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Rolled Up Claims and Wharf Properties Revisited (Part 1)

ROLLED UP CLAIMS AND WHARF PROPERTIES REVISITED (Part 1)

Contractors' claims for delay and for loss and expense are frequently prepared in the knowledge that profit margins are falling below expectations. In such circumstances it is all to easy to assume that events, for which the employer was responsible under the contract, must, in some way, be responsible for all delays and cost overruns.

In law, however, the claimant must prove his claim. In the context of contractors' claims this means that the contractor must establish that the events on which the claim is based occurred and that there was a causal nexus between them and the delay or disruption and loss sustained.

A rolled up, or global claim, would not appear to satisfy these requirements. Instead of describing how certain events caused specific periods of delay or disruption and loss, it merely identifies the events on which it is founded and the amount of delay or disruption and loss experienced. The causal link is implied by comparing actual resources and costs with those anticipated at tender stage.

It is assumed that the tender was based on realistic estimates of resources and costs, that construction was efficiently organised and that, apart from those events identified in the claim, nothing of significance occurred to disrupt the anticipated progress. Where these assumptions are unjustified a rolled up claim is little more than an attempt to turn a lump sum contract into a cost plus contract.

Not surprisingly, rolled up claims are regarded with some scepticism. Nevertheless, ***Crosby & Sons v Portland UDC***[1] and ***Merton v Stanley Hugh Leach***[2] are frequently cited as justifying this approach.

The principle established by these cases is that an arbitrator can make a rolled up award in respect of a contactor's loss and expense claim where. because of the complex interaction of consequences of the various events giving rise to the claim, it is impractical to apportion loss and expense separately to each of the events giving rise to the claim. This is provided that there is no double recovery and the type of loss and expense awarded is recoverable, in principle, under each and every head

[1] (1967) 5 B.L.R. 121.
[2] (1985) 32 B.L.R. 51.

of claim, considered separately. A rolled up award cannot be made for those parts of the claim that can be dealt with in isolation, on normal legal principles, nor where the difficulty in disentangling the consequences of the various events was due to the late presentation of the claim.

The preparation of rolled up claims was not considered in either of these cases. However, it was assumed that they supported the view that such a claim could be prepared and prosecuted to a successful judgement without providing any explanation of the causal nexus between the events on which it was founded and the delay or disruption and loss alleged.

Recent judgements both in this country and overseas have raised considerable doubts about the soundness of this view. This article reviews the principles of rolled up claims in the light of these recent authorities.

Preparing a rolled up claim

When presenting a claim all the material facts that give rise to the entitlement sought must be identified.[3] Material facts are those facts which, if proved, would be necessary and sufficient for obtaining the entitlement sought. If material facts are missing the claim is, in effect, hopeless and it can be struck out as failing to disclose a cause of action.[4]

A claim may, however, be defective despite including all the material facts. This is because, under the principle of natural justice known as *audi alteram partent*, further details, and particulars, of material facts must be provided where this is necessary to give the other party adequate notice of the claim to be met at trial and so that the trial is conducted fairly, openly, without surprises and, incidentally, to reduce costs.[5]

There are no hard and fast rules for deciding what are necessary particulars. This is a matter for the discretion of the tribunal in which the claim is brought. This discretion should be exercised judicially, in accordance with guidelines developed by the courts.[6]

If a claim is not properly particularised, despite requests by the other party, the tribunal may conclude that it should be struck out on the grounds that it may prejudice, embarrass or delay the fair trial of the action or is otherwise an abuse of process.[7]

The case

The application of these principles to rolled up claims was considered by the Privy Council in ***Wharf Properties Ltd v Eric Cumine Associates***.[8]

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[3] R.S.C. Order 18 rule 7.
[4] R.S.C. Order 18 rule 19. Similar principles apply in arbitration proceedings.
[5] *Astovlanis Compania Naviera SA v Linard* [1972] 2 QB. 611. Similar principles apply to arbitration proceedings.
[6] The commentary to R.S.C. Order 18 rules 12 and 19 in the White Book provides a useful summary of these guidelines.
[7] R.S.C. Order 18 rule 19. The court also has an inherent jurisdiction to proceed in this way. The better view is that arbitrators are also endowed with similar powers at common law, *Bremer Vulkan v South India Shipping Corporation Ltd* [1981] A.C. 909.
[8] (1991) 52 B.L.R. 1.

Wharf was the developer of the Ocean Centre in Hong Kong. Construction did not run smoothly and, on completion, Wharf commenced proceedings against its architects, Eric Cumine Associates (ECA), the main contractor, John Lok and Partners Limited (Lok), and various sub-contractors. The claims against Lok and the sub-contractors were compromised, but that against ECA was pursued on the basis that, in breach of contract, they had failed to properly supervise and administer the works of Lok and its sub-contractors. It was alleged that as a result of ECA's defaults construction was disrupted and delayed and that, in consequence, Wharf had suffered damage by having to meet claims for loss and expense in excess of HK $300 million, from Lok and its sub-contractors and from lost rents of about HK $200 million.

