section 1.17.

as the technology develops improves, however it will not be without legal and contractual challenges[920].

Another technological advance, still in its relative infancy in construction projects is adoption of system dynamics modelling. System dynamics is way of measuring disruption on a project by creating:

"…a computer simulation of the construction project, using software that allows various 'but-for' scenarios to be simulated to postulate the impact of employer-responsible disruption." [921]

There are no reportable UK cases where a claimant has adduced evidence of disruption based upon this form of modelling, although there appears to be anecdotal evidence that it has been used in arbitration proceedings[922]. The fact that the 2nd Edition of the SCL Delay and Disruption Protocol has dedicated a paragraph to explaining, in general terms, how system dynamics operates[923] may be indicative that the construction industry is considering that it may be an acceptable method of calculating disruption borne by employer responsible events. If, as Goodchild suggests, the TCC may be amenable to such modelling to prove disruption borne out of a myriad of project change, commonly referred to as *'death by a thousand cuts'*[924]common on projects of scale, then it is a welcome development, to further assist in balancing the commercial risks inherent in a construction project.

It would not be unreasonable to suggest that construction industry uptake in technological advances has been slow[925]. However, it would appear that there are a growing number of Contech, or construction technology start-ups receiving significant funding from venture capitalists[926], with a view to improving productivity in the industry. For example, in the US Katerra, an expert in off-site modular construction has seen a $865 million investment from

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[920] May Winfield, 'Building Information Modelling: The Legal Frontier – Overcoming Legal and Contractual Obstacles' A paper based on the highly commended entry in the Hudson Prize Essay Competition 2014, April 2015 D178.

[921] Ralph Goodchild, 'Proven by Computer? System Dynamics and Disruption Claims' A paper based on the joint second prize winning entry in the Hudson essay competition 2017 presented to the Society of Construction Law at a meeting in London on 8th May 2018. September 2018 212, p 1

[922] Ibid, p 15.

[923] Supra note 26, Section 18.16 (e)

[924] Supra note 921, 9.

[925] Charlotte McCarthy, Director of Marketing at Proptech a major technology event firm had this to say." "*It is hard to change people's minds and get them used to new ways of doing things, especially in traditional sectors like construction and real estate. The cost of these new solutions is not always cheap and therefore there is normally quite a lot of sign-off required to integrate unproven solutions. This will be the biggest barrier to adoption,"*

[926] Finbarr Toesland, 'How Contech is taking Construction into the Future' Raconteur 13th December 2018.

SoftBank's Vision Fund at the beginning of 2018. Although modular construction can be made more difficult if the design is not finalised (requiring constant rework of prefabricated units), it is envisaged that modular construction will go some way to reducing the inefficient use of labour resources which has plagued the construction industry for millennia.

It is further envisaged that the adoption of technological innovation may go some way to articulating the causal nexus between event(s) and losses prevalent in a global claim more effectively than relying upon further developments in the law and/or the standard form contracts, which appear to have stalled on this matter. There appears to be growing weight behind the notion that technological innovation will ultimately reduce construction disputes:

"As digitalisation matures and the industry harnesses the data that flows through it, we expect to see improved situational awareness … We expect this to translate into fewer disputes with less complex causation amongst our clients."[927]

Finally, in a global construction survey by KPMG in 2017, 72% of its respondents said that technology innovation or use of data will play a prominent role in their strategic plan or vision[928], and that the industry is ripe for technological disruption, which is seen as more of an opportunity than a threat[929]. Given that only 5% of the respondents considered themselves *"cutting edge",* in their adoption of technology, it would be reasonable to infer that growth in this area is at least on the near horizon.

[927] Supra note 22, 13.
[928] KPMG, 'Make it or Break it, Reimagining governance, people and technology in the construction industry' 2017 Global Construction Survey.
[929] KPMG, Building a technology advantage, 2016 Global Construction Survey.

CHAPTER 8: CONCLUSIONS

8.1 Introduction

Despite both the English and Scottish courts confirming a global claim can be advanced by a claimant under a construction contract; a historical review of the case law in both jurisdictions, and since composite claims were originally recognised in the courts in the 1960's, reveals that remarkably, there has not been one case of a claimant proactively (and without reserve) pleading a construction claim on a "global claim" basis. Therefore, when both the 1st and the 2nd Edition of the SCL Delay and Disruption Protocol state that *"The not uncommon practice of contractors making composite or global claims without substantiating cause and effect…"*[930]*;* it can be by inference only[931], and that due to the undeniable pejorative overtones associated with global claims, a claimant in the UK will be reluctant to plead its case expressly on that basis[932]. It is the defendant who advances that a claim is global in nature, in an attempt to obfuscate a claimant's case which is not adequately particularised. This disclination is warranted, because analysis of the case law suggests that the courts are reluctant to make composite awards against multiple causes/events. In fact, despite a softening of the UK judge's rhetoric in relation to global claims[933], they remain, as ever, faithful to the judicial triptych set out in *Doyle* in Scotland and echoed in *Walter Lilly* in England i.e. that entitlement is settled, the existence of loss and a causal link between these is identified; then legally, the cause is deemed to have occurred and the subsequent assessment of damage incurred as a consequence. As of 2018, it therefore remains a truism that advancing a claim is still a *"…risky business"*[934] as proffered by their Lordships in *Doyle.*

It is understandable why the UK courts have difficulties with accurately assessing global claims, not least because, notwithstanding that current global claims' definitions are correct, the wording is limited and cannot adequately explain the complex array of factual evidence that surrounds such lexica. It is well understood in the construction industry that in a claim deemed global in nature, there will be a number of events (not all of which may be the fault of the defendant), a body of loss and/or delay and a lack of causation between the events and

