THE CONSTRUCTION BAR ASSOCIATION

Technical talk

on

DELAY AND DISRUPTION CLAIMS
Contractors’ Compensation Entitlements

by

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General note:

The primary form of contract upon which this paper is based is the Public Works Contract for Building Works Designed by the Employer; the comments apply equally to the other Public Works forms of contract which have near identical provisions. As noted herein there is additional commentary on the RIAI and FIDIC forms of contract.

Practitioners ought to be aware that The Public Works Contract is undergoing a review at present which may address many of the issues discussed hereunder. The review will not change the fundamentals of the form of contract; as noted on the government run construction procurement website:

The Minister reminded stakeholders that the key objectives that underlie the public works contracts: cost certainty at contract award; value for money and efficient delivery of public works projects will remain core to any revisions proposed to Government as a result of the review.

References:

1. Public Works Contract for Building Works Designed by the Employer: PW-CF 1 v1.9
2. Royal Institute of Architects of Ireland Agreement and Schedule of Conditions of Building Contract (Yellow) 2012 Edition
3. FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer First Edition
1.0 **Introduction – Delay and Disruption in Reality**

1.1 In most construction contracts the contractor is working to a programme for the works, an agreed contract sum and/or an associated set of contract rates, and a set of tender documents upon which these are based. This paper analyses the financial effect of delay and disruption to these fundamental elements of the standard building contract.

1.2 In order to prepare or defend a claim it is necessary to understand how these two main elements of the contract are compiled by the contractor; a contractor typically receives a set of tender documents and carries out the following steps in arriving at his price:

- Split the documents into a selection of work packages.
- Obtain net prices for the work packages from sub contractors.
- Prepare a programme for the works based upon the above packages, as part of this extracting a critical path to give the overall project duration.
- Compile a list of preliminaries required to complete the project within the prepared programme period.
- Collate all of the above into a net tender price.
- Calculate the head office overheads; either on a historical basis or on a forward looking basis. Attribute head office overhead costs to the tender, either on a percentage addition based on the value of the project, or on a monthly rate based on the programme.
- At this point contractors will generally sit down and assess the risk rating for the project (state employer, reputedly difficult client, long term client, new client, competence of design team, form of contract, etc…).
- On the basis of the above the contractor will add a percentage to the project for profit.

1.3 It is not uncommon for a contractor to enter a negative profit figure for a mixture of the following reasons:

- Anticipation that packages will be purchased at a lesser price due to it being a real project as opposed to a potential project.
- Anticipation that package prices will be lesser due market conditions.
- Anticipation that, generally due to the poor tender documentation, claims will be successfully submitted for variations, delay and/or disruption.

1.4 If one looks at the last possibility, a shrewd contractor will be able to adjust his rates upwards in the items he expects to increase and discount his rates for items which are unlikely to change or likely to reduce. In taking such an approach a contractor will look in particular at the preliminaries and overheads; if the anticipation is that the project will be delayed but not changed in terms of scope it will be wise to increase these provision so as to provide a basis for subsequent claims; likewise, if the project absolutely has to be open within a given timeframe, such as a school or a public building, then it may be preferable to enter preliminaries and overheads at ‘nil’ and add the percentage to every single rate, in particular rates for items which they anticipate as increasing.

1.5 It is with this reality in mind that representatives of the parties need to approach any claim brought to them for consideration.

1.6 There is a distinct difference between delay and disruption; however, they often occur in tandem and contractors prevented from claiming for delay under a
contract, or limited in the damages they may claim for delay, may attempt to present what is in effect a delay claim which they as a potential delay claim which was avoided by mitigation and/or acceleration (without stating this); thereby turning the claim into a disruption claim. It is vital that practitioners are alert to this approach and know how to argue against such an attempt.

1.7 The distinction between delay and disruption in exactly as the words indicate:

When an item of work is unable to finish at an anticipated date due to some event/s, and this item of work is on the critical path of a project programme, the project is delayed.

