GLOBAL CLAIMS FOR DAMAGES IN CONSTRUCTION CONTRACTS

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To my beloved Father, Mother, Brothers and Sister

THANK YOU

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ABSTRACT

Global claims are measures of damages or contractor's claims for additional costs caused by alleged breaches of contract by the employer where the alleged total costs of the contractor is compared with the contract value or price. In global claims, the claimant does not seek to attribute loss to specific breaches of contract, but rather alleges a composite loss as a result of all the alleged breaches. This method obscures the necessity of demonstrating the nexus between the individual breaches alleged to the consequences of the breach. Thus, one would have concluded that claims made under the method, but does not fully complied with the strict circumstances which allow a global claim to be put forward, would not have survived litigation. However, the current legal position of global claims seems to be at odd with this proposition. Therefore, this research is to determine whether the conventional approach and requirement of establishing the causal nexus link in a damages claim can be dispense with in cases where the claims are put forward in this form. Consequently, study is conducted to find out the approaches adopted by the courts to strike a balance between the need to prove causal nexus while preserving the claimant's right to sought remedy for the damages suffered. The research methodology undertaken in this study is analysis and review of case laws from United Kingdom and other Commonwealth countries. Further to the study conducted, conclusion can be made that the court will insist on the claimant to establish the causal nexus link between the breach of contract and the resulting financial consequences. However, this requirement is not enforced with utterly strict requirement for compliance which failure to establish the causal nexus link will resulted in the claim being struck out. It is undeniable that although global claims are discouraged, the right of a 'wronged' party to sought remedy for the damages suffered due to the breach is not extinguished merely due to the impossibility or impracticality to prove the causal link as can be deduced from the findings of the court in many case laws.

ABSTRAK

Tuntutan global adalah remedi kerosakan atau tuntutan kontraktor bagi kos tambahan yang disebabkan oleh dakwaan pelanggaran kontrak oleh majikan di mana jumlah kos yang dibelanjakan oleh kontraktor dibandingkan dengan nilai harga kontrak. Dalam tuntutan global, pihak yang menuntut tidak bertujuan untuk mengaitkan kerosakan dengan pelanggaran kontrak yang tertentu, tetapi mendakwa kerugian komposit akibat semua pelanggaran yang dikatakan. Kaedah ini mengaburi keperluan menunjukkan pertalian antara perlanggaran tertentu dengan akibat pelanggaran tersebut. Oleh itu, seseorang akan membuat kesimpulan bahawa dakwaan yang dibuat di bawah kaedah ini, tetapi tidak mematuhi sepenuhnya kiteria yang ketat yang membenarkan tuntutan global dikemukakan, tidak akan dibenarkan di bawah undang-undang. Walau bagaimanapun, kedudukan semasa undang-undang tentang tuntutan global adalah tidak begitu terus terang. Oleh itu, kajian ini adalah untuk menentukan sama ada pendekatan konvensional dan keperluan untuk mewujudkan pautan pertalian sebab dan akibat dalam tuntutan ganti rugi boleh diketepikan dalam kes-kes di mana tuntutan tersebut dikemukakan dalam kaedah ini. Oleh itu, kajian ini dijalankan untuk mengetahui pendekatan yang diterima pakai oleh mahkamah untuk mengimbangi antara keperluan membuktikan pertalian sebab dan akibat di samping memelihara hak penuntut menuntut remedi untuk kerosakan yang dialami. Kaedah penyelidikan yang dijalankan dalam kajian ini adalah analisis kes-kes undang-undang dari United Kingdom dan Negara-negara Komanwel yang lain. Kesimpulan daripada kajian adalah makamah akan mendesak pihak yang menuntut untuk menubuhkan pertalian antara sebab pelanggaran kontrak dan akibat kewangan. Walau bagaimanapun, keperluan ini tidak dikuatkuasakan dengan ketat di mana kegagalan membuat demikian akan menyebabkan tuntutan dibatalkan. Tidak dapat dinafikan bahawa walaupun tuntutan global tidak digalakkan, hak parti 'dianiaya' untuk mendapatkan remedi kerosakan yang dialami disebabkan oleh pelanggaran tidak akan dipadamkan semata-mata kerana kemustahilan atau kegagalan untuk membuktikan pertalian sebab dan akibat yang boleh disimpulkan dari penemuan kes-kes mahkamah.