[930] Supra note 25 & 26.
[931] The claims may indeed appear global; however, they are not plead as such by the claimant. Perhaps the wording is based on experiences which are based on other dispute resolution forums
[932] Supra note 275, 416. In this seminal article on the matter Bryne J considered that "*A more prudent course it to present this claim [global] in the alternative to a more orthodox claim, in order to provide some encouragement to the tribunal to accept the latter."*
[933] Supra note 11 [486 (d)]
[934] Supra note 10 [37]. Appellate decision.

the losses. However, as can be derived from the case law, applying such generic definition to projects of unique factual sensitivity is open to considerable subjectivity and interpretation. By the time the case at hand has progressed to the judiciary, experienced counsel, expert witnesses, claims consultants, as well as the parties to a dispute (on both sides), are able to credibly assert whether a claim has been adequately plead or otherwise, and/or whether it is global in nature or otherwise. The decisions made by the learned judges upon making their assessment of a construction claim for loss and/or delay are neither predictable nor certain, due to the complex factual matrices surrounding each case. It is the inference of the causative potency of events based on the evidence adduced, which lies at the centre of whether a case will be won or lost.

It is submitted that once a claim deemed global is permissible, and once the direct losses are quantified and separated, the task at hand for the claimant, is firstly to articulate entitlement to the indirect losses, secondly to narrative an explanation as to why a series of events has caused a composite loss and where it is possible to do so, attempt to explain the causal nexus between both elements. Once plead and defended, the decision maker is expected to, on balance, using common sense principles, and as far as the law in each jurisdiction allows, satisfy itself that causative inference is adequate to make an award, a partial award or no award. The law allows that inference to be made in principle, but more often than not the causal leap is an inferential step too far for an experienced judicial decision maker.

From a wider socio-economic perspective, it is clear that an average profit margin of 1.7% for the top 150 UK contractors is undesirable and arguably unsustainable. As set out previously, whilst there is a myriad of reasons why this may be the case, a contributory factor are the contractual imbalances found in many construction contracts. Whilst in 2018, there is no excuse for contractor's failing to maintain adequate records, the complex interaction and articulation of change, particularly on projects of scale requires that more should be done by the parties to a contract, the standard form contracts and the judiciary to ensure that a fair and transparent compensatory arrangement is attained. It would be naïve to posit the notion that the suggestions set out in this thesis will be the panacea for contractors attempting to successfully plead claims which are casually problematic, however it is submitted that they may go some way to at least addressing the contractual imbalances which persist in construction contracts, and in the long term, perhaps contribute to how a contractor is more able to take control of its own profitability.

For example, in relation to the assessment of global claims where there are competing or concurrent causes, a hybrid of Lord Carloway's opinion in the appellate decision in *City Inn* should/could be considered. As a matter of policy, where there are competing events/causes of critical delay, which are the responsibility of the contractor and a contractually recognised employer event, then similar to the first limb of the Malmaison Approach, the contractor is entitled to an extension of time for the delay period attributable to the employer event. In addition to entitlement to an extension of time, the contractor would also be entitled to the loss and expense associated with such delays. Taking this approach, questions of dominant or effective causes are irrelevant, the losses are simply allocated to the critical delay period identified. It is admitted that there is an argument to suggest, as opined by Seymour J in *Royal Brompton*, that if the project was already in critical delay prior to and subsequent to an employer event, then the employer event has not the casual potency or impact on the completion of the project. However, adopting the logic of both Akenhead J in *Walter Lilly* and Lord Carloway in *City Inn*, who both favour the literal interpretation of the contract, which stated in both instances that an extension of time is awarded for an employer event, if there is no express contemplation of what happens in the event of a contractor's concurrent delay in the contract, then this is to be discarded.

Moving forward, perhaps the most effective way to bridge the inferential gap between event(s) and composite loss associated with global claims, will lie in the burgeoning technological advances available to the construction industry but yet to be adopted in any meaningful way by the mainstream, instead of relying upon either revision of the standard forms, or the unrealistic expectation that precedent will provide greater certainty and fairness.

Finally, it is submitted that a reasonable and rationale man on the street may be forgiven for aligning him/herself with the conclusion of how delay and/or loss or expense should be ascertained (even plead on a global basis), with that set out by Ennis:

"…there may be circumstances where it is reasonable to recommend, or award, a payment in respect of loss and/or expense, or damages, in circumstances when there is no documentary proof, but where it is reasonably certain that some loss has been suffered by the contractor, and that the amount of such payment may have to be based on experience, or professional skill and judgment, or by reference to one of the industry-standard formulæ, or even via some form of general assessment or hypothesis."[935]

[935] Supra note 130, 5.

Unfortunately, whilst this approach appears on the face of it equitable, upon analysis, it is highly unlikely that either a Scottish and/or English judge will follow such an approach. At best it is likely that an award will be a *"...reasonable minimum"*[936], which will do little to improve a contractor's chance of success or indeed to encourage it to plead a claim on an unreserved global basis.

8.2 Limitations

An analysis of how the UK courts have dealt with global claims, requires to a degree, consideration of many and varied overarching legal doctrines, principles, rules and applications relevant to the assessment of the foregoing. Furthermore, there are many practical and technical advances whose adoption and development in the future, will no doubt assist decision makers in construction claims which are casually complex. In consequence, the thesis has certain limitations.

In particular, given the dearth of case law actually showing how tribunals and/or judges arrive at their assessment of a global claim, such as those presented in *Walter Lilly*, it has not been possible to discern any pattern or consistency as to how the courts, both North and South of the border actually assess construction claims, which are evidentially problematic. It is submitted that even if detailed pleadings of quantum and delay had been presented, the fact sensitivity of each case may render the exercise futile in any event.

As the thesis's focus centred on a doctrinal analysis of UK case law, with only a tangential reference to the influence of other commonwealth countries, a detailed comparative study of the jurisprudential development in global claims in countries Australia, Canada and the USA was not possible within the University word count regulations.