Where the item of work is not on the critical path, but the timing of the work has to be altered, the work are disrupted.

1.8 In practice it is rarely this straightforward:

- There are often a mix of critical path items and non-critical path items delayed and/or disrupted throughout a project.
- These delays and/or this disruption rarely arise from one simple event, but rather a multitude of events, some of which may be contractor caused.
- There are a often a multitude of non-critical path items disrupted to such an extent that an overall project delay results and/or the project is disrupted and/or delayed in a general sense.
- There can be a multitude of events without any disruption and/or delay attributable to them in isolation; however, due to the number and nature of these events a delay and/or disruption claim arises therefrom.

1.9 These are real problems for contractors; when the programme is disrupted and/or delayed this can have serious financial consequences for a contractor and a contractor submitting a claim on this basis is not a claims conscious contractor in the bad sense in which the word is regularly used, he is merely enforcing his contractual rights and/or claiming for breach of contract.

1.10 The effects of delay and/or disruption are multiple, for example:

- Additional site management in rescheduling disrupted works.
- Additional head office management in managing disrupted works.
- Additional costs from the above if the completion date is delayed.
- Diversion of staff from working on other projects and making profit thereon/gaining a contribution towards their costs.
- Claims from affected sub-contractors who had scheduled the time to work.
- Reduction in the profitability of the project.

1.11 Critical to the preparation of claims is the availability of records, not just of the period of delay and/or disruption, but in particular the elements of the project which were not affected, thereby providing a benchmark against which to assess the delay and/or disruption. One of the first things representatives need to advise clients to do is to collate all possible information in a comprehensive manner.
2.0 **Heads of Loss and Quantum**

**Heads of loss**

**General:**

2.1 In the first instance, a construction contract is no different to any other contract, therefore in order to successfully argue a claim, one must prove loss, causation linked to an employer risk event, and ensure that the damages pleaded are not too remote. It is not within the scope of this paper to address the general principles of what needs to be proven in a claim for damages for breach of contract. Practitioners can read any leading textbook which deals with the principles as laid down in *Hadley v Baxendale*, *Victoria Laundries v Newman Industries* and a plethora of other cases addressing the relevant issues.

2.2 Where construction contracts differ to most other commercial contracts is in the number of issues which typically arise in any one claim under a construction contract. This comes about primarily as a result of the number of parties engaged in a construction contract (employers, employers’s representatives, main contractor, sub contractors); the number of disparate elements involved in a construction contract (from basic excavation, to complex mechanical and electrical installations, to final finishes); the extended duration of construction contract (regularly exceeding a year or two); the very large value of many construction contracts; and in a general sense, the fluidity which is required to amend the project as it progresses to take account of changing perceptions and requirements. As a result of this, there are a number of different heads of loss which arise under any construction contract. In assessing these claims it is often necessary to look at the interaction of many of the above elements.

2.3 There is one additional difficulty for non-construction based practitioners and this is the language used in constructions contracts and in relation to construction activities.

2.4 The following are typical heads of loss, which have been accepted by the courts along with a commentary on the court’s approach to these clauses.

**Preliminaries & Overheads**

2.5 Preliminaries and overheads are two very distinct heads of loss; however, a smart contractor will know how to manipulate these figures in order to increase one or the other to their advantage. As a result of this these heads are examined together.

2.6 Preliminaries are the costs of running the project and will include the following among many other items:

- Site huts
- Electricity
- Security
- Site setup
- Site demobilization

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5 *Hadley v Baxendale* [1854] 9 EX 341
6 *Victoria Laundry (Windsor) v Newman Industries* [1949] 2 KB 528
7 *The Heron II* [1969] 1 AC 350; *Transfield Shipping Inc v Mercator Shipping Inc* [2008] UKHL 48; *Siemens Building Technologies FE Ltd v Supershield Ltd* [2010] EWCA Civ 7
These are costs which run on a daily basis and are spread over every aspect of the works. Therefore if a contractor proves that a project has been delayed and such a delay is compensable then subject to any limitations in the contract, he ought to be able to claim the above items on a simple calculation.