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LIST OF ABBRIEVATIONS

A.C.	Appeal Cases
All ER	All England Law Reports
ALR	Australian Law Report
App Cas	Appeal Cases
BLR	Building Law Reports
CA	Court of Appeal
Ch. D.	Chancery Division
CLR	Commonwealth Law Reports
Con LR	Construction Law Reports
Const LJ	Construction Law Journals
EWCA	England and Wales Court of Appeal
Ex Rep	Exchequer Reports
K.B.	King Bench
Lloyd's Rep	Lloyd's List Reports
MLJ	Malayan Law Journals
MLJA	Malayan Law Journal Articles
NSWLR	New South Wales Law Reports
NZLR	New Zealand Law Reports
PC	Privy Council
SCLR	Southern California Law Reviews
QB	Queen Bench
UKHL	United Kingdom, House of Lords
V.R.	Victorian Reports
WLR	Weekly Law Reports

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CHAPTER 1

INTRODUCTION

1.1 Background Study

In general, the legal basis for claims of loss and expenses is damages as remedy for breach of contract under the common law.[1] The principle established by Parker B. in *Robinson v Harmon*[2] is that *'the innocent party is entitled to be placed so far as money can do it, in the same position as he would have been had the contract been performed.'*[3] Based on this principle, the innocent party or the plaintiff has to prove four main criteria.[4]

First, the innocent party has to prove that there existed an obligation between the parties i.e. in the form of a legally binding contract between the parties and must show that the terms he relied on for his case were part of the provisions in the contract.[5] Secondly, the plaintiff has to prove that these obligations have been breached including of the question of which obligations were breached, when the

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[1] Chappell, D., Powell-Smith, V. and Sims, J. "Building Contract Claims." 4th Edition. (Blackwell Publishing, 2006), p. 87
[2] [1848] 1 Ex Rep 850
[3] [1848] 1 Ex Rep 850 at p. 855
[4] Whitfield, J. "Roll Up, Roll Up." Digest (7), 1992. Retrieved on January 19, 2011 from www.trett.com/EN/media/Documents/Digest%20issue%207.pdf
[5] Beatson, J. "Anson's Law of Contract." 28th Edition. (Oxford University Press, 2002), pp. 596 - 597

obligations were breached and how they were breached.[6] Thirdly, after establishing the breach of the obligations, the plaintiff must prove that the breach caused some damage.[7] And finally, the plaintiff must show that he has suffered losses or incurred expenses as a result of the damage caused by the breach.[8]

It should be noted that the court in the *Robinson case* held that there is no premise for a claim if the cause of the plaintiff's loss arise independently of the breach by the defendant or if the breach is technical in nature and did not result in any loss or injury for the plaintiff.[9] Furthermore, the innocent party's claim for damages may fail if it can be proven that the plaintiff has not taken reasonable steps to avoid or mitigate his damages as highlighted in *Kabatasan Timber Extraction v Chong Fah Shing*.[10]

Global claims, which is also known as "composite claims", "rolled-up claims", "total-loss claims" and "total cost claims". These methods of claims are commonly used in a contractor's claim for loss and expenses due to delay or a number of causes which the employer is responsible or in default. An example method of quantification put forward in a global claim is where the quantification of the loss is deduced by subtracting the tender cost of the works from the final cost.

According to Duncan Wallace (1995), global claims are defined as:-

> *'[T]hose where a global or composite sum, however computed, is put forward as the measure of damages or of contractual compensation where there are two or more separate matters of claim or complaint, and where it is said to be impractical or impossible to provide a breakdown or sub-division of the sum claimed between those matters.'*[11]

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[6] Whitfield, J. "Roll Up, Roll Up." Digest (7), 1992. Retrieved on January 19, 2011 from www.trett.com/EN/media/Documents/Digest%20issue%207.pdf
[7] *Ibid.*
[8] *Ibid.*
[9] [1848] 1 Ex Rep 850 at p. 855
[10] [1969] 2 MLJ 6
[11] Wallace, D. "Hudson's Building and Engineering Contracts." 11th Edition. (United Kingdom: Sweet & Maxwell, 1995), pp. 1086 - 1087

Meanwhile, according to Byrne J. in *John Holland Construction v Kvaerner R.J. Brown Private Limited,*[12] global claims are defined as situations 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 the breaches alleged, or presumably as a result of such breaches as are ultimately proved.'*[13]

