Client Alert | Construction

Striking out total cost claims

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Authors: Julian Bailey, Emma Knight

A "global" or "total cost" claim is one in which the damages calculation is derived from the total cost of the work incurred by a contractor, minus the bid amount. Such claims are increasingly used by contractors where proving actual damages is impossible or impracticable. Whilst total cost claims are not in principle objectionable, in order to succeed, the courts will require significant legal hurdles to be met.

In the recent case of Built Environs WA Pty Ltd v. Perth Airport Pty Ltd ("Built Environs v Perth"), the Supreme Court of Western Australia granted leave to strike out elements of an inadequately pleaded modified total cost claim.

What is a "total cost" claim and a "modified total cost" claim?

A "total cost" claim is one where a contractor claims for all of its additional costs above its tender costs, incurred after a particular point in time, on the basis that its costs were increased above its anticipated costs solely due to owner-caused events. Similar to a global claim, in a total cost claim a contractor does not identify causal links between the individual events and the costs incurred. However (as established in a line of case law to which the judge in ***Built Environs v Perth*** referred), a total cost claim requires four propositions to be made out:

- the contractor might reasonably have expected to perform the work for a particular sum, usually the contract price;
- the owner committed breaches of contract;
- the actual reasonable cost of the works was a sum greater than the expected cost; and
- the proprietor's breaches were the only causally significant factor responsible for the difference between the expected cost and the actual cost.

A "modified total cost claim" is a variant on this. Quantum is calculated by taking the actual cost incurred, less any costs that are attributable to contractor-caused or neutral events, less the relevant tender amount. This has the advantage of dealing (to an extent) with criticisms that can validly be made of a contractor's claim, without necessarily destroying the premise of its claim.

Key facts

The case of ***Built Environs v Perth*** arose within the context of a strongly-contested construction dispute over major works to terminals at Perth Airport. The Defendant, Perth Airport, sought leave to strike out certain paragraphs of the Claimant's Statement of Claim ("SoC") on the basis that they were so deficient of required details that they would prejudice a fair trial.

In a previous order, the judge had directed the Claimant to provide further detail as to both:

- specific alleged deficiencies in drawings provided by the Defendant; and
- its causation of loss pleas, addressing how these alleged deficiencies had generated the loss and damage pleaded as being caused, and identified in the SoC down to the nearest cent.

While the Claimant had subsequently submitted an expert report intended to address the drawing deficiencies, the judge found that this "only provided the barest of details towards the nature of the drawing deficiencies" and thus did not discharge this obligation. The Claimant had also amended its SoC, but still failed to demonstrate causation of the alleged loss by reason of the alleged deficiencies.

The Claimant's counsel also refused to commit to whether or not the Claimant was advancing a global claim (or more precisely, a modified total cost claim).

Decision

In ***Built Environs v Perth***, the Claimant was apparently unwilling or unable to commit to a clear position as to whether or not it was advancing a modified total costs claim. Thus, it failed to advance the necessary accompanying pleas establishing the propositions listed above, and excluding any alternative causes for the alleged loss.

Faced with the continuing absence of detail and, importantly, with the refusal by the Claimant's counsel to 'nail its colours to the mast', the judge granted leave to strike out the relevant paragraphs of the SoC.

The judge did however leave it open to the Claimant to commit, within a reasonable time, to plead in unmistakeable terms as to whether it was running a total cost claim (and if so, to provide the proper accompanying pleas).

Comment

This case highlights the importance of identifying, and clearly setting out, the true legal basis of a case in litigation / arbitration pleadings.

Under English law, the mere fact that a claim is presented as a global or total cost claim does not necessarily mean that it is objectionable, or "wrong".[1] However, there are generally evidential difficulties which a claimant has to overcome, as well as other issues to consider. First, are there any contractual restrictions on global or total cost claims? Subject to any such restrictions, a claimant will have to establish on a balance of probabilities that the losses it is claiming would not have been incurred in any event. This will generally require it to demonstrate, amongst other things, that:

- its tender price was reasonable;
- the additional costs it incurred were incurred reasonably; and
- that the breaches complained of were the only causally significant factor responsible for the difference between the tender price and the actual cost.

It will then be for the defendant to demonstrate that the loss would always have occurred irrespective of the events complained of, or that there were other events which caused or contributed to the losses claimed.

Where a global claim or total cost claim is so poorly particularised that – even after orders for further particulars, as in ***Built Environs v Perth*** – there is no discernible causal nexus between the events pleaded and the alleged consequences, then a strike-out application may be available to defendants and may well be granted by a court or arbitration tribunal.

What are ultimately in issue, when the adequacy of a pleading of a total cost claim comes under judicial scrutiny, are matters of fairness, practicality and the appropriate means of enabling the court to decide the issues between the parties.

1 Walter Lilly & Co Ltd v Mackay [2012] EWHC 1773 (TCC)

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 1000