Proof in Global Claims and Total Cost Claims

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This article seeks to demonstrate that it is possible to prove a global claim or total cost claim so long as a claimant approaches proof in a logical manner. The article considers jurisprudence across Australia, the United Kingdom and the United States addressing the issue of global claims and total cost claims. In particular, the article considers what the Courts require a claimant to prove when bringing a global claim or total cost claim, what evidence the Courts have accepted or suggested as being sufficient to prove such claims, and suggests the types of evidence claimants in construction disputes may read into the record to successfully prove their global claims and total cost claims.

I. Introduction

Infrastructure projects are becoming the subject of mega-claims with increasing frequency due to their expanding size, technical complexity, and cost. These factors cause difficulties for contractors making claims during the project, as well as in the course of arbitration or litigation. It is in the context of disputes arising from these infrastructure projects that global claims and total cost claims are commonplace.

In this article, I will discuss the evidence necessary to establish global claims and total cost claims. I will first give a brief overview of what global claims and total cost claims are, then discuss what the Courts have considered to be sufficient or insufficient evidence to establish these types of claims. Finally, I will suggest forms of evidence that claimants may place on the record when seeking to prove these claims in the context of construction disputes.

At the outset it is worth noting that, while the vast majority of total cost claims are made as global claims, it is not a requirement that this be the case, nor do global claims need to be brought as total cost claims.[1]

II. The Evidential Starting Point

It is trite law that a claimant claiming damages for breach of contract is required to prove, through admissible evidence: breach, loss, and causation for each alleged claim.[2]

Cross on Evidence helpfully describes evidence as:

> [T]he testimony, hearsay, documents, things and facts which a court will accept as evidence of the facts in issue in a given case.[3]

III. Establishing a Global Claim

"Global claims" were described in *Wharf Properties Ltd v Eric Cumine Associates (No 2)* as:

> [C]ases where the full extent of extra costs incurred … depend upon a complex interaction between the consequences of various events, so that it may be difficult to make an accurate apportionment of the total extra costs.[4]

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[1] *John Holland Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 8 VR 681, 689 [15], 690 [16] (Byrne J); *J Crosby & Sons Ltd v Portland Urban District Council* (1967) 5 BLR 121 (Donaldson J); *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 (Vinelott J).

[2] *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633; (2014) 310 ALR 113, 151 [187] (Leeming JA); [2014] NSWCA 184; *Walter Lilly & Co Ltd v Mackay* [2012] BLR 503, [486] (Akenhead J); [2012] EWHC 1773 (TCC).

[3] JD Heydon, *Cross on Evidence* (LexisNexis, 31 July 2023) [1075].

[4] *Wharf Properties Ltd v Eric Cumine Associates (No 2)* (1991) 29 Con LR 113, 125–126 (Lord Oliver of Aylmerton).

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In Australia, global claims have been described in *John Holland Pty Ltd v Kvaerner R J Brown Pty Ltd*[5] (*John Holland*) as claims where:

> [T]he 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 of the breaches alleged, or presumably as a result of such breaches as are ultimately proved.[6]

The Court has permitted global claims where the claimant proves the following:[7]

(1) multiple breaches (of contract or otherwise) by the respondent;
(2) there is a complex interaction between the consequences of the alleged breaches;[8]
(3) they have suffered loss or incurred extra costs as a result of the breaches;
(4) it is impractical to apportion the global loss to each individual underlying breach;
(5) the quantum of its global loss;
(6) the inability to apportion the global loss has not been brought about by a delay or other conduct of the claimant; and
(7) none of the claimed loss arose as a result of anything other than those breaches alleged to have been committed by the respondent.

At a basic level, by bringing a global claim, a claimant is seeking to: (1) group the respondent's alleged breaches together, (2) group its losses together, and (3) infer causation between these two groups. By engaging in this approach, the claimant is avoiding establishing, by way of admissible evidence:

(1) the individual quantum of its loss or cost said to have been caused by each individual breach; and
(2) importantly, the causal link between each individual breach and the loss or cost arising from that individual breach.

Given the prevalence of global claims in construction disputes, this article focuses on construction disputes and the evidence available in them. However this is not to say that global claims cannot be brought in other types of disputes, as is evidenced by the various decisions of the Court of Claims in the United States.[9]

A. The Claimant Establishes Multiple Breaches (of Contract or Otherwise)

For the sake of completeness, it is necessary to comment briefly on what is no doubt an obvious aspect of global claims: the claimant must establish multiple breaches of contract (or otherwise) by the respondent. For example, as an alternative, or in addition to, a breach of contract claim, it is common for claimants to also allege breaches of the *Australian Consumer Law*[10] (*ACL*), by alleging that the respondent engaged in misleading or deceptive conduct. Clearly, without multiple alleged breaches, there cannot be a global claim and causation will need to be established in the normal manner.[11]

In bringing a global claim, the claimant will allege that there have been multiple events which have caused delay, disruption, or increased costs *where the risks for such events fall with the respondent*.[12]

[5] *John Holland Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 8 VR 681 (Byrne J).

[6] *John Holland Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 8 VR 681, 689 [14] (Byrne J).

[7] *John Holland Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 8 VR 681, 689 [14]–[15] (Byrne J).

[8] However, there are conflicting decisions across jurisdictions as to this factor. In the recent case of *Walter Lilly & Co Ltd v Mackay* [2012] BLR 503, [486(a)] (Akenhead J); [2012] EWHC 1773 (TCC), the English High Court found that this is not a necessary factor in proving a global claim.