A global claim is submitted by some to be an exception to damages claim as in global claims, the claimant *'does not seek to attribute loss to specific breaches of contract, but rather alleges a composite loss as a result of all the alleged breaches.'*[14] It is submitted by Harban Singh (2007) that a global claim is a form of claim where *'no nexus or linkage is established between the cause of the alleged compliant and its effect i.e. the redress sought.'*[15]

In general, global claims are highly discouraged in the industry as stated in the Society of Construction Law Delay and Disruption Protocol (2002) that:-

> *'The not uncommon practice of contractors making composite or global claims without substantiating cause and effect is discourage by the Protocol and rarely accepted by the courts. If the contractor has made and maintained accurate and complete records, the contractor should be able to establish the causal link between the Employer Risk Event and the resultant loss and/or expense suffered, without the need to make a global claim.'*[16]

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[12] [1996] 82 BLR 83 (Supreme Court of Victoria)
[13] [1996] 82 BLR 83 (Supreme Court of Victoria), at p. 85
[14] Molloy, J.B. "Global Claims – The Current Position." HKIS Newsletter. 7 (7), 1997.
[15] Singh K.S., H. "Demystifying Direct Loss And/Or Expense Claims." Malayan Law Journal, 5, 116. (Kuala Lumpur: LexiNexis, 2007), p. 116
[16] Society of Construction Law. "Delay and Disruption Protocol." Society of Construction Law. (United Kingdom: Society of Construction Law, 2002), p. 26

Furthermore, Duncan Wallace in Hudson's (1995) articulated his objections to global claims in reliance to the case of *Whaft Properties Ltd v Eric Cumine Associates (No. 2)*[17] where it is submitted that:-

> *'[I]n the English and Commonwealth jurisdictions, claims on total costs basis, a fortiori, 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 an interlocutory stage.'*[18]

One of the major objections of principle to the use of a global or total cost method submitted in Hudson's (1995) is that *'a total cost computation by itself is evidence neither of breach or other entitlement, nor of damage or additional costs.'*[19]

Secondly, it is submitted in the same paragraph that:-

> *'[G]lobal claims are almost invariably unfair and highly prejudicial to defendants, since they avoid indicating the precise case to be met and enable the plaintiff to "change course" during the evidence.'*[20]

Thirdly, as a global or total cost claim is typically build up as a sum with no breakdown, consequently, it is submitted that :-

> *'[N]o material is provided for valuing any part or parts of the claim which a defendant or his advisers may be disposed to concede or allow while resisting the remainder, or for which to make provision by payment-in or sealed order. The tribunal in such a case equally has no satisfactory material before it to reduce the overall claim in respect of disallowed individual claims, unless it is prepared to rescue the plaintiff in embarking on an inquiry or calculations of its*

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[17] [1991] 52 BLR 8
[18] Wallace, D. "Hudson's Building and Engineering Contracts." 11th Edition. (United Kingdom: Sweet & Maxwell, 1995), para. 8-204
[19] *Ibid*, para. 8-201
[20] *Ibid*, para. 8-201

own at a late stage of the proceedings, which can again be very unfair to the defendant.'[21]

Finally, Hudson's (1995) pointed to the difficulty caused to the defendant and the tribunal to proof that, even where only one matter of claim is advanced but it has been computed on a total cost basis, any one matter for which the claimant and not the defendant is responsible must have caused palpable damage or additional cost.[22] In a nutshell, the underlying factor which gives rise to the objections made is that a global / total cost claim method obscures or avoids the necessity of demonstrating the nexus between the individual breaches alleged or grounds of claim to the effects or consequences of the breach i.e. the particular sums claimed.

1.2 Problem Statement

By referring to the objections on global / total cost claims as submitted in Hudson's (1995), one would have concluded that claims made under the method, but does not fully complied with the strict circumstances which allow a global / total cost claim to be put forward, would not have survived litigation. However, the current legal position of global claims seems to be at odd with this proposition as can be deduced from the development of the following case laws since 1967.

In the early case of *J Crosby & Sons v Portland Urban District Council*,[23] the court upheld an arbitrator's award where the arbitrator awarded sums on a composite basis. Furthermore, in *London Borough of Merton v Stanley Hugh Leach Ltd*,[24] the court held that in principle, a global claim for loss and expenses was permissible under Clause 11 and 24 of the JCT 1963 Form of Contract.

