Litigation & Claims
Facts & Figures

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2011
The reasons claims arise

- Inadequate contract preparation
- Mistakes in documents
- Optimisms instead of reality
- Misunderstanding formation of Contract
- Failure to understand risk
- Poorly drafted variation instructions
- Failure to understand basic contractual position
- Failure to analyse / explain additional entitlements
GENERAL PRINCIPLES

Recognising Claims Early

- Essential to avoid disputes and speed resolution
- Allow good record keeping
- Assists in managing entitlements
- Burden of proof on claiming party
- Monitoring procedures
  - (+consequential time / costs)
EXTENSION OF TIME CLAIMS

Purpose

Protects contractor against liquidated damages by excusing delay

Protects Employer’s right to LADs by maintaining a completion date (a date from which to calculate LADs)

– Holme V Guppy 1838
– Wells V Army & Navy Co-op 1902
• Otherwise a penalty
Employer’s Claims
LIQUIDATED DAMAGES

Reason for Use of LADs

• Contractual equivalent of common law damages
• Benefit for both parties
• For Employer:
  – a contractual right - no need to prove loss
    • Hadley V Baxendale
• For Contractor:
  – Obligation known
  – Can advise potential liability to others (ie. special damages)
Rules (cont’d)

Rules for applying LADs

• Where procedures apply, must be applied strictly
• Where notice required – condition precedent

– Principal may lose right to LADs where proper notice not given –
  • Bell v CBF;
  • JF Finnegan Ltd -v- Community Housing Association Ltd
  • Delaying breach where no corresponding provision
  • (Rapid v Ealing Family Housing)

• Incompatibility between contract and appendix

  • (Sheffield v Bramell & Ogden)

• ‘NIL’ in appendix
Penalties

• Sum must not be a penalty
  – Dunlop v New Garage & Motor Co (1915)
  – is it a genuine pre-estimate?
    - is it ‘in terrorem’ (threat)

Employer’s Claims
LIQUIDATED DAMAGES

• Need not be actual loss
  – *Clydebank Engineering and Shipbuilding Company Limited v Don Jose Ramos Ysquierdo y Castaneda and Others [1905]*
EXTENSION OF TIME CLAIMS

Notices

• Most contracts contain procedures – normally requirement for notice,
  – JCT – forthwith after delay apparent
  – MF/1 – as soon as reasonably practicable
  – ECC – within 8 wks of becoming aware of compensation event
  – GC Works - Within 56 days
Notices (cont’d)

• Form of notice? – as contract requires
• Some contracts require detailed notice, eg
  – JCT – particulars and effects, estimate, update
  – ECC – Early warning in writing
  – MF/1 – full supporting details
  – Recommendation- apply as close as possible to event
• Site minutes?
  – In Haley v Dumfries & Galloway – not good notice
Grounds for extension (ie. for excusable delay)

Some contracts list ‘reasons’ in detail, eg:

Employer (late information)
Neutral (exceptional inclement weather)

• Some contracts give general grounds, eg:
  JCT Minor Works, MF/1
    • Matters beyond contractor’s control
EXTENSION OF TIME (cont’d)

• Use of Float
  – First to use gets the benefit
  – JCT Architect gives reasonable EOT
    • Use float
  – NEC Actual time added to Programme
    • Float Preserved
EXTENSION OF TIME (cont’d)

• Claimant must identify **Employer’s liability** that *actually* causes delay to completion.
  – I.E. delay on critical path
  Delay on non critical item –
    No EOT to contract
  Perhaps additional prelims as VO
PROGRAMMES

• Programmes often not ‘agreed’, e.g.
  – JCT 05 (clause 2.9.1.2): silent other than contractor to “provide”
  – ICE (clause 14): acceptance of original
  – GC Works: agreement of amendments by PM
  – NEC3 (clause 31): acceptance of original & revisions by PM
Critical Path Analysis

“The Society of Construction Law Delay and Disruption Protocol – October 2002”

www.eotprotocol.com

Recommendations

• A Critical Path Network

• Uses commercially available Software

• Identifies All Relevant Activities

• Tool to Manage Change
## Schedule of delays

<table>
<thead>
<tr>
<th>Ref No</th>
<th>Arch Ins Or other + Date</th>
<th>Cause</th>
<th>Period of Delay (days)</th>
<th>Effect on Progrm</th>
<th>Notice Served</th>
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Delay Analysis “Black Art”