8.3 Recommendations for Future Research

A historical and doctrinal examination of the case law since the 1960's, in analysing how the UK courts have dealt with global claims, has revealed fertile ground for future research, including but not limited to the following:

[936] Supra note 11 [508].

i. An analysis as to why the English[937] and Scottish[938] judges have diverged on how causative principles are to be applied in matters of competing/concurrent delays, where the contract between is silent upon the matter.

ii. A definitive review as to whether the dominant cause is still the correct causative test to be applied in the English courts, or has this now been superseded by an effective cause test;

iii. Given that no proof is required for an employer to levy liquidated damages, would it be more equitable for a construction contract to exclude such provision and instead include a remedy where the remedy for either party is to pursue liquidated damages?

iv. The current and standard model in construction contracts is that the contract administrator (employed by the owner) administers the contract. Would it be fairer if the role of contract administrator was independent, employed by a recognised independent body?

v. How technological advancements such as BIM, Delay Analysis Software and System Dynamics could assist the courts assess complex construction claims;

8.4 Summary

Upon exhaustive analysis of the UK case law, it is submitted that despite a softening of the judicial language, the courts have not taken a more lenient approach in their assessment of global claims. It is true that (as identified in this thesis); in the past five decades there have been various clarifications both in English and Scottish jurisdictions, as to how global claims are plead and are perceived by the courts; there would, however, appear to be no special circumstances attaching to how the courts arrive at an award or otherwise. This position is echoed in the judgement of the eminent Leeming JA in the 2014 Australian case of *Mainteck v Stein Heurty*[939] where he was moved to say that in relation to a global claim for loss:

"…there are no special legal principles that mean that plaintiffs in "building cases" win or lose differently from plaintiffs in other classes of contractual case…… plaintiff seeking damages will fail unless he, she or it stablishes breach, causation and loss. True it is that some decisions on breach of contract in building cases have used the language of "global claim"….this does not involve any special principles of fact or of law."[940]

[937] Supra note 473.
[938] Supra note 469.
[939] Supra note 509.
[940] Ibid [186-8].

The foregoing position has probably been accepted by most construction law professionals in the UK, for example in the 2016 case of *Frankhurst Developments*[941]the claimant declined to pursue a global claim despite as suggested by Davies J, that this solution may be open to them in principle.

Notwithstanding the various principles and clarifications set out in both English and Scottish jurisdictions, identified at section 7.3 above, there are many areas of the law relating to global claims which remain uncertain. Whilst there is guidance as to the way in which a claimant may plead its case from a technical perspective[942], there are nevertheless various legal questions which remain uncertain, such as whether apportionment is allowed in the English courts for loss and expense claims which are not time related and concurrent, or whether an effective cause definitely usurps a dominant cause in matters of causation. In Scotland the position on how the courts will assess a global claim is perhaps clearer, due to its acceptance of apportionment generally, however more case law will have to be considered by the Scottish courts, in order to provide a definitive and workable definition as to how concurrent or competing causes operate.

Finally, upon analysis of the case law in the UK, it is submitted that this thesis concludes that the UK courts have, in fact, not taken a more lenient approach in their interpretation and assessment of global claims, and a claimant's position with regard to its success or failure in pleading a claim in such a manner, remains uncertain, both from an evidential and legal perspective.

[941] *Fairhurst Developments Ltd & Anor v Collins & Anor* [2016] EWHC 199 (TCC)
[942] For example, the 7 principles set out by Akenhead J in Walter Lilly,