[9] See, eg, *Oliver-Finnie Co v The United States*, 279 F 2d 498 (Judge Laramore) (Fed Cir, 1960), involving a global claim arising out of a contract to manufacture combat rations.

[10] *Competition and Consumer Act 2010* (Cth) Sch 2.

[11] *Robinson v Harman* (1848) 154 ER 363, 365 (Parke B); *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310, 314–315 (Glass, Mahoney and McHugh JJA).

[12] *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* (2002) 85 Con LR 98, 118–119 [36]–[37] (Lord MacFadyen).

Each of the individual alleged breaches must be proven by the claimant. It is not sufficient for a claimant to allege and attempt to prove several different breaches as a composite.[13] *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* (*Nauru Phosphate*)[14] provides a good example where a claimant sought to allege a composite breach by using examples of alleged breaches rather than particularising each individual breach. The arbitrator in *Nauru Phosphate* did not permit the matter to proceed to hearing without further particularisation of the breaches, including exhaustive identification of each individual event that was alleged to constitute a breach.[15]

A claimant will generally seek to establish that the respondent has committed the alleged breaches through lay witness evidence (including tendering contemporaneous project records). Such witnesses may include the claimant's project managers, site engineers, or planners. Their evidence will be deployed to demonstrate the respondent (or its authorised representatives) acted in a manner inconsistent with the terms of the contract, for example:

(1) by directing the claimant to undertake work not contemplated within the specification or work scope; or
(2) the respondent was late in providing designs and drawings.

In addition to this factual evidence, subject to the breach alleged, a claimant may call independent expert witnesses. Engineers, programmers, project managers, and experienced construction personnel may assist in establishing, among other things, the duty owed by the defendant (eg that of a reasonable contractor) and the way in which the defendant's action or inaction fell short of that duty.

B. There Is a Complex Interaction between the Consequences of the Alleged Breaches

Consistent with the industry's view, Courts have tended to accept that where multiple breaches occur during a construction project, their consequences are often inherently complex and intertwined.

However, placing evidence on the record in support of this proposition can be difficult. *Nauru Phosphate* considered the sufficiency of particulars in the context of an arbitration. Smith J relied on two aspects in concluding that there was a complex interaction between the consequences of the alleged breaches. The first was submissions made by the first defendant in the course of a hearing in the arbitration that it was not possible to provide a further detailed breakdown of the losses incurred by their client.[16] The Court accepted this as being sufficient "As the arbitration [was] not governed by the rules of evidence it was open to the arbitrator to accept that statement".[17] The second aspect relied on by Smith J was that on the face of the pleadings there was "a complex interaction between alleged disruptive events and the way they affected progress".[18]

The above elements are an appropriate approach for considering the sufficiency of a global claim at the pleadings stage of an arbitration. However, at final hearing, where a claimant is seeking to prove a global claim and alleviate itself of the requirement to establish the loss it has incurred from each individual breach, the claimant should be required to tender admissible evidence to establish that there is, in fact, a complex interaction between the consequences of the breaches it alleges. Without such a requirement, the respondent is deprived of the fundamental opportunity to cross-examine the witness making such a statement and test their evidence in support of this assertion.[19] Further, a claimant should be required

[13] *Mid-Glamorgan County Council v J Devonald Williams & Partner* (1991) 29 Con LR 129, 154 (Recorder Tackaberry QC) : "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.*" (emphasis added).

[14] *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* [1994] 2 VR 386 (Smith J).

[15] *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* [1994] 2 VR 386, 393 (Smith J).

[16] *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* [1994] 2 VR 386, 405 (Smith J).

[17] *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* [1994] 2 VR 386, 405 (Smith J).

[18] *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* [1994] 2 VR 386, 405 (Smith J).

[19] *Lee v The Queen* (1998) 195 CLR 594, 602 [32] (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ); [1998] HCA 60.

to establish that they have at least attempted to determine the consequences of each alleged breach to no avail given the significant evidential burden that shifts to the respondent where a global claim is brought.[20]

In establishing this element, a claimant could tender factual evidence from its project managers and engineers to explain: first, the practical consequences of the alleged breaches (relevant to the "intervening step" below); second, that the ultimate impact to the project of each alleged breach cannot be identified individually; third, that the cumulative effect of the breaches can be identified and what that effect was; and fourth, why this is the case. One reasonable basis for the impossibility of individually identifying the effects of each breach is that the work fronts effected by the breaches interact with one another consecutively, or cumulatively, or in another way.

To support the above factual evidence, a claimant could also rely on expert evidence from a construction, project management, or programming expert. Such an expert could provide their opinion on the cumulative consequences to the project, arising out of the alleged breaches. In addition, to support the claimant's case, an expert witness may opine that, upon review of the documentary evidence, they cannot separate out the individual consequences of each alleged breach. Assuming the Court accepts the independent expert's opinion regarding the complexity of the consequences, the claim may then proceed as a global claim and the quantum expert may calculate the global loss.