Subsequently, the view of the court on this issue seems to take an apparent change especially in the case of *Wharf Properties Ltd v Eric Cumine Associates (No.*

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[21] *Ibid*, para. 8-201
[22] Wallace, D. "Hudson's Building and Engineering Contracts." 11th Edition. (United Kingdom: Sweet & Maxwell, 1995), para. 8-201
[23] [1967] 5 BLR 121
[24] [1985] 32 BLR 51

2)[25] where the claimant's global claim had failed due to abuse of the court process. Subsequently, several cases on the same issue also failed due to evidence submitted are found to be inadequate to prove the claim.[26] But, it is evident that in later cases,[27] the court is reluctant to strike out global claims while giving the chance to the plaintiff to state his case by allowing amendments and ordering the submission of Better and Further Particulars.

It is further discussed in *Bernhard's Rugby Landscape Ltd v Stockley Park Consortium Ltd*[28] and *John Doyle Construction Ltd v Laing Management (Scotland) Ltd*[29] that there is a need to strike a balance between the difficulties faces by the plaintiff in proving individual causal links and the defendant's right to know the case it has to meet.

It is undeniable that although global claims is discouraged by many sectors in the industry, the right of a 'wronged' party to sought remedy for the damages suffered due to the breach is not extinguished merely due to the impossibility and impracticality to prove the causal link as can be deduced from the findings of the court in many case laws.

Therefore, this research is to determine whether the conventional approach and requirement of establishing the causal nexus link in a damages claim can be dispense with in cases where the damages claim are put forward in the form of global claims. Consequently, study is to be conducted to find out the approaches adopted by the courts to strike a balance between the need to prove causal nexus while preserving the claimant's right to sought remedy for the damages suffered.

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[25] [1991] 52 BLR 1
[26] *McAlpine Humberoak v McDermott International* [1992] 52 BLR 1
[27] *British Airways Pensions Trustees Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 72 BLR 26 where on appeal, the court ordered for the submission of Further and Better Particulars rather than to struck out the statement of claim, *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 82 BLR 83 (Supreme Court of Victoria) where the court allowed for amendments and order for the submission of Further and Better Particulars
[28] [1997] 82 BLR 39
[29] [2004] BLR 295

1.3 Objective Of Study

With reference to the above problem statement, the following are the objectives of this study:-

a) To determine whether the conventional approach and requirement of establishing the causal nexus link in a damages claim can be dispensed with in cases where the damages claim are put forward in the form of global claims; and

b) To find out the approaches adopted by the courts to strike a balance between the need to prove causal nexus while preserving the claimant's right to sought remedy for the damages suffered

1.4 Scope Of Study

The scope of study will be focused on the following:-

a) Court cases related to the issue in Commonwealth countries in particular United Kingdom, United States, Australia and Hong Kong;

1.5 Significance Of The Study

Although there are no reported cases regarding the issue of global claims for loss and expenses in the local construction industry, it is hoped that this research will give some insight to the key players in the local construction industry on the tenability of global claims for loss and expenses based on the international scenario in view of the rapidly globalised world and the growing numbers of key players in the Malaysian construction industry who is involved in international contracts and projects.

1.6 Research Methodology

In order to achieve the objectives of this study, the research methodology to be applied for the process of conducting the study involves five major stages as follows:

1. Identifying the issues and objectives of the study

This process involves readings on books, journals, articles and conference papers on the issue which can be obtained from the university's campus library and online databases such as LexisNexis.

2. Review on relevant literature on the issues

After identifying the issue and objective of the study, further reading is necessary to refine the objectives and identify the limitation of the study.

3. Data collection including research for related and relevant cases

The next step is to research for related and relevant cases in support of the objective and for analysis from different sources such as the local Malayan Law Journal, Current Law Journal, All England Law Reports, etc.

This process involved retrieving case law reports from not only the university's campus library (Perpustakaan Sultanah Zanariah) and online databases such as LexisNexis but is also widened to off-campus library i.e. the Faculty of Law Library in University of Malaya (Tan Sri Professor Abdul Ibrahim Law Library).

4. Data analysis and discussion

After collecting all the data, detail analysis on the facts of the cases and the principle underlying the decision imparted by the Court are required. At this

stage, comparison of the cases and discussion is vital in order to achieve the objective of the study.

5. Writing up, conclusion and suggestion.

Finally, the last step will be to write up the report, to make conclusion based on the data analysis and to make suggest for future studies based on the conclusion limitation of the study.

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