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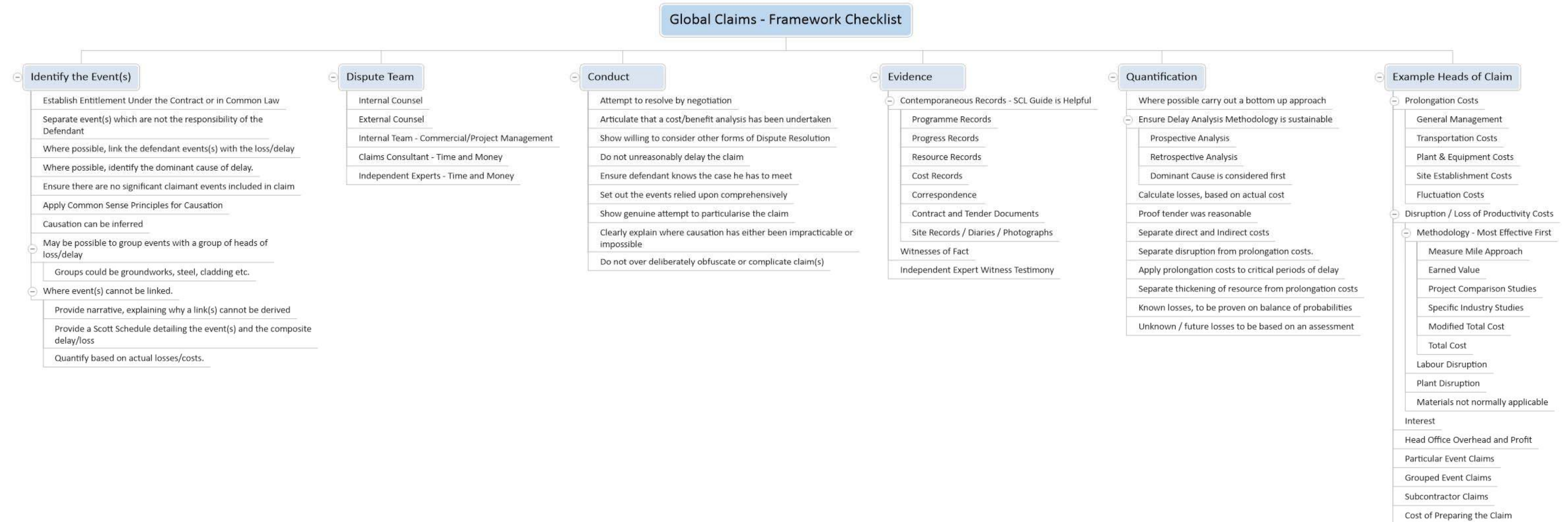
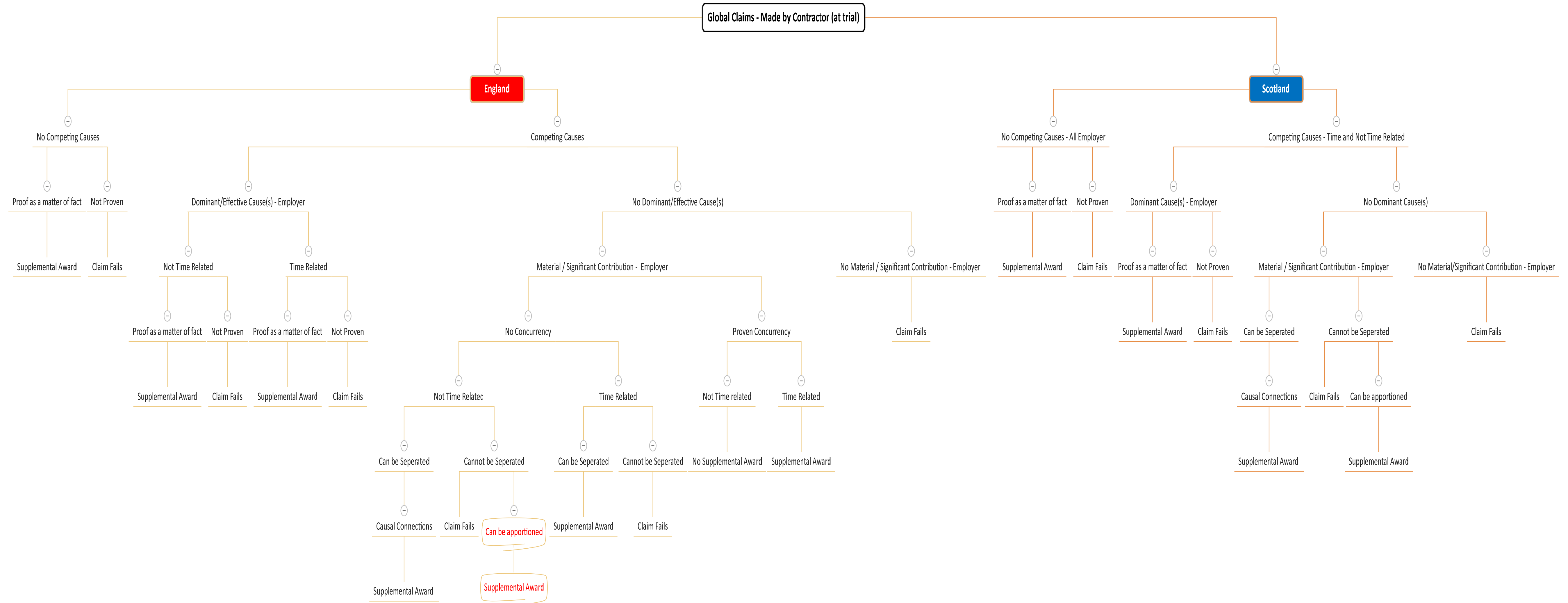
APPENDIX 1: FRAMEWORK CHECKLIST


Global Claims - Framework Checklist
Identify the Event(s)
Establish Entitlement Under the Contract or in Common Law
Separate event(s) which are not the responsibility of the Defendant
Where possible, link the defendant events(s) with the loss/delay
Where possible, identify the dominant cause of delay.
Ensure there are no significant claimant events included in claim
Apply Common Sense Principles for Causation
Causation can be inferred
May be possible to group events with a group of heads of loss/delay
Groups could be groundworks, steel, cladding etc.
Where event(s) cannot be linked.
Provide narrative, explaining why a link(s) cannot be derived
Provide a Scott Schedule detailing the event(s) and the composite delay/loss
Quantify based on actual losses/costs.
Dispute Team
Internal Counsel
External Counsel
Internal Team - Commercial/Project Management
Claims Consultant - Time and Money
Independent Experts - Time and Money
Conduct
Attempt to resolve by negotiation
Articulate that a cost/benefit analysis has been undertaken
Show willing to consider other forms of Dispute Resolution
Do not unreasonably delay the claim
Ensure defendant knows the case he has to meet
Set out the events relied upon comprehensively
Show genuine attempt to particularise the claim
Clearly explain where causation has either been impracticable or impossible
Do not over deliberately obfuscate or complicate claim(s)
Evidence
Contemporaneous Records - SCL Guide is Helpful
Programme Records
Progress Records
Resource Records
Cost Records
Correspondence
Contract and Tender Documents
Site Records / Diaries / Photographs
Witnesses of Fact
Independent Expert Witness Testimony
Quantification
Where possible carry out a bottom up approach
Ensure Delay Analysis Methodology is sustainable
Prospective Analysis
Retrospective Analysis
Dominant Cause is considered first
Calculate losses, based on actual cost
Proof tender was reasonable
Separate direct and Indirect costs
Separate disruption from prolongation costs.
Apply prolongation costs to critical periods of delay
Separate thickening of resource from prolongation costs
Known losses, to be proven on balance of probabilities
Unknown / future losses to be based on an assessment
Example Heads of Claim
Prolongation Costs
General Management
Transportation Costs
Plant & Equipment Costs
Site Establishment Costs
Fluctuation Costs
Disruption / Loss of Productivity Costs
Methodology - Most Effective First
Measure Mile Approach
Earned Value
Project Comparison Studies
Specific Industry Studies
Modified Total Cost
Total Cost
Labour Disruption
Plant Disruption
Materials not normally applicable
Interest
Head Office Overhead and Profit
Particular Event Claims
Grouped Event Claims
Subcontractor Claims
Cost of Preparing the Claim