C. The Claimant Has Suffered Loss or Incurred Extra Costs

The evidence necessary to establish that loss has been suffered or extra costs have been incurred will depend significantly on the subject matter of the claims pursued by the claimant. While a global claim proceeds on the basis that the actual loss suffered or cost incurred as a result of each individual breach is not ascertainable, Byrne J highlighted the importance of proving that the breaches caused *some* extra cost in *John Holland*, stating:

> The likelihood and nature of some extra cost flowing from the breaches of contract may be readily apparent from the nature of each of the breaches and a general understanding of its impact on the building project. It may also be apparent in what precise way this breach led to the extra cost. In most, if not all, cases, however, there is an intervening step relating the extra cost to the breach. For example, it may be that a breach means that work has to be redone, or that work takes longer to perform, or that its labour or material cost increases, or perhaps that there was extra cost due to disruption or loss of productivity.[21]

It is that intervening step that the Court requires a claimant to plead and subsequently prove when bringing a global claim. Justice Byrne provided guidance regarding this element in *John Holland* where he stated that causation "must be determined by the application of common sense to the logical principles of causation".[22] Although Byrne J was in that case considering an application to strike out pleadings, his statement is of equal assistance with respect to the method of proving the intervening step.

Against the above background and given the claim proceeds on the premise that the precise loss arising from each breach is not identifiable, a claimant will need to place factual evidence on the record to prove this element. This evidence should come from its project managers, programmers and, where required due to the technical nature of the breach and its consequences, its engineers.

These witness statements should explain:

(1) the practical consequences of each alleged breach, that is the intervening step; and
(2) that the witnesses have reviewed the project records relevant to the breach and the exact loss cannot be identified.

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[20] Wayne E Lord and Thomas E Gray, "Cost Benefit Analysis Approach to Global Claims" (2011) 3(3) *Journal of Property, Planning and Environmental Law* 222.

[21] *John Holland Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 8 VR 681, 689 [15] (Byrne J).

[22] *John Holland Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 8 VR 681, 689 [13] (Byrne J), citing *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310, 315 (Glass JA), 350–351, 357 (McHugh JA); subsequently cited in *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633; 310 ALR 113, 152 (Leeming JA); [2014] NSWCA 184.

D. It Is Impractical to Apportion the Total Extra Costs among the Individual Breaches

The importance of establishing this aspect of a global claim has been highlighted in numerous cases in the United States (generally dealing with global claims being brought as total cost claims). For example, in the case of *Huber, Hunts & Nichols Inc v Richard R Moore et al* (*Huber*),[23] the Contractor sought to rely on a project cost ledger to establish both causation and loss.

It is worth noting at this point that there is a divergence between the United States and England with respect to this aspect as the English Courts have recently moved toward permitting a party to elect to prove its case as a global claim without requiring proof that it is impractical to identify the consequences of the multiple alleged breaches.[24]

In light of the decisions in Australia, including *John Holland* and *Mainteck Services Pty Ltd v Stein Heurtey SA* (*Mainteck*),[25] it appears unlikely that the Australian Courts will take the same approach as the English Courts in permitting a global claim to proceed without sufficient evidence to prove the impracticality of apportioning costs for individual breaches.[26] As discussed above, in *Nauru Phosphate*, Smith J found that in the context of determining the sufficiency of pleadings and particulars, it was open to an arbitrator to accept this element upon submission from counsel on the basis that the arbitration was not governed by the rules of evidence.[27] While this may be acceptable at the procedural stages of an arbitration, given the significant burdens placed on a respondent in the context of defending a global claim, it appears that the better approach is to require a claimant to prove this element by way of admissible evidence and not on the basis of submission alone.

While the use of project cost ledgers in "total cost claims" brought as global claims is not uncommon, in *Huber*, the contractor failed to produce any evidence to explain why it was not possible to establish causation in the standard manner. During oral testimony, the contractor's contract manager stated that original records forming the basis of the project cost ledger existed during construction. However, the contractor provided no explanation as to why these records were not produced at trial or why no calculations had been prepared using these records to establish causation. In its judgment, the Court said that:

> If the computer printout [project cost ledger] was not organized in a manner to indicate the specific cause of particular cost overruns, a qualified accountant should have been able to make the calculations from the original records which were the source of the data fed into the computer.[28]

It is unclear how an accountant would have sufficient expertise to identify the cause of cost overruns on a construction project purely based on invoices. As such, it is frequently the case that quantity surveyors are engaged to provide expert evidence on quantum using invoices, timesheets, and payment claims. Where a global claim is made, quantity surveyors may provide evidence as to why this identification is not possible for individual breaches.

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[23] *Huber, Hunts & Nichols Inc v Richard R Moore et al*, 67 Cal App 3d 278 (Loring J) (1977).

[24] *Walter Lilly & Co Ltd v Mackay* [2012] BLR 503, [486] (Akenhead J); [2012] EWHC 1773 (TCC); Compare *Mid-Glamorgan County Council v J Devonald Williams & Partner* (1991) 29 Con LR 129 (Recorder Tackaberry QC), cited in *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* [1994] 2 VR 386, 404 (Smith J).

[25] *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633; 310 ALR 113 (Leeming JA); [2014] NSWCA 184.

[26] Particularly in light of comments such as Byrne J's in *John Holland Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 8 VR 681, 693 [23] (Byrne J): "In my opinion, the court should approach a total cost claim with a great deal of caution, even distrust." Although Byrne J only identifies total cost claims in this statement, given its context in his judgment, it appears to apply equally to global claims and has subsequently been cited in *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633; 310 ALR 113, 152 (Leeming JA); [2014] NSWCA 184, in support of this proposition; See also *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* [1994] 2 VR 386, 404 (Smith J); *DM Drainage & Constructions Pty Ltd v Karara Mining Ltd* [2014] WASC 170, [75] (Beech J).

