



Technical

## Global Claims Article 2 – Causation and Global Claims

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[Click here for Global Claims Article 1 – What are Global Claims?](#)

### Introduction

1. In my previous Article I asked “*What are Global Claims?*” and referred to the case of *Walter Lilly & Co. Ltd v Mackay & Anor (2012)* which is an important case when attempting to answer this question. This case summarised the legal position on a number of areas of Construction Law including the scope of legal privilege, concurrent delay in construction disputes and global claims and notification (Thomas, 2013). The case is seen as containing a common-sense approach to quantification of loss in global claims and this Article will review the following question:

*“Did the case of Walter Lilly & Co. Ltd v Mackay & Anor (2012) remove the contractor’s obligation to demonstrate proof of causation when advancing a Global Claim?”*

### The Seven Principles for Global Claims to Succeed

2. The Judge warned that care was needed in utilising the expression “*global*” and was wholly unconvinced that Walter Lilly’s claim could be

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categorised as global. He did, however, draw together all the relevant threads from the previous cases and summarise the position regarding global claims. Although not directly referred to in the Judgement these conclusions have been referred to as the “*Seven Principles for Global Claims to Succeed*”.

## Principle 1 – Ultimately Claims by Contractors for Delay or Disruption Related Loss and Expense must be proved as a matter of fact and on the balance of probabilities

3. The Judgement sets out that the Contractor (Claimant) has to demonstrate, on a balance of probabilities, the following three elements (Paragraph 486(a) of the Judgement):
  - Events occurred which entitle it to loss and expense (Employer risk events).
  - That those events caused delay and/or disruption.
  - Such delay or disruption caused it to incur loss and/or expense (or loss and damage as the case may be).
  
4. This was a change from the previous authority (*Bernhard’s Rugby Landscapes Ltd v Stockley Park Consortium Ltd (1997)*<sup>1</sup>) where the Judge expressly stated:
 

*“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.” (Walter Lilly v Mackay (2012), para 486a)*
  
5. However, the Judge did put a caveat on this by saying that the “*contractual clause relied upon must be checked*”. The first step should therefore be to check the drafting of your Contract to see if it says anything about global claims. In previous Case Law, the Courts in England, have repeatedly emphasised the need for Contractors to satisfy the contractual pre-conditions to entitlement in respect of each of the events relied upon<sup>2</sup>. This was confirmed in *Walter Lilly*<sup>3</sup> in paragraphs 462 to 470. The requirement to satisfy contractual provisions to entitlement applies to all claims and not just global claims. The most important contractual provision with regard to claims is the

giving of an application or notice (as the case may be) by a Contractor of an event<sup>4</sup>.

6. Due to the nature of global claims, a Claimant will usually not be able to demonstrate direct causal links between events and losses. Day and Cope (2013), however, states that

*“Contractors nevertheless need to provide as much explanation and evidence as possible”.*

7. The proof of causation has therefore altered and Claimants, as a matter of principle, do not have to prove that it is impossible or impractical to plead and prove cause and effect for every event<sup>5</sup>. **This was thought to be an essential requirement**<sup>6</sup>. Claims for delay or disruption-related loss and expense must now be proved as a matter of fact and on the balance of probabilities.

## Principle 2 – Contractual Notice requirements. If the Conditions Precedent set out in Clause 26 are satisfied, direct loss and expense can be ascertained by appropriate assessment

8. Clause 26 in the Contract for this case sets out the procedural requirements with regard to the giving of notices and these were a Condition Precedent. There are issues with Condition Precedent Notices clauses such as enforcement of time bars and whether a Condition Precedent creates a conflict with the prevention principle (Sinclair, F. 2013). Day and Cope (2013), however, believes that if these are met then the clause does not prevent a common-sense approach to assessment of the loss from taking place.
9. The Judge has clarified the law in the sphere of global claims here with regard to a Conditions Precedent.
10. However, no-one wants to be in the position of arguing Condition Precedent points and it is therefore advisable to comply with the Contract and give notice where required. For instance:

- JCT SBC/2011 requires a Contractor to make its application for loss and expense

“as soon as it has become, or should reasonably have become, apparent to him that the regular progress has been or is likely to be affected”.