APPENDIX 2: DECISION MAKING FLOWCHART


Global Claims - Made by Contractor (at trial)
England
No Competing Causes
Proof as a matter of fact
Not Proven
Supplemental Award
Claim Fails
Competing Causes
Dominant/Effective Cause(s) - Employer
Not Time Related
Time Related
Proof as a matter of fact
Not Proven
Proof as a matter of fact
Not Proven
Supplemental Award
Claim Fails
Supplemental Award
Claim Fails
No Dominant/Effective Cause(s)
Material / Significant Contribution - Employer
No Material / Significant Contribution - Employer
Claim Fails
No Concurrency
Proven Concurrency
Not Time Related
Time Related
Not Time related
Time Related
Can be Seperated
Cannot be Seperated
Can be Seperated
Cannot be Seperated
No Supplemental Award
Supplemental Award
Causal Connections
Claim Fails
Can be apportioned
Supplemental Award
Claim Fails
Supplemental Award
Supplemental Award
Scotland
No Competing Causes - All Employer
Proof as a matter of fact
Not Proven
Supplemental Award
Claim Fails
Competing Causes - Time and Not Time Related
Dominant Cause(s) - Employer
Proof as a matter of fact
Not Proven
Supplemental Award
Claim Fails
No Dominant Cause(s)
Material / Significant Contribution - Employer
No Material/Significant Contribution - Employer
Claim Fails
Can be Seperated
Cannot be Seperated
Causal Connections
Claim Fails
Can be apportioned
Supplemental Award
Supplemental Award

APPENDIX 3: THE SEVEN PRINCIPLES – WALTER LILLY

"(a) Ultimately, claims by contractors for delay or disruption related loss and expense must be proved as a matter of fact. Thus, the Contractor has to 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 (or loss and damage as the case may be)[943]*. I do not accept that, as a matter of principle, it has to be shown by a claimant contractor 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. 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. Absent and subject to such restrictions, the claimant contractor simply has to prove its case on a balance of probabilities.*

(b) Clause 26 in this case lays down conditions precedent which, if not complied with, will bar to that extent claims under that clause. If and to the extent that those conditions are satisfied, there is nothing in Clause 26 which states that the direct loss and/or expense cannot be ascertained by appropriate assessments.

(c) 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 disruption and which then demonstrates with precision to the nearest penny what that delay or disruption actually cost.

(d) There is nothing in principle "wrong" with a "total" or "global" cost claim. However, there are added evidential difficulties (in many but not necessarily all cases) which a claimant contractor has to overcome. It will generally have to establish (on a balance of probabilities) that the loss which it has incurred (namely the difference between what it has cost the contractor and what it has been paid) would not have been incurred in any event. Thus, it will need to demonstrate that its accepted tender was sufficiently well priced that it would have made some net return. It will need to demonstrate in effect that there are no other matters which actually occurred (other than those relied upon in its pleaded case and which it has

[943] These three principles accord with those set out in *John Doyle*.

proved are likely to have caused the loss). It is wrong, as Counsel suggested, that the burden of proof in some way transfers to the defending party…".

(e) 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. It depends on what the impact of those events or factors is. 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 under priced 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. This is not inconsistent with the judge's reasoning in the Merton case that "a rolled up award can only be made in the case where the loss or expense attributable to each head of claim cannot in reality be separated", because, where the tribunal can take out of the "rolled up award" or "total" or "global" loss elements for which the contractor cannot recover loss in the proceedings, it will generally be left with the loss attributable to the events which the contractor is entitled to recover loss.

(f) Obviously, there is no need for the Court to go down the global or total cost route if the actual cost attributable to individual loss causing events can be readily or practicably determined. I do not consider that Vinelott J was saying in the Merton case (at page 102 last paragraph) that a contractor should be debarred from pursuing what he called a "rolled up award" if it could otherwise seek to prove its loss in another way. It may be that the tribunal will be more sceptical about the global cost claim if the direct linkage approach is readily available but is not deployed. That does not mean that the global cost claim should be rejected out of hand.

(g) DMW's Counsel's argument that a global award should not be allowed where the contractor has himself created the impossibility of disentanglement (relying on Merton per Vinelott J at 102, penultimate paragraph and John Holland per Byrne J at page 85) is not on analysis supported by those authorities and is wrong. Vinelott J was referring to unreasonable delay by the contractor in making its loss and/or expense claim; that delay would have led to their being non-compliance with the condition precedent but all that he was saying otherwise was that, if such delay created difficulty, the claim may not be allowed. He certainly was not saying that a global cost claim would be barred necessarily or at all if there was such delay. Byrne J relied on Vinelott J's observations and he was not saying that a global cost claim would be barred but simply that such a claim "has been held to be permissible in the case where it is impractical to disentangle that 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". In principle, unless the contract dictates that a global cost claim is not permissible if certain hurdles are not overcome, such a claim may be permissible on the facts and subject to proof.”[944]

[944] Supra note 11 [486].

APPENDIX 4: JOHN DOYLE

"*…the Contractor has to 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 (or loss and damage as the case may be)*"[945]

[945] Supra note 11 [486].