[27] *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* [1994] 2 VR 386, 405 (Smith J).

[28] *Huber, Hunts & Nichols Inc v Richard R Moore et al*, 67 Cal App 3d 278, 309 (Loring J) (1977).

The use of financial statements to establish causation and loss was also attempted in *James A Boyajin, Assignee of Triumph Manufacturing Co, Bankrupt v The United States* (*Boyajin*),[29] where the contractor put forward an accountant's schedule and the accountant's testimony in support of the schedule, which contained:

> [C]omputations, based on plaintiff's books and records, of plaintiff's total expenditures in performing the contract, and subtracting therefrom the total contract receipts, thus arriving at a total "loss" figure, for which plaintiff demands recoupment.[30]

Unsurprisingly, the Court found that "this is not in and of itself acceptable 'proof'",[31] citing *River Construction Corp v The United States* (*River Construction*)[32] which set out the relevant principle as:

> Recoverable damages cannot be proved by a naked claim for a return of costs even where they are verified. The costs must be tied in to fault on defendant's part. Plaintiff's claim is something like an attempt to secure damages based on the difference between costs and the contract price or a bid price.[33]

The Court in *Boyajin* stated with respect to establishing causation:

> However, contrary to these basic causal-connection damage principles, no attempt is here made to relate any specific amount of increased costs to any particular alleged breach. Nor is any satisfactory explanation given as to why such an attempt was not made or why it would not have produced reasonably accurate results.[34]

Although the cases of *Huber* and *Boyajin* relate to total cost claims, based on the Courts' reasoning in those cases, absent explanation as to why causation and loss cannot be proven in the ordinary manner for each alleged breach, the Court will not accept a global claim.

In establishing this element, a claimant could put on the record, factual evidence from its cost controllers or accounts team (*Financial Evidence*), explaining how project cost records were maintained during the project and tendering the claimant's cost records for the project. Further, to succeed in a global claim, the Financial Evidence must prove it is impossible to identify the costs that were caused by each individual breach and that it is therefore necessary to determine loss as a single sum for the established breaches.

In support of the above factual evidence, a claimant could call on:

(1) An accounting expert,[35] to review the claimant's cost records and provide evidence as to:
  (a) their accuracy; and
  (b) whether it is possible to ascertain from those records what alleged breach resulted in what costs (although as noted above, one might query whether an accountant would have the necessary expertise to opine on this aspect), and/or

(2) A quantum expert (generally a quantity surveyor), to explain in the context of the construction project:
  (1) the complex interaction between the consequences of the breaches that the claimant alleges;
  (2) the dearth of records recording costs incurred as a result of the breaches; and
  (3) the resulting difficulty in assessing on a claim-by-claim basis, the quantum of the alleged breaches.

[29] *James A Boyajin, Assignee of Triumph Manufacturing Co, Bankrupt v The United States*, 191 Ct Cl 233 (Chief Judge Cowen, Judges Laramore, Durfee, Davis, Collins, Skelton and Nichols) (1970).

[30] *James A Boyajin, Assignee of Triumph Manufacturing Co, Bankrupt v The United States*, 191 Ct Cl 233, 240 (Chief Judge Cowen, Judges Laramore, Durfee, Davis, Collins, Skelton and Nichols) (1970).

[31] *James A Boyajin, Assignee of Triumph Manufacturing Co, Bankrupt v The United States*, 191 Ct Cl 233, 246 (Chief Judge Cowen, Judges Laramore, Durfee, Davis, Collins, Skelton and Nichols) (1970).

[32] *River Construction Corp v The United States*, 159 Ct Cl 254 (1973) (*River Construction*).

[33] *River Construction Corp v The United States*, 159 Ct Cl 254, 270 (1973).

[34] *James A Boyajin, Assignee of Triumph Manufacturing Co, Bankrupt v The United States*, 191 Ct Cl 233, 240 (Chief Judge Cowen, Judges Laramore, Durfee, Davis, Collins, Skelton and Nichols) (1970).

[35] As was suggested in the context of the total cost claim in *Huber, Hunts & Nichols Inc v Richard R Moore et al*, 67 Cal App 3d 278, 309 (Loring J) (1977).

E. Quantum

A claimant's global loss may arise from a variety of factors, including both delay and disruption. To establish its global loss, a claimant may use:

(1) rates contained in the contract for liquidated damages;
(2) calculation of losses arising from critical delay and disruption;
(3) measured mile method;
(4) baseline productivity analysis; or
(5) total cost method,

or a combination of the above.

Adopting these methods in the form of a global claim is attractive where the effect of disruption cannot be separated from the consequent delays to project completion and where a contractor does not have sufficient records to determine the costs incurred as a result of individual delays and disruptions. It will be necessary for a claimant to submit evidence from its cost controllers/accounts team, exhibiting primary supporting documents such as:

(1) timesheets, to demonstrate additional labour (including subcontractors) or additional time expended; or
(2) evidence of payment of salary to relevant employees and of invoices to relevant subcontractors where those costs form part of the claimant's alleged global loss.