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- NEC3 requires the Contractor to notify the Project Manager of a Compensation Event within eight weeks of becoming aware of the event.

### Principle 3 – There is no set way for Contractors to prove the three elements they are required to prove as set out in Principle 1

11. The Judge states in his Judgement that it is open to Contractors to prove the three elements with whatever evidence will satisfy the Tribunal and the requisite standard of proof. This therefore leaves it open for any Judge/Arbitrator/Adjudicator to decide the level of evidence they require in proving events occurred which entitle the Claimant to loss and expense. The Claimant must also demonstrate that the events caused delay and/or disruption, and such delay or disruption caused it to incur loss and/or expense.
12. The level of detail should be the best that you can provide and, if you are unable to provide substantive evidence due to poor records, you need to be able to explain the reasons why. Although, in their paper to The Society of Construction Law, Day and Cope (2013) state that  
*“a Contractor may also rely on expert evidence to support its case<sup>7</sup>”*.
13. Therefore the linking of events with the proof of causation is paramount and the level of evidence and proof that the Claimant has to make will depend on the Judge/Arbitrator/Adjudicator and the Agreement/Contract in question.
14. Some examples of evidence which can be used to prove causation include:
  - Contemporaneous Site Diaries.
  - Meeting Minutes.
  - Photographs.
  - Witness Statements.

### Principle 4 – There is nothing wrong in principle with a “global” or “total cost” claim but there are added evidential difficulties

15. With regard to “Global” or “Total Cost” claims, Day and Cope (2013) summarises the position well; if you can prove your Client’s claim by

conventional means then do so. If you cannot, then all is not lost but you will need to persuade the Court that a meritorious claim exists, and in particular, that the loss (which you are claiming) would not have been incurred in any event.

16. The Judge in *Walter Lilly (2012)* set out that the Contractor must show its tender was sufficiently well priced and it would have made some nett return. The Judge dismissed the contention that the burden of proving this transfers to the Employer although he acknowledged it is open to the Employer to

*“...adduce evidence that suggests or even shows that the accepted tender was too low and the loss would have been occurred irrespective...” (paragraph 486(d), Judgement, Walter Lilly, 2012).*

17. It is, however, sensible that if a Claimant decides to present a global claim, then the burden must be on the Claimant to demonstrate it would not have incurred the loss in any event. The Claimant will need to demonstrate, in effect, that there are no other matters which actually occurred which caused it loss.
18. The Law on global claims has therefore been somewhat clarified. The burden of proof is still with the Claimant to prove that it would not have incurred the loss in any event.

**Principle 5 – The fact that one or a series of events or factors (either unpleaded or which are the Contractor’s risk) caused or contributed to the global loss does not necessarily mean that the Claimant Contractor can recover nothing – It depends on what the impact of these factors are**

19. This principle shows the pragmatic and common-sense approach applied by the Judge to global claims. In *Day and Cope (2013) SCL* paper they are of the view that this is arguably a major departure from the previously stated view on how global claims should be decided. It had been generally considered that, if a Defendant proved that one of the causes of delay or the Claimant’s loss was not the Defendant’s responsibility, then the entire claim would fail. This can be seen in the 11th Edition of *Hudson* where it stated:

“...even if [a global] claim is allowed to proceed, it should only be on the basis that, on proof of any not merely trivial damage or 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.” (Wallace, I. D, QC (ed.). 1995. Para 8.204)

20. This was often referred to as the “Exocet” defence and was relied on as a defence to global claims.
21. *John Doyle Construction Ltd v Laing Management (Scotland) Ltd (2002)* had changed the Law on this as the event that the Employer was not responsible for had to be “significant”. *Walter Lilly v Mackay (2012)* altered the Law further as the Judge, at paragraph 486(e), confirmed that, just because a global claim has contributing factors/events for which the Claimant is culpable, the global claim would not fail outright and would simply be reduced by the loss resulting from that contributing factor/ event.
22. The Law on global claims has clearly developed and global claims will now no longer fail simply because the Defendant proves one cause of delay by the Claimant.