- Bridge
  - Site Clearance
  - Cofferdams
  - Abutments
  - Deck Structure
  - Deck Furniture/E&M
  - Finishing & Commissioning

- At-Grade Approach Roads
  - Appoint Subcontractor
  - Construct Approach Road (2km)
  - Open Bridge & Roads

MONTHS
0 1 2 3 4 5 6 7 8 9 10 11
Delay Analysis – as built

MONTHS
0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15

Construct Approach Roads (3km)

At-Grade Approach Roads

Bridge

Cofferdams

Deck Structure

Deck Furniture/E&M

Finishing & Commissioning

Appoint Subcontractor

Abutments

Site Clearance

Actual Finish Month 15
Progress after 15 months

- 10 Days Denied Access to Site.
- 30 Days Additional work to abutments required by client.
- 45 Days Additional work to approach road
- 6 Days Additional gulley road approach road.

MONTHS

- 0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15

- 40d EoT
- 45d EoT
- 6d EoT

Delay Analysis – Time Slice/Window
The way **NOT** to show progress and delays
Variations Claims

Employer / agent changes;
• the features, scope or complexity of the project
  – Therefore;
• Adjustment to the contract price
• Adjustment to the contract period
Claim Problems

- Viability of Original Programme
- Original Resources correct?
- Variation in critical path
- Subcontractors information
- Lack of Records
Claim Issues

• JCT

Wide definition of variation

• Access to site, working space, working hours, specific order of works
  – Variations must include adjustment of preliminary items as SMM
  – Change in conditions under which other work is executed must be taken into account in variations
  – Include *fair allowance* for any change caused by variations
  – Exclusion for reimbursement under any other provision
Claim issues

- **GC /Works/1**
  - Very wide definition of variation
    - Change, suspension, “any other matter”
  - Disruption to be included in price of variation
  - Allowance for expense only (money expended) not loss
  - Obligation to submit information within 28 days
  - QS to notify within 28 days
  - Contractors objection to QS limited to 14 day “window”
  - Weather delays excluded
  - Embargo on delay claims after completion
Claim issues

• NEC (ECC)
  – Wide range of rights to claim compensation events
  – BUT notice must be given within 8 weeks = condition precedent to rights
  – References to EOT = Change in Completion Date
  – Contractor can be locked into his quote
  – Project Manager must give decision within one week
Claim Problems

• Acceleration claims are almost impossible
  – Nearly all current contracts have special clauses
• No instruction – no acceleration
• Thickening claims
  – Include in preliminaries for additional staff in variations
Legal Principles and Case Law

- Percy Bilton Ltd v Greater London Council [1982]
  - Lowdell (first Nominated Sub-Contractor) stops work and is liquidated
  - Crown House (second Nominated Sub-Contractor) withdraws without starting work
  - Home Counties (third Nominated Sub-Contractor) completes work
  - Employer must re-nominate in reasonable period
  - Time not at large
Legal Principles and Case Law

• Walter Lawrence & Sons Ltd v Commercial Union Properties Ltd [1984]
  – Contractor defers work into period of bad weather
  – Test: does exceptionally inclement weather actually give rise to a delay
Yorkshire Water Authority v Sir Alfred McAlpine & Son Ltd [1986]
- McAlpine programme and method statement included in Contract
- Works were impossible to build to programme sequence
- Change is Variation under Contract
• Glenlion Construction Ltd v The Guinness Trust [1987]
  – Glenlion programmed to complete works early
  – Glenlion entitled to work to programme
  – Guinness obliged not to hinder or obstruct
  – BUT Guinness not obliged to provide information early
Legal Principles and Case Law

• Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd [1999]
  – Ascon cause McAlpine delay
  – McAlpine main contract programme contains “float”
  – McAlpine not entitled to “benefit of “float”
• Great Eastern Hotel Company Ltd v John Laing [2005]
  – Laing used Impacted As-planned analysis
  – GEHC used a form of Time Impact Analysis
  – Judge favoured the factual basis of GEHC and Laing analysis hypothetical
So what to do?

- Question over the probative value of different techniques
- Remember 'rubbish in rubbish out' especially to computerized CPA models
- Don’t get lost in the analyses;
- Assemble a matrix of facts in the form of planned and as-built dates
- Beware of manipulation to create a preferred result;
- Complex networks can be very difficult to follow and the relationships between activities difficult to understand
- Adopt the appropriate one using a level of detail which is both persuasive and yet proportionate to the scale of the dispute.