In addition, a claimant may submit evidence from their project management team, exhibiting primary supporting documents such as:

(1) Job Safety Analysis (JSA) Certificates which should, if completed in accordance with statutory requirements, provide accurate records of what work was being undertaken, by whom, and when;[36]
(2) evidence of progress claims submitted to the claimant by its subcontractors, with additional costs included as variation items alongside evidence of the claimant's associated payment certificates; or progress claims that have been assessed by the claimant, confirming that the claimant has assessed the submitted variation amount and confirmed its reasonableness and accuracy;
(3) correspondence between the claimant and its subcontractors/suppliers identifying the scope of additional or changed work and the estimated cost impacts of the additions or changes;
(4) weekly or monthly reports recording work hours, particularly where these reports compare actual with planned; and
(5) updated programmes prepared by the contractor throughout the project so that a programming expert may utilise these programmes in developing their independent evidence and establishing the critical path of the project.

The contractor may then engage an independent programming expert who may use the above evidence to opine on:

(1) which activities were delayed, including what the effect of the primary delay was on subsequent activities and the critical path;
(2) when the delay or disruption commenced;
(3) when the delay or disruption ended; and
(4) subject to the level of detail contained in the contractor's schedules, the resources that were affected by the delay.

In the context of a global claim, the programming expert is unlikely to be able to identify the delay caused by each alleged breach and will therefore provide an opinion as to the cumulative delay that arose from all of the breaches (ie globalising the claim).

The culmination of the evidence referred to above will be an expert report from a quantum expert (generally a quantity surveyor) providing an opinion on the costs incurred or loss suffered by the claimant.

[36] JSA Certificates are a hazard and risk assessment tool utilised to ensure compliance with work health and safety laws in Australia, including: *Work Health and Safety Act 2011* (Cth); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2012* (SA).

Where quantification can be undertaken for individual claims, only those claims that cannot be assessed individually should be claimed globally.[37] This principle is generally consistent with the requirement that a party bringing a global claim must establish it is impractical to apportion the global loss to the individual breaches alleged (discussed above). It is imperative that claimants understand and adhere to this principle when preparing their case.

A further consideration regarding this aspect of global claims, is the likely outcome if a claimant pleads, with respect to each factual circumstance giving rise to an alleged "breach", that the respondent has:

(1) breached their contract with the claimant; or alternatively
(2) breached legislative provisions (in Australia those relied upon are often contained in the *Trade Practices Act 1974* (Cth) (*TPA*) or the *ACL*[38] (eg misleading & deceptive conduct or unconscionable conduct) (as the case may be)).

It stands to reason that a claimant may make a global claim for a combination of breaches, comprising breaches of contract and breaches of statute such as the *TPA*/*ACL*. However, an issue that arises in combining these claims is that the *TPA*/*ACL* permits a claimant to quantify its damages using the broader assessment permitted under those Acts.[39]

In the context of a global claim, pursuing this broader assessment may be considered akin to a claimant seeking to include reasonable profit in the sum it claims from the respondent. Such damages should not be permitted unless a claimant can segregate, from its global loss, the specific loss that arose from the alleged breach of the *TPA*/*ACL*. Assuming that this analogy is accepted, rejection of the *TPA*/*ACL*'s broader assessment of damages where a claimant brings a global claim is supported by jurisprudence. This includes cases such as *J Crosby & Sons Ltd v Portland Urban District Council* (*Crosby*)[40] and *London Borough of Merton v Stanley Hugh Leach Ltd* (*Merton*)[41]in England, and *Laburnum Construction Corp v United States* (*Laburnum*)[42] in the Court of Claims in the United States. The Court in *Laburnum* found with respect to the inclusion of profit in global claims:

> In this case, where the work called for by the contract has been completed, plaintiff must take its profit in the contract price… The burden of allocating costs to the particular periods involved is upon the plaintiff. If the sum of these costs, plus the contract price, including the equitable adjustments to which the parties have agreed, give plaintiff a profit on the project as a whole, it should receive the benefit of its bargain. On the other hand, the contractor cannot, because of such delay, be assured of a profit on the whole job by adding a profit to its damages. It has not been deprived of any anticipated profit. It is entitled to recover only its loss incurred on account of the delay.[43]

F. The Inability to Apportion the Total Extra Costs Has Not Been Brought about by a Delay or Other Conduct of the Claimant

There has been limited consideration of this element by the Courts, however some guidance as to what may be considered can be found in the judgment of Vinelott J in *Merton*. His Honour found that it was permissible for the architect to assess a global claim "provided of course that the contractor has not unreasonably delayed in making the claim and so himself created the difficulty".[44] It should be noted however that the Court's judgment in *Walter Lilly & Co Ltd v Mackay* (*Walter Lilly*)[45] suggests, at least in England, a claimant need not prove this element when bringing a global claim.[46]

[37] *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* [1994] 2 VR 386, 406 (Smith J).

[38] *Competition and Consumer Act 2010* (Cth) Sch 2.

[39] *Competition and Consumer Act 2010* (Cth) Sch 2 s 236; *Trade Practices Act 1974* (Cth) s 82.

[40] *J Crosby & Sons Ltd v Portland Urban District Council* (1967) 5 BLR 121 (Donaldson J).

[41] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 (Vinelott J).

[42] *Laburnum Construction Corp v United States*, 325 F 2d 451 (Judge Whitaker) (1963) (*Laburnum*).

[43] *Laburnum Construction Corp v United States*, 325 F 2d 451, 459 (Judge Whitaker) (1963).

[44] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51, 215 (Vinelott J).