**Principle 6 – 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, although this does not prevent a global or total cost claim being made**

23. It is important that a Contractor pleads all parts of the claim where a causal link can be demonstrated separately. This was identified in *Crosby v Portland (1977)*<sup>8</sup>. After separating out those parts of the claim where the causal link can be demonstrated, global claims are then “composite claims” or “rolled-up claims”. In *Merton v Stanley Hugh Leach (1985)*<sup>9</sup> it was suggested that a Contractor should be debarred from pursuing a “rolled up award” if it could otherwise seek to prove its loss in another way.
24. In his Judgement of *Walter Lilly v Mackay (2012)* the Judge disagreed with what had been stated in *Merton*<sup>10</sup>. He was of the view that, if a party wished to put before a Tribunal a global claim when it could produce a claim with direct causational linkage, then it was for the party

to decide if it wanted to do that. The Judge did not believe a party producing a global claim in these circumstances should have it rejected out of hand.

25. This principle, in *Walter Lilly v Mackay (2012)*, means that Claimants can choose how they wish to present their claims and the level of causation it proves. However, as the Judge states

*“if a party goes down a global claim route, when a case could have been produced showing causation, the tribunal will look at it sceptically”.*

26. Pattern (2013) summarises practically what this meant in his Article *“Pleading Global Claims”* as follows:

*“The decision in Walter Lilly does not make it any easier for claimants to plead and prove global claims. However, it does show that it is possible to plead a claim which has a global element even, if it was not a total cost claim. Pleading even the most difficult global claim is possible provided the pleader keeps sight of the objective: provides the claimant’s route map of how it proposes to link events to loss; tells the defendant the case it has to meet.” (Pattern, B. 2013, para. 62)*

27. Claimants can issue a global claim if they wish to, but a Judge/Arbitrator/Adjudicator is unlikely to look on this favourably if found out during the process that a more detailed claim could have been presented.

## Principle 7 – A global award can still be made even if the Contractor has himself created the impossibility of disentanglement

28. In the *Walter Lilly v Mackay (2012)* case, Mackay’s Counsel argued that a global claim should not be allowed where the Contractor has himself created the impossibility of disentanglement and relied on the cases of Merton<sup>9</sup> and John Holland<sup>10</sup>. The Judge, Mr Justice Akenhead, found this analysis to be plainly wrong and rejected the arguments and summarised the position as follows:

*“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.” (Walter Lilly v Mackay .2012. para 486(g))*

29. The law in the sphere of global claims has developed and a global award can still be made even if the Contractor has himself created the impossibility of disentanglement.

## Summary

30. Following the case of *Walter Lilly v MacKay (2012)* it seems that Claimants are being given a “cautious green light” to advance global claims provided that they are aware of, and comply with, the principles set out above.
31. In his Judgement, Mr Justice Akenhead stated that global claims are recoverable in principle provided that the Claimant proves his claim on the balance of probabilities. As always, the terms of the Contract in question will have a bearing on whether a global claim can be recovered. A Claimant no longer has to show that it is impossible to plead and prove cause and effect. This does not mean global claims become an attractive way to put a claim because the Contractor (Claimant) will have to show causation in the sense that the loss he suffered would not have been incurred anyway and that his tender price was sufficient to produce a nett return. Contrary to earlier legal authorities the Judge in this case accepted that a global claim may be advanced even if it was the Claimant who made it impossible to isolate individual causes and effects and if it was the cause of a contributory event which caused the global loss, then the whole claim does not fail (a deduction for this event may be made).
32. Nevertheless, a well-advised Claimant should still submit a claim (which is not global) wherever possible and attempt to link specific losses with specific events. Failure to do so in litigation/arbitration/adjudication may lead to the Judge/Arbitrator/Adjudicator looking sceptically at the Claimant’s case.
33. My next article will look at how to prevent the need to make a global claim and how to break down your claim to make it less global.