APPENDIX 5: SUMMARY TABLE OF CASE LAW

Item	Case Law	Date	Country	Summary
1	Lichter v Mellon Stuart Co (1962) 305 F 2d 216	1962	USA	Referred to in John Doyle by Defendant's Counsel. If it cannot be proven that a non-compensable event caused additional cost or time, then the total cost/time claim may fail. Lord Macfadyen decided that if the event was material it may be fatal, however if not a rational apportionment may be made based common sense principles.
2	Wunderlich Contracting Co v United States (1965) 351 F 2d 956 Ct of Claims	1965	USA	US Cases considered by Lord MacFadyen in John Doyle
3	Philips Construction Co Inc v United States (1968) 394 F 2d 834 Ct of Claims	1968	USA	US Cases considered by Lord MacFadyen in John Doyle
4	Boyaijan v United States 423 F 2d 1231 (1970) Ct of Claims	1970	USA	US Cases considered by Lord MacFadyen in John Doyle
5	J.Crosby & Sons v Portland UDC (1967) 5 BLR 121 (QBD)	1967	England	Donaldson J decided it premissable for the arbtitrator to make a composite award, providing: i. The interaction of events relied upon must be “complex” and it must be “impracticable” to separate them; ii. There can be no duplication; and iii. Any claim for money, must not include profit. Not awarded, just let the Arbitrator decide and did not interfere - supported that view.
6	Merton LBC v Stanley Hugh Leach Ltd [1985] 32 BLR 51	1985	England	Vinelott J decided that an Arbitrator is also allowed to make a rolled up claim, in a similar manner to Crosby, i.e. where it is impractible to separate and also the following 2 additional criteria: i. Provided the contractor does not unreasonably delay in making the claim: ii. The conditions which have to be satisfied before an award can be made have been satisfied in relation to each head of claim (referring back to Crosby in terms of no profit or duplication, but also may be referring to notices.

7	Wharf Properties Ltd v Eric Cumine Associates (No. 2) [1991] 52 BLR 8.	1991	Hong Kong	The Appeal Court concluded that Wharf had failed to provide the material facts to support that any action or inaction by Eric Cumine, was essentially linked to those events with the damages averred, and the global case was (at that time) struck out accordingly. The Privy Council Agreed with this position. In Wharf the plaintiff had "…avowedly and contumaciously failed to comply with an order of the court for a supply of particulars" Global Claims were considered to be disfavoured by courts, around this time.
8	Mid Glamorgan CC v j Devonald Williams & Partner (1991) 29 Con LR 129 QBD (OR)	1991	England	Not a fully plead case like Crosby or Merton, but one regarding whether a claim should be struck out. Tackaberry J said the case should not be struck out unless it was plain and obvious.
9	McAlpine Humbroak Ltd v McDermott International Inc (No) (1992) 58 BLR 1 CA	1992	England	The court initially found that a large volume of variations could frustrate a contract, and a re-price of the whole work should be allowed. Overturned in the Court of Appeal.
10	ICI v Bovis Construction Ltd [1993] Con LR 90	1993	England	Fox Andrews J referred to the previous case law above and analysed the Scott Schedule presented. Concluded that it was not as severe as Wharf and gave leave to serve a fresh Scott Schedule with more information. A refusal to strike out case
11	British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd [1995] 72 BLR 26	1994	England	Saville LJ provided insight into the notion of *"the case to answer to"*. Often the party knows perfectly well the case it has to answer to. Nevertheless allowed the appeal to continue, as unlike Wharf, there was no express refusal.
12	John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd [1996] 8 VR 681	1996	Australia	Bryne J moving from his article to an actual case. Added more to be considered. "A typical global cost claim involves the claimant establishing: i.the reasonable cost of the work unaffected by the suggested breaches, usually put as the tender price; ii.that the respondent committed the suggested breaches of contractual or other duty; and iii.that the actual cost of the work exceeded the reasonable cost." A precursor to Doyle and Lilly, which

				referred to this case and took up the criteria and added causation. Case identifies the importance of materiality of the breach. Some items plead failed, some were allowed to be re-plead. Byrne J also set out three important principles, firstly that it is for the parties to decide how to frame their case, secondly, the court has limited powers to strike out a claim and thirdly, during interlocutory proceedings the judge can encourage the parties to clarify the matters between them.
13	Bernhards Rugby Landscapes Ltd v Stockley Park Consortium Ltd [1997] 82 BLR 39	1997	England	Humphrey Lloyd J would not strike out the case. In summary, leave was served for the claimant to submit a substitute statement of claim.
14	John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd [1997] no 6844/95	1997	Australia	In the appeal case, Nathan J (in a similar vein to British Airways), stated that when a defendant pleads confusion as to the case it has to answer to, it is often deliberate and self generated.
15	How Engineering Services Ltd v. Lindner Ceilings Floors and Partitions plc 1999] 2 All E.R. (Comm) 374; 64 Con. L.R. 67.	1999	England	This case is important, because reflects the reality that a decision maker deciding upon a case that may appear global in nature, does not have to be certain, but must use his judgement based on the civil standard of proof, i.e. on a balance of probabilities. Mr Tackaberry QC allowed the arbitrators decision allowed to stand.
16	Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd [1999] 70 Con LR,	1999	England	On matters of concurrency, the claimant is entitled to time (and therefore relief from Liquidated Damages), but not loss and expense, because that would have been incurred in any event.
17	Amec Process and Energy Ltd v. Stork Engineers & Contractors BV [2002] All ER (D) 98 (February). & [1999] All ER (D) 511	2002	England	Thornton J was of the opinion that the claim by Amex was in fact not a global claim, for the following reasons: i. It restricted its claim to the direct labour hours it utilized, with discrete claims for subcontract and drawing office hours; ii. The direct man hours expended were set out on a weekly basis, so Stork had the ability to contest any section of the claim, and its effect over time. iii. Given that the variation was in effect an instruction to deploy as many labour hours as necessary to complete the Mechanical Completion Date, then “the resulting claim would be bound to be