[45] *Walter Lilly & Co Ltd v Mackay* [2012] BLR 503, [486] (Akenhead J); [2012] EWHC 1773 (TCC).

[46] *Walter Lilly & Co Ltd v Mackay* [2012] BLR 503, [486(g)] (Akenhead J); [2012] EWHC 1773 (TCC).

Based on the above and given the limited consideration of this element by the judiciary, where a claimant has unreasonably delayed in bringing its claim, such that records have been destroyed or lost, or failed to maintain the records expected of a reasonable contractor, the Courts may be inclined to entertain a dismissal. However, the Courts are unlikely to dismiss a global claim absent a claimant positively proving that it did not cause their own inability to apportion the total extra costs.

G. None of the Costs Claimed Arose as a Result of Anything Other than Those Breaches Alleged to Have Been Committed by the Respondent

Proof of a negative is a difficult task for a claimant to undertake. In Australia, for a global claim to succeed "there must be no material causative factor for which the defender is not liable" contributing to the costs or delay alleged to have been caused by the respondent.[47] Not only must factors that are the fault of the claimant be excluded from a global claim, but neutral factors[48] (where risk has not been allocated to either party), such as weather events, must also be excluded from the loss being claimed.[49]

In order for a claimant to prove this element in a global claim, the claimant is required to be transparent in the method adopted in calculating its global loss. Where a claimant is making a "pure" global claim, a quantum expert is likely to be engaged to calculate the global loss figure and is under an obligation to explain their calculations to the Court or Tribunal.[50]

A claimant needs to ensure that when preparing evidence in support of its loss, costs incurred as a result of its own conduct or neutral events such as those outlined above are expressly deducted from the quantum claimed.[51]

There are no decisions in Australia that have exhaustively identified what evidence is required in order for a claimant to prove this element. However, some guidance may be obtained from other jurisdictions, including in cases such as *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* (*John Doyle*),[52] *Great Lakes Dredge & Dock Co v The United States*[53] and *River Construction* (albeit these cases were global claims brought as total cost claims).[54] These cases suggest that, in the event a claimant tenders its books and records and the respondent fails to establish that acts of the claimant or neutral events materially contributed to the costs being claimed, the Courts will be satisfied that this element has been proven by a claimant. For a respondent to prove that the claimant or neutral factors contributed to the loss, it may tender evidence establishing (among other factors): incompetent execution of the project; delays caused by rain and inclement weather; or industrial action.

Further, this element requires a claimant to carefully consider how they formulate their case. If a claimant seeks to put its case on the basis that *all* of the alleged breaches caused their global loss, it may be that

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[47] *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633; 310 ALR 113, 155 (Leeming JA); [2014] NSWCA 184: "In a global claim, a significant cause of loss not attributable to the defendant is fatal."; *DM Drainage & Constructions Pty Ltd v Karara Mining Ltd* [2014] WASC 170, [59] (Beech J); *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* (2004) SCLR 872, 878 [13]–[14] (Lord Drummond Young).

[48] Causes of extra costs or time that are not legally the responsibility of either claimant or respondent.

[49] *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* (2002) 85 Con LR 98, 118–119 [36] (Lord MacFadyen); *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633; 310 ALR 113, 155; [2014] NSWCA 184.

[50] See, eg, Australian Federal Court, *Harmonised Expert Witness Code of Conduct*, Art 2; See also *IBA Rules on the Taking of Evidence in International Arbitration*, Art 5.2(e).

[51] *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* (2004) SCLR 872, 878 [13]–[14] (Lord Drummond Young); *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633; 310 ALR 113, 153 [195] (Leeming JA); [2014] NSWCA 184.

[52] *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* (2004) SCLR 872 (Lord Drumming Young).

[53] *Great Lakes Dredge & Dock Co v The United States*, 119 Ct Cl 504 (Judge Whitaker) (Fed Cir, 1951).

[54] Compare the subsequent Scottish cases cited in *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633; 310 ALR 113, 153 [195]–[196] (Leeming JA); [2014] NSWCA 184: *Irene Henderson Ltd v Eddie Mair Ltd* [2012] CSOH 66, [97] (Lord Menzies); *Musselburgh and Fisherrow Co-Operative Society Ltd v Mowlem Scotland Ltd (No 2)* [2006] CSOH 39, [19] (Lord Eassie).

failing to prove liability on any one breach will result in a finding that the claimant has failed to discharge its burden of proof.[55]

Where a claimant fails to exclude costs that are not attributable to the respondent, the Courts in England and the United States have taken a more lenient approach than the Courts in Australia. In *John Doyle*, and its appeal, the Court of Session (both Outer House and Inner House) in Scotland permitted a reduction/apportionment of the claim where the evidence before the Court established that certain costs were not attributable to the respondent.[56] In the United States, the Court of Claims has applied the same logic as that in Scotland by way of the "modified total cost claim" where the Court is willing to find that the claimant is entitled to a lesser quantum so long as there is evidence on the record to support that lower quantum.[57]

In contrast, Australian Courts have held that the onus of proving its claim strictly rests with the claimant. Where a claimant brings a global claim, the claimant bears the onus of removing from its claim any costs not attributable to the respondent. Failure to do so will result in a finding that the claimant has failed to prove its loss.[58] It is also important to note Leeming JA's comment in *Mainteck*,[59] that the basis of argument for apportionment which was successful in *John Doyle* was rejected by the High Court in *Astley v Austrust Ltd*.[60] It therefore seems unlikely that we will see the Courts in Australia move to align themselves with the decision in *John Doyle*.