**Note: This article is based on the authors own research.**



[Click here for Global Claims Article 3 – De-Globalising Global Claims](#)

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42. Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd (1997) 82 BLR 39 (OR).
43. Crosby & Sons Portland v Urban and District Council (1977) 5 BLR 121 (QBD).
44. John Doyle Construction Ltd v Laing Management (Scotland) Ltd [2002] BLR 393.
45. John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd (1996) 82 BLR 81 (Supreme Crt of Victoria).

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46. London Borough of Merton v Stanley Hugh Leach Ltd (1985) 32 BLR 51, (1986) 2 Const LJ 189 (ChD).
  47. Mid Glamorgan County Council v Devonald Williams and Partners (1992) 8 Constr LJ 61, 29 Con LR 129 (OR).
  48. Walter Lilly & Company Ltd v Mackay & Anor [2012] EWHC 1773, [2012] BLR 503, (2012) 28 Constr LJ 622, 14 Con LR 79 (TCC).
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## Footnotes

1. Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd (1997) 82 BLR 39 (OR) and John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd (1996) 82 BLR 81 (Supreme Crt of Victoria)
2. London Borough of Merton v Leach (1985); Mid Glamorgan County Council V Devonald Williams and Partners (1992)
3. Walter Lilly & Company Ltd v Mackay [2012] EWHC 1773, [2012] BLR 503, (2012) 28 Constr LJ 622, 14 Con LR 79 (TCC)
4. For example: JCT Standard Building Contract 2011 clause 4.23.1 and NEC3 Clause 61.3
5. Walter Lilly & Company Ltd v Mackay [2012] EWHC 1773, [2012] BLR 503, (2012) 28 Constr LJ 622, 14 Con LR 79 (TCC) – In particular paragraphs 486(c), (f) and (g)
6. Mid Glamorgan County Council V Devonald Williams and Partners (1992)
7. Mr Justice Akenhead stressed Walter Lilly and Mackay (2012) that there should not be over reliance on experts
8. Crosby & Sons v Portland Urban and District Council (1977) 5 BLR 121 (QBD)
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<p style="text-align: center;"><b>Sheffield</b></p> <p>The Annexe 260 Ecclesall Road South Ecclesall Sheffield S11 9PS</p> <p>Tel – 0114 230 1329 E-mail – <a href="mailto:frances.sawicki@ramskillmartin.co.uk">frances.sawicki@ramskillmartin.co.uk</a></p>	<p style="text-align: center;"><b>London</b></p> <p>Adam House 7-10 Adam Street London WC2N 6AA</p> <p>Tel – 020 7520 9295 E-mail – <a href="mailto:clive.ramskill@ramskillmartin.co.uk">clive.ramskill@ramskillmartin.co.uk</a></p>
<p style="text-align: center;"><b>Birmingham</b></p> <p>Birmingham Business Park 4200 Waterside Centre Solihull Parkway Birmingham B37 7YN</p> <p>Tel – 0121 481 2381 E-mail – <a href="mailto:clive.ramskill@ramskillmartin.co.uk">clive.ramskill@ramskillmartin.co.uk</a></p>	<p style="text-align: center;"><b>Manchester</b></p> <p>3 Hardman Street Manchester Lancashire M3 3HF</p> <p>Tel – 0114 230 1329 E-mail – <a href="mailto:nick.cheetham@ramskillmartin.co.uk">nick.cheetham@ramskillmartin.co.uk</a></p>
<p style="text-align: center;">Head Office The Annexe 260 Ecclesall Road South Sheffield, S11 9PS UK</p> <p style="text-align: center;">Tel – 0114 230 1329</p>	