The bare outline of these allegations was contained in section 6 of Wharf's claim. Further particulars were provided in subsequent sections. Section 7 was typical. This dealt with ECA's involvement with the work of the former third defendants, a nominated sub-contractor. Sections 7.2 to 7.4 alleged that ECA had failed to act in timely fashion in respect of a variety of matters, including the provision of design and the exercise of powers over the third defendant's work.

Section 7.6 alleged that because of these defaults Lok and its nominated sub-contractors had been able to claim loss and expense from Wharf. Sections 7.6 and 7.8 identified various delays that were alleged to relate to these claims. Calculations showed the value of the claims made by Lok and the sub-contractors. Lok's claim was in the region of HK $30 million. The sub-contractors claims were in the region of HK £107million. Section 7.10 alleged that the whole of Lok's claim and an unspecified portion of the sub-contractors' claims were attributable to the ECA. No details were provided of how Lok and the sub-contractors had been entitled to recover these sums from Wharf.

Commenting on the manner in which section 7 was particularised Lord Oliver observed:

> "This, as it stands, is plainly an insufficient pleading, for there is no way in which ECA are able to ascertain with any precision what the case is that is being made against them. All the allegations of breach of contract against ECA are allegations of breach of their contractual duties not in relation to Lok's contract or the contracts with sub-contractors but in relation to the letting and supervision of the third defendants' contract. Because of those breaches it is said that Lok and the nominated sub-contractors were enabled and entitled to claim that their works were delayed. But no attempt is made to correlate the claims made by Lok ... with the particular pleaded breaches by ECA. For example, one allegation is that ECA 'caused or permitted there to be an excessive number of variations in the design of the third defendants' work so as to disrupt their progress'. What variations are alleged to be excessive, what disruption they caused and what contribution (if any) that disruption made to Lok's claim and how they contributed remains unspecified. ...

> "The position with regard to the sub-contactors claims is even more confusing. ... This claim is advanced not only without any specification of the causal connection between the breaches and the sums claimed but without any facts pleaded which will enable ECA to ascertain what parts of these sums are being alleged to be attributable to the breaches alleged. ... on any analysis (this pleading) was, in their Lordships' view, hopelessly embarrassing as it stood." (page 14)

Wharf consented, in principle, to provide further particulars of its claim. In response to a request for details of all variations which were alleged to be excessive, it replied that this would have to be determined at trial. In response to a request for details of delays caused to Lok and the sub-contractors, Wharf replied that the cumulative delay and the totality of the losses claimed were ECA's responsibility but that, due to the complex inter-relationship between the large number of delaying and disruptive factors, it was impossible to identify and isolate separately in relation to Lok and its sub-contractors individual periods of delay and loss which were ECA's responsibility. This approach was justified, inter alia, by reference to ***Crosby & Sons v Portland UDC*** and ***Merton v Stanley Hugh Leach***.

Lord Oliver first considered whether Wharf's claim should be struck out for failing to disclose a reasonable cause of action. He observed that this power should only be exercised in plain and obvious cases. He concluded that it was not appropriate here because, although highly unlikely, it was theoretically possible that Wharf might prove its allegations of breach against ECA and that these cumulatively gave rise to the delay pleaded and to the damages claimed. The fact that it faced extraordinary evidential difficulties was not a sufficient ground for saying that the claim disclosed no reasonable cause of action.

Lord Oliver then considered whether the claim, as it stood some seven years after the action had commenced, should be struck out as embarrassing to the fair trial of the action or otherwise as an abuse of the process. He held that it should be struck out and continued:

> "Their Lordships are wholly unpersuaded ... that the two cases (***Crosby & Sons v Portland UDC*** and ***Merton v Stanley Hugh Leach***) provide any basis for saying that an unparticularised pleading in this form ought to be permitted to stand. Those cases establish no more than this, that in cases where the full extent of extra costs incurred through delay depend upon a complex interaction between the consequences of various events, so that it maybe difficult to make an accurate apportionment of the total extra costs, it may be proper for an arbitrator to make individual financial awards in respect of claims which can conveniently be dealt with in isolation and a supplementary award in respect of the financial consequences of the remainder as a composite whole. This has, however, no bearing upon the obligation of a plaintiff to plead his case with such particularity as is sufficient to alert the opposite party to the case which is going to be made against him at trial. ECA are concerned at this stage not so much with quantification of the financial consequences - the point with which the

> two cases referred to were concerned -but with the specification of the factual consequences of the breaches pleaded in terms of periods of delay. The failure even to attempt to specify any discernable nexus between the wrong alleged and the consequent delay provides ... 'no agenda' for the trial."

The implications for rolled up claims of ***Wharf Properties Ltd v Eric Cumine Associates*** and, in particular, the above remarks by Lord Oliver, will be considered in the second part of this article.