IV. Establishing a Total Cost Claim

A "Total Cost Claim" is unique in the method by which a party seeks to establish the quantum of its claim. Total cost claims have been described as claims where a claimant seeks to quantify its loss as "the actual cost of the work less the expected cost". Justice Byrne explained the logic sequence underpinning this type of claim in *John Holland* (although the total cost claim had been brought on a global basis), as follows:[61]

(1) the claimant might reasonably have expected to perform the work for a particular sum (usually the contract price);
(2) the proprietor committed a breach(es) causing extra cost;
(3) the actual reasonable cost of the work was a sum greater than the expected cost; and
(4) the "proprietor's breaches represent the only causally significant factor responsible for the difference between the expected cost and the actual cost".[62]

A claimant will succeed in its total cost claim only if each of the above elements are proven. Claimants often face significant difficulties in establishing the fourth element in claims arising from large infrastructure projects. The difficulty these projects pose is that where there may be thousands of people working simultaneously on a project, it is difficult if not impossible to establish that *no other factors* caused an increase in costs.

In bringing a total cost claim, the claimant seeks to avoid proving its loss through direct evidence and in so doing infers that the respondent's breach(es) caused its total loss on the project.

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[55] *John Holland Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 8 VR 681, 691 [17] (Byrne J).

[56] *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* (2002) 85 Con LR 98 (Lord MacFadyen), affirmed on appeal: *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* (2004) SCLR 872 (Lord Drummond Young).

[57] See, eg, *Great Lakes Dredge & Dock Co v The United States*, 119 Ct Cl 504, 926 (Judge Whitaker) (Fed Cir, 1951).

[58] *John Holland Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 8 VR 681, 690 [15] (Byrne J); *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633; 310 ALR 113, 155 [205] (Leeming JA); [2014] NSWCA 184: "In a global claim, a significant cause of loss not attributable to the defendant is fatal.".

[59] *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633; 310 ALR 113, 154 [199] (Leeming JA); [2014] NSWCA 184.

[60] *Astley v Austrust Ltd* (1999) 197 CLR 1 (Gleeson CJ, McHugh, Gummow and Hayne JJ); [1999] HCA 6.

[61] *John Holland Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 8 VR 681, 689 [15] (Byrne J).

[62] *John Holland Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 8 VR 681, 689 [15] (Byrne J).

A. Reasonable Original Tender

Generally, the reasonableness of an original tender has been established by first tendering the detailed calculations and estimations used to prepare the tender; and secondly retaining a tendering expert or quantity surveyor to provide their opinion on the reasonableness of the tender.

However, there is support in Australia that where the employee responsible for the tender provides evidence regarding preparation of the tender and they are sufficiently experienced, the claimant need not call an expert quantity surveyor or expert tenderer to provide evidence as to the reasonableness of the claimant's tender estimate. In *Decor Ceilings Pty Ltd v Cox Constructions Pty Ltd (No 2)*,[63] the South Australian Supreme Court found that in order to establish that a claimant's original tender was reasonable, it was sufficient to call the person who prepared the claimant's tender to provide evidence regarding how the tender was prepared as well as their estimates of the costs of various items comprising the works (ie take-offs). In accepting this evidence as establishing the reasonableness of the claimant's tender estimate, it is worth noting that:

(1) no evidence was expressly provided by the tenderer that their estimate was reasonable;
(2) the tenderer was not cross-examined on their calculations and reasons for their estimates; and
(3) the tenderer was an experienced professional builder.

An alternative method for proving a total cost claim arose in *Nauru Phosphate*, where the claimant sought to establish that disruptive events attributable to the respondent caused an increase in the man hours required to complete the project. Rather than relying upon their own tender as the basis for original costs, the claimant used the average of other tenderers' estimates to establish the baseline for the total cost claim calculation.[64]

B. Breaches of Contract Occurred That Caused Extra Cost to Be Incurred

Next, the claimant must prove that the respondent has breached the contract and that the breach resulted in the claimant incurring extra costs. However, quantification of those costs is not required at this stage.

In the context of a total cost claim, the claimant is required to prove the alleged breach in the standard manner. This will be achieved in much the same way as described above in relation to global claims (see Part III(A) above) given that in the context of global claims each breach is to be established individually.

Next, the claimant will seek to prove that as a result of the proven breach, it has suffered loss or incurred extra costs. This may be clear from the nature of the breach itself, however, in cases where this is not the case, the Court will require the claimant to put evidence on the record regarding the "intervening step" explaining the actual consequences of the breach.[65] This is similar to the proof required for global claims (see Part III(C) above).

Assuming that the "intervening step" is explained, in the context of a total cost claim, although not strictly required based on the authorities, the claimant may then put evidence on the record explaining why the claim must be brought as a total cost claim. The claimant may put evidence on the record explaining that as a result of the breach, while the "intervening step" can be identified, such as disruption to a particular work-front, the ultimate impact of that disruption cannot be identified except by reference to the total increase in costs of the project (ie the difference between its actual costs and the reasonable tender).

C. Reasonable Cost of the Work Was Greater than the Expected Cost

By this stage of a total cost claim, a claimant has proved:

(1) the quantum of its tender;
(2) that its tender was reasonable;

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[63] *Decor Ceilings Pty Ltd v Cox Constructions Pty Ltd (No 2)* (2007) 23 BCL 347 (Besanko J); [2005] SASC 483.