2.8 Preliminaries may also include the following items:

- Craneage
- Quantity Surveyor
- Concrete pumping
- Cleaning
- Insurance

2.9 Preliminaries may include these items as some of these costs may actually be better described and included in head office overheads (Quantity Surveyor, insurance), or may be attributed to trade rates (craneage, concrete pumping, cleaning).

2.10 Finally, head office overheads will include the following, bearing in mind that there could be some duplication with the items directly above.

- Head office staff (accountants, receptionists, non work specific directors, Quantity Surveyors).
- Head office costs (rental, power, etc…)
- Overall company insurance

2.11 Where these may be claimed will depend on the manner in which the project has been priced and what the claim in question is. If the claim is an overall extension of the project duration with no corresponding cost increase, then the insurance may not increase whilst others will. Likewise, if there is disruption to the concrete element without a corresponding overall project delay, then the concrete pumping may increase.

2.12 A point that ought to be taken from the above by both representatives and dispute resolvers is that it is worthwhile examining claims for Preliminaries and Overheads to ensure that the claimant has indeed incurred costs, as if he has not incurred costs, then he fails to satisfy the requirement that an event caused him loss. On the other hand a party preparing a claim may find that while a contractor feels he is not entitled to damages as the overall project was not delayed, this may not be the case and he ought to ensure that he either includes and gets trade specific costs as part of a variation claimed, or as part of a disruption claim.

2.13 The English courts have accepted that head office overheads are a recoverable head of loss on two basis:

2.14 In *Aerospace Publishing Limited v Thames Water Utilities Limited* the court held that in order to succeed in a claim for overheads the following needed to be established:

The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the claimant to adduce is not adduced, he is at risk of a finding that they have
not been established. (b) The claimant also has to establish that the diversion caused significant disruption to its business. (c) Even though it may well be that strictly the claim should be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time.\textsuperscript{8}

2.15 Judge Holland went on to award the claimant costs for staff that had been diverted in dealing with the breach of contract.

2.16 This approach was affirmed in the subsequent cases of Bridge UK.Com Limited v Abbey Pynford Plc\textsuperscript{9} and Azzurri Communications Ltd v International Telecommunications Equipment Ltd (t/a SOS Communications)\textsuperscript{10}.

2.17 Claims for preliminaries are relevant in relation to both delay and/or disruption claims and are much simpler to prove providing records are kept of resources utilised on a project, and when those resources were increased as a result of an event for which the client is responsible.

**Loss of contribution**

2.18 This is another means by which to present a claim for overheads and is actually referred to in the Aerospace judgement as quoted above, namely where the Judge stated the following:

\[
\text{…had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time.}\textsuperscript{11}
\]

2.19 In essence, in an overheads claim a claimant claims the costs he incurs in head office overheads. In presenting the case as a loss of contribution, the claimant claims for the loss of income which would have contributed to the cost of overheads.

2.20 Submitting a claim in this manner was endorsed by the Court in Property & Land Contractors Ltd v Alfred McAlpine Homes (North) Ltd\textsuperscript{12}.

2.21 The claimant’s argument will be that he incurs costs of a fixed amount each year (the costs of running his business) and he aims to complete a certain amount of work to raise funds to pay these costs. The claim is structured stating that due to the actions of the employer the amount of work completed is less than it ought to have been and therefore less money was earned in the period to cover these fixed costs. It is arguable that, if he is not compensated for this loss of contribution, his profit will reduce accordingly as he uses project profit to cover head office overheads.