				both large in size and superficially rounded in nature since it would appear to be a claim for all unpaid direct labour ”
18	John Doyle Construction Ltd v Laing Management (Scotland) Ltd [2002] ScotCS 110	2002	Scotland	In his judgement, Lord Macfadyen then set out what a pursuer must prove to assert a claim for loss and expense, (1) an event arises for which the defenders bear responsibility (2) that the pursuer has suffered loss and /or expense and (3) that the event caused the loss and/or expense Rational Apportionment possible based on common sense and providing no material breach by the Claimant.
19	Joinery Plus v Laing [2003] EWHC 3513 (TCC)	2003	England	This case provides much needed detail about how a decision maker (in this instance an adjudicator) analyses the quantum associated with a claim which appears global in nature. In particular, the adjudicator found that the claimant had underestimated its tender. One of the three criteria identified in John Holland. Another leave was given for another adjudication
20	R. Durtnell & Sons Ltd. v Kaduna Ltd [2003] EWHC 517 (TCC)	2003	England	Case where global claims is mentioned, but no notable findings
21	Hurst Stores and Interiors Ltd. v M.L. Europe Property Ltd [2003] EWHC 1650 (TCC)	2003	England	Case where global claims is mentioned, but no notable findings
22	Conocophillips Petroleum Company UK Ltd v v Snamprogetti Ltd & Anor [2003] EWHC 223 (TCC)	2003	England	Case where global claims is mentioned, but no notable findings
23	John Doyle Construction Ltd v Laing Management (Scotland) Ltd [2004] SC 173	2004	Scotland	Their Lordships explained that if a global claim was to succeed the contractor must firstly eliminate any matters for which he is culpable, and the contractor should firstly attempt to group events, where they could not be seperated. Secondly, establishing the causal link between the events should be undertaken using common sense

				principles and that the proximate or dominant cause is “sufficient to establish liability”, even if some other events are concurrent. Thirdly, where the employer’s event or events could not be considered dominant but are nonetheless deemed to be a material cause of the loss, “it may be possible to apportion the loss” , between the events which the employer is responsible and other causes.
24	Skansa Construction UK Ltd v Egger (Barony) ltd (2004) EWHC 1748	2004	England	Wilcox J found that the experts were cosndiering the case from "different ends of a telescope". Loss and expense, able to be seperated. This case identified that when the evidence is made available to do so, a jusdge is able to assimilate and separate claims which are averred by the opposing side as global in nature.
25	Tombs v Wilson Connolly [2004] EWHC 2809 (TCC)	2004	England	Global claim for loss of profit, fails in its entirety. Claimant unable to evidence actual loss of profit on the work in question.
26	Great Eastern Hotel v Laing [2005] EWHC 181 (TCC)	2005	England	This case therefore provides a helpful example of an English Court being influenced by a recent Scottish Court decision, by applying the dominant cause method of causation and with the experts being able to apportion the quantum accordingly. The judge heavily relies on the experts to arrive at his decision.
27	Shell Refining (Australia) Pty Limited v. AJMayr Engineering Pty Limited [2006] NSWSC 94.	2006	Australia	Bergin J asked if adjudicator had given due consideration to his decision. Claim was based upon a high level calculation - using average labour rate for whole claim. Bergin J considered that the adjudicator had gven enough consideration.
28	Musselburgh and Fisherrow COOP v Mowlem Scotland [2006] CSOH 39 CA30/02.	2006	Scotland	The specific facts of the case moved Lord Essie to apportion the loss and/or expense, because dominance could not be established.
29	Midland Expressway v Carillion [2006] EWHC 1505 TCC	2006	England	Jackson J found among other things that Further if a claim is presented in such a nebulous and ill-defined manner that the defendant cannot sensibly respond to it, neither silence nor express non-admission could give rise to a dispute for the purposes of adjudication or arbitration.

30	City Inn v Shepherd Construction - Outer House[2007] ScotCS CSOH_190.	2007	Scotland	Lord Drummond Young - followed John Doyle but found it was limited in this case, as JD related to Loss and Expense, and City Inn was predominantly delay. Case predicated on concurrency, and apportioned. Lor Drummon went against the logic and set out in Malmaison and widened the definition of concurrency.
31	London Underground Ltd v Citylink Telecommunications Ltd Rev 1 [2007] EWHC 1749 (TCC)	2007	England	Arbitrator awarding 48 from 81 weeks and the judge agreeing it was not irregular. He then set out three issues which should be considered: i.As the contract had obligated the arbitrator to act fairly and reasonably, meant that the Arbitrator is not "tied to a particular analysis", nor "bound to follow the contentions of the parties". The assessment must be subjective, based on the circumstances; ii.Critical Path Analysis, it is "at most an area of expert evidence" and although it can assist the court (or arbitrator), the findings "should not be seen as determining the answer to the question". In this case Ramsey J agreed with the arbitrator and decided that project was not best suited by analysis using the Critical Path Method. iii.An arbitrator award must be based on the pleadings, and "whilst it does not prevent an Arbitrator from going outside the limits, or acting in a manner which is unfair", it is "less likely to happen when the Arbitrator consciously approaches the questions with the relevant considerations in mind" In general terms, the London Underground case again evidences that the courts are reluctant to overturn an arbitrator's position. In specific terms, London Underground is the first reported case where a decision maker (in this instance, the arbitrator), has arrived at a decision by determining a case is "global" in nature and without the claimant arguing their case as such

32	Maersk Oil UK Ltd (Formerly Kerr-McGee Oil (UK) Plc) v Dresser-Rand (UK) Ltd [2007] EWHC 752 (TCC) (03 April 2007).pdf	2007	England	Case centred upon a single issue, i.e. losses associated with deisel costs. Wilcox J concluded therefore that: "If an apportionment, based on the evidence is possible, albeit difficult it would be manifestly unjust to deny a remedy, where there are plain contractual breaches by the defendant" Upon an assessment of the evidence adduced, Wilcox J decided that it was not possible to identify a dominant cause, or to apportion the loss, therefore Maersk's claim should fail in its entirety
33	Petromec Inc v. Petroleo Brasilerio SA Petrobras [2007] EWCA Civ 1371	2007	England	Found that the claim was not to be evaluated on a global basis (i.e. difference in costs) but by a detailed review of the changes to the specification. If using a Scott Schedule - form needs to be stipulated and what each party is required to do.
34	Ronald Smith & Honda Moter Europe [2007] CSOH 74	2007	Scotland	A bottum up, not a top down, is to be preferred, when calculating loss.
35	Jacobs UK Ltd v Skidmore Owings & Merrill LLP [2008] EWHC 2847 (TCC) (21 November 2008).pdf	2008		Global claim fails. Found that if the claimant wants to say that particular elements of the costs are in reality the costs of rectifying breaches of contract, then they have to identity those breaches and that causal link.
36	Donal Tonar v Kean Construction [2009] CSOH 105	2009	Scotland	Mentioned global claim in a different context - as "a matter of practice" a defender should not face a global claim contained in a single conclusion in relation to two distinct claims i.e. for damages and additional damages.
37	City Inn v Shepherd Construction - Inner House [2010] CSIH 68 CA101/00.	2010	Scotland	Outer decision upheld. Albeit Apportioned - Significant in terms of certainty and the fact that the Brompton case in england is different to scottish view - in terms of events already in critical delay.
38	Tullis Russell PaperMakers v Inveresk Limited [2010] CSOH 148	2010	Scotland	Lord Durmmond Young satisfied that the defenders' breaches of contract are the dominant cause of the pursuers' loss. On that basis, the fact that the pursuers' claim is currently on a global basis is not relevant.