[64] *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* [1994] 2 VR 386, 388 (Smith J).

[65] *John Holland Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 8 VR 681, 689 [15] (Byrne J).

(3) that the respondent has breached the contract; and
(4) the consequence of that breach is that the claimant incurred extra cost.

The next element of the total cost claim requiring proof is the quantum of the cost/loss incurred as a consequence of the respondent's breach. In terms of evidence, this can be broken down into three stages, being:

(1) the costs actually incurred by the claimant;
(2) the money the claimant has received; and
(3) the costs incurred by the claimant are reasonable.

As to the first stage, generally a claimant will seek to tender an export from its cost management programme in the form of an excel or PDF document. As described in *Huber* this document generally contains:

> [A] computer read out consisting of pages … Each page consist[ing] of various columns containing words or figures arranged under the following headings: "Cost Code" (under which appear the numbers for 200 different items); "Description" (under which appear one to three words describing the 200 different items) …; "Construction Budget"; "Budget Changes" with subheadings "Initial", "Final", "Current Budget"; "Costs" with subheadings "To Date," "To Complete," "Overrun/Underrun"; "Variance" with subheadings "Fm.," "Prev.," "Mo."[66]

As was highlighted in *Huber*, this export should be accompanied with a witness statement from a member of the claimant's cost control or accounts payable team responsible for monitoring and recording the costs incurred on the project against certain cost codes. This evidence should explain the structure of the project cost ledger, how it was constructed and, if possible, depose to its accuracy. If it is not possible for the witness to depose to the accuracy of the records, it will be necessary to engage a forensic accountant to undertake a review of the ledger and the underlying invoices and, in effect, verify its accuracy. In seeking to comply with the overarching purpose[67] and given the fact that this expert evidence should not be particularly controversial, it would be prudent for the parties to jointly appoint an accounting expert or have the Court or Tribunal appoint the expert to verify the records.

The second stage requires a claimant to account for monies that it has received for the works. To ensure that the method utilised for this stage is clear, it is suggested that this calculation be undertaken at this stage as a "take off" (total costs minus monies received) rather than when proving the quantum of the reasonable tender as an "add on" (tender amount plus monies received).

Regardless of which method is adopted, the claimant must adduce evidence accounting for the monies it has received in respect of the works. If a claimant's project cost ledger also records the claimant's project receivables, then tendering the ledger accompanied with a witness statement from the employee responsible for entering the receivables data would likely be considered sufficient to account for monies received. However, where the project cost ledger does not record receivables data, a claimant should be prepared to submit records of its actual project receivables. Records of payment might include breakdowns explaining what money was, in fact, received and explanations for such payments where they relate to variations, extensions of time or other changes in scope.

The third element a claimant must prove is that the total costs it has incurred are reasonable.[68] The importance of the reasonableness of the claimant's costs was highlighted by Beech J in *DM Drainage & Constructions Pty Ltd v Karara Mining Ltd*[69] where his Honour found: "If the actual costs were not reasonable, the inference that those costs to the extent they exceed the contractually expected costs, were caused by the principal's conduct could not be drawn."[70] The method by which a claimant will generally

[66] *Huber, Hunts & Nichols Inc v Richard R Moore et al*, 67 Cal App 3d 278, 294 (Loring J) (1977).

[67] For example that contained in *Federal Court of Australia Act 1976* (Cth) ss 37M, 37N: "To facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible.".

[68] *DM Drainage & Constructions Pty Ltd v Karara Mining Ltd* [2014] WASC 170, [66] (Beech J).

[69] *DM Drainage & Constructions Pty Ltd v Karara Mining Ltd* [2014] WASC 170 (Beech J).

[70] *DM Drainage & Constructions Pty Ltd v Karara Mining Ltd* [2014] WASC 170, [66] (Beech J).

seek to prove this element is through expert evidence. Subject to the experience of available witnesses, a claimant may seek to establish this by calling:

(1) technical experts that can opine on the reasonableness of the work methods employed on the project;
(2) project management experts to opine on the reasonableness of the time undertaken to complete the project, and if within the expert's expertise, the costs incurred; and
(3) if reasonableness of costs is not within the project management expert's expertise, a quantity surveyor to opine on the reasonableness of the costs incurred.

D. Proprietor's Breaches Represent the Only Causally Significant Factor Responsible for the Difference

This element poses the same difficulty in the context of a total cost claim as in a global claim – it requires proof of a negative. A claimant will approach proving this element in much the same way as in a global claim and so I refer the reader to Part III(G) above. There, I discuss proof that the respondent's breaches are the only causally significant factor responsible for the claimant's loss.

V. Conclusion

As Leeming JA commented, pursuing a global claim (or a total cost claim) is "a perilous course for a plaintiff to adopt".[71] However, where construction projects result in global losses that cannot be apportioned to individual breaches, or loss can only be determined by reference to the total costs incurred by a claimant – so long as proof of these claims is approached in a logical manner and each of the elements discussed in this article are addressed by way of admissible evidence – it is not impossible for claimants to succeed in establishing their claims.

Although the burden that shifts to a respondent upon proof of the elements identified is significant, the respondent's interests are protected if Courts or Tribunals require a claimant to strictly prove these elements as suggested in this article.

[71] *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633; 310 ALR 113, 154 [201] (Leeming JA); [2014] NSWCA 184.