

GLOBAL CLAIMS REVISITED - THE EVIDENTIAL BURDEN

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Legal Briefings

The expressions "global" or "total costs" claims refer to claims by contractors or sub-contractors which identify numerous potential or actual causes of delay and/or disruption, a total cost incurred for the project and a claim for the balance between that cost and sums already paid. This balance is generally attributed to the cause or causes of delay and disruption relied on but individual causes are not separately costed.

This definition was set out in the leading case of *Walter Lilly* in 2012 and the issue of the evidential burden in proving such claims has now been revisited in the case of *John Sisk v Carmel*, decided by the Technology and Construction Court of England and Wales on 15 April 2016.

The court concluded that an Arbitrator's Award could not be criticised where he had found that the burden on the party seeking to prove such claims was greater than the burden it would bear in having to prove the same claims on an itemised basis.

THE ARBITRATOR'S AWARD

The claimant in this case was John Sisk and Son Limited ("Sisk"), who appealed against an arbitrator's award in favour of its sub-contractor Carmel Building Services Limited ("Carmel") relating to a mechanical and electrical services sub-contract which was entered into on the JCT 2005 Standard Sub-Contract conditions.

Carmel had entered into administration and ceased work under the Sub-Contract, which was terminated. The provisions of the Sub-Contract permitted Sisk to deduct from sums owing to Carmel the amount of any direct loss and/or damage caused to Sisk as a result of the termination. If the amount due to Sisk exceeded the amounts due to Carmel, then the balance was recoverable by Sisk from Carmel.

The Arbitrator decided that Sisk's claim for losses caused by the termination was a "total costs" claim or "global" claim because each part of the costs claimed was attributed to a single event, namely the termination of the sub-contract. The arbitrator considered the judgement in Walter Lilly and concluded that it did not preclude the pursuit of a claim on a global or total costs basis.

However, the burden which befell a party putting forward a total costs claim was greater than the burden it would bear in having to prove the same claim on an itemised basis. He decided that sufficient doubt had been established by Carmel as to the accuracy of the total costs alleged to have been incurred by Sisk to justify the rejection of the claim advanced on that basis.

Sisk appealed without needing the Court's permission as the parties consented (as in all JCT Contracts) to an appeal being made to the Court on a point of law from an Arbitrator's award.

THE COURT'S DECISION

The Court reviewed the Walter Lilly case. It noted that, in that case, the court had found that, when claiming for delay and disruption relating to loss and expense, a contractor must demonstrate on a balance of probabilities that

- events occurred which entitled it to loss and expense
- that those events caused delay and/or disruption and that
- such delay or disruption caused it to incur loss and/or expense

The court concluded that there was nothing in principle "wrong" with a total costs or global claim. However, a contractor must establish that the loss which it has incurred would not have been incurred in any event by reference to the sufficiency of pricing in its tender and prospective net returns. It would need to be shown that no matters other than those relied on caused the loss.

Sisk contended that global or total costs claims were effectively the same and that their claim was for the losses attributable to a single event, namely the termination. They said that Walter Lilly did not apply; alternatively, if it did, there was no greater burden of proof upon Sisk in seeking to prove the actual costs incurred than any other claim would impose. The Court found that the Arbitrator was correct in saying that a party endeavouring to prove a global or total costs claim would carry a greater burden than a party endeavouring to prove the same claim on an itemised basis. Therefore, there are added evidential difficulties in proving a global or total costs claim.

Such a claim must be proved "properly", which may be more difficult than in the case of an itemised claim. Further, the court accepted the Arbitrator's conclusion that the task of proving a global or total costs claim involves demonstrating both that every element of the actual cost to have been incurred is valid and has been properly incurred and that the hypothetical comparative costs have financial validity. On the facts (which could not be appealed), the arbitrator had found that Sisk had failed to prove its claim.

CONCLUSION

Sisk challenged the arbitrator's award on the issues of both burden of proof and the nature of evidence required to prove a global claim. The court interpreted *Walter Lilly* to confirm that the arbitrator had understood that case properly and reaffirmed that the burden on a party maintaining a global claim is greater than if an itemised claim is put forward.

The case provides a useful practical interpretation of the principles set out in *Walter Lilly* and demonstrates that substantial evidential burdens remain applicable when global or total costs claims are brought .

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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