39	Carillion Construction Ltd v Stephen Andrew [2011] EWHC 2910 (TCC).	2011	England	In arriving at his decision, the Akenhead J carried out a detailed analysis of the claim asserted in the second adjudication and the third adjudication and reached the conclusion that the third adjudicator had no jurisdiction: "…what Mr Smith has done is to seek to overcome, by a massive effort on his part, the lacunae and gaps in the Subcontractor's case as led the Second Adjudicator to decide that the quantum case was not proved in the Second Adjudication." Clearly therefore an injured party will have to be very careful when trying to assert a global claim, when it has been previously unsuccessful in other dispute forums.
40	Walter Lilly & Company Limited v Giles Patrick Cyril McKay and DMW Developments Limited [2012] EWHC 1773 (TCC).	2012	England	Seminal commentary about how global claims operate in England. Akenhead sets out 7 principles, set out in the Appendices of the thesis.
41	Transport for Greater Manchester v Thales Transport & Security Limited [2012] EWHC 3717 (TCC)	2012	England	Akenhead J ordered specific performance for the claimant to produce more details (cost details and accounts), which, to some degree contradicts what he had previously set out in Lilly.
42	Irene Henderson Ltd v Eddie Mair Ltd [2012] 20 April 2012	2012		Not a construction case, however the judge compared it to a "global claim" or "total cost claim" in building law; in such a case, the contractor must eliminate from the causes of his loss and expense all matters that are not the responsibility of the employer - John Doyle Construction Limited v Laing Management (Scotland) Limited 2004 SC 713 at paragraphs 12 to 14. In other words, if there is just one possible cause that is not the responsibility of the employers, the contractors' claim must fail.
43	Mainteck Services Pty Ltd v Stein Heurty SA [2014] NSWCA 184 (CA (NSW))	2014	England	#REF!
44	BlueWater Energy Services v Mercon Steel [2014] EWHC 2132 (TCC)	2014	England	Claim failed - figures not substantiated. De minimis award given by Ramsey J
45	The Secretary of State for the Home Dep v Raytheon Systems [2014] EWHC 4375 (TCC)	2014	England	#REF!
46	The Secretary of State for the Home Dep v Raytheon	2015	England	As part of his judgement on relief and costs, Akenhead J decided to set aside

	Systems [2015] EWHC 311 (TCC)			the full award, which was then to be referred to a different tribunal for review.
47	William Clark v Dock St [2015] EWHC 2923 (TCC)	2015	England	Zero award for global element but award was granted for variations where the could be seperated More a claim for negligence, but Davies J applies same global principles as in contract.
48	Van Oord v Allseas [2015] EWHC 3074 (TCC)	2015	England	Found that the claimants claim for delay and disruption (arising out of both the unforeseen ground conditions and the temporary/permanent crossings) are essentially global claims: ..."because they operate on the basis that the entirety of the delay and disruption on site was caused either by the deeper peat or the problems with the temporary/permanent crossings. There is no acknowledgement or allowance in the pleaded claims for any delay and disruption which might have been due to OSR, nor any obvious way in which a lesser entitlement has been claimed or might be calculated. The formulation of such alternative claims is often the task of the claimant's expert but, as we shall see, there was a complete absence of such material in this case."
49	Fairhurst Developments Ltd & Anor v Collins & Anor [2016] EWHC 199 (TCC)	2016	England	Davies J indicated that it might in principle be open to Fairhurst to argue that its total costs could be advanced as a "global" claim on the basis that they all related to the contract works and variations and to no other cause. "Wisely, it seems to me, given the admissions in contemporaneous emails that there were a number of reasons for the delay and the overspend above and beyond variations, Mr Goff did not take up that invitation, and instead invited me to accept that Fairhurst was entitled to the contract sum plus the value of the variations as assessed by Mr Bushell."
50	John Sisk & Son Ltd v Carmel Building Services Ltd [2016] EWHC 806 (TCC).	2016	England	The arbitrator decided that whilst the burden of proof rests with the claimant (i.e. Carmel) to prove its case, there is nonetheless an evidential burden that still falls on the respondent to evidence why it had evaluated an earlier valuation higher. Carr J agreed with Arbitrators opinion, but the burden of proof still rests with the claimant.

51	Amey LG Limited v Cumbria County Council [2016] EWHC 2856 (TCC).	2016	England	Davies J undertook a highly detailed analysis on the claims and dismissed the claims. Claimant had failed to separate out causes.
52	DM Drainage & Constructions Pty LTd v Karara Mining Limited (2016) 32 Const LJ 203	2016	Australia	Beech J struck out parts of the claimants claim as global in nature and ordered a repleading of others.
53	North Midland v Cyden Homes [2018] EWCA Civ 1744	2018	England	Coulson J found that in relation to concurrency: i. The prevention principle is not an overriding rule of public or legal policy; ii. The prevention principle has no obvious connection with concurrent delay; iii. Akenhead J's analysis in Walter Lilly was unconnected to the prevention principle ; and iv. Parties can decide to contract out of the effects of the prevention principle.