\textsuperscript{8}Aerospace Publishing Limited v Thames Water Utilities Limited [2007] EWCA Civ 3 at para 86
\textsuperscript{9}Bridge UK.Com Limited v Abbey Pynford Plc [2007] EWHC 728
\textsuperscript{10}Azzurri Communications Ltd v International Telecommunications Equipment Ltd (t/a SOS Communications) [2013] EWPCC 17
\textsuperscript{11}[2007] EWCA Civ 3 at para 86
\textsuperscript{12}Property and Land Contractors Ltd v Alfred McAlpine Homes North Ltd 47 ConLR 74
**Loss of profit (on the project)**

2.22 This is a very straightforward concept; the project was expected to return a profit percentage; however, due to the actions of the employer, the project returned a lesser percentage or amount.

**Global claims**

2.23 Global claims, or modified total cost claims are a form of heads of loss arising under delay and/or disruption. These are addressed in detail further in the paper; put simply the claim is that the costs of the project exceed the monies being received for the project, and this arises due to the employer’s actions.

**Loss of productivity**

2.24 This is a head of loss where the claimant claims that the resources on the project were disrupted to the extent that they were unable to provide the output of work that they would ordinarily be capable of, as a result of this they did not deliver the profit expected of them and the claim consists of the difference between the return achieved and the return they maintain ought to have been achieved.

2.25 Claimants and defendants have to be very careful to ensure there is not a case of double claiming between the above heads of loss.

**Additional resources**

2.26 When is it acceptable to claim additional resources as part of a delay and/or disruption claim? This is one area where there is a significant split between the two different types of claim.

2.27 On one hand, where additional resources are required on a project to accommodate delay and/or disruption, the question has to be asked “why are they needed?” If it is because without the additional resources the project will not finish on time, then these additional resources really constitute acceleration resources and are not claimable unless there is an explicit or implied instruction to accelerate. On the other hand, if the resources are required due to specific delay and/or disruption, then it is likely that these additional resources would be better priced as specific preliminaries associated with a variation.

2.28 The two scenarios above constitute the vast majority of additional resources claims; however, there will be occasions where due to the delay and/or disruption of the works through multiple events that additional resources are required to manage the project. A clear example of this would be a programmer being brought onto a project due to continuous change orders where one was not previously required; their job is not to accelerate the works or mitigate delay.

2.29 Great care must be taken when claiming additional resources to ensure the resources do not constitute acceleration or mitigation without instruction to engage additional resources.

**Loss of chance**

2.30 Primarily loss of chance is associated with negligence; in this respect it is noted that such a claim is equally open to someone in a construction contract scenario where negligence is in issue. It is less common for loss of chance to be dealt with
in a breach of contract scenario; however, in the case establishing loss of chance in the first place, *Chaplin v Hicks*\(^{13}\), the issue was a breach of contract. Unfortunately, there are very few authorities addressing this under contract thereafter, though it remains a valid head of claim.

2.31 The courts examined this issue in *Allied Maples v Simmons & Simmons*\(^{14}\), a negligence action, and the courts findings of when a loss of chance claim was appropriate were summarised in *Emden’s Construction Law* as follows:

- where the defendant is guilty of a positive act or statement which was negligent. The question is, what would have happened if the defendant had not so acted or advised?;
- where the defendant is guilty of a negligent omission to act or advise; there the question is, what would the claimant have done had the defendant acted or advised properly?;
- where the question is what would a third party have done had the defendant acted or advised carefully?

2.32 It is the final of these with which we are primarily concerned in relation to loss of chance. As stated by Clarke in *Contract Law in Ireland* the court the test established was “whether the chance or possibility was substantial enough to warrant some award of damages”\(^{15}\). If a claimant can show that he was prevented from accepting a profitable venture as a direct result of the defendant’s actions, be that negligence or breach of contract, and that these losses are not to remote, then there is a claim to be considered. This would fall at the higher end of the spectrum; at the other end of the spectrum would be where a contractor was prevented from tendering for works, and therefore a benefit may have accrued, see commentary hereunder on this.

2.33 One notable difference in relation to loss of chance claims is the level of proof required. In general civil law a matter must be proven on the balance of probabilities; however, in loss of chance claims the proof differs as explained by Stuart-Smith LJ in *Porter v Secretary of State for Transport* as follows:

Where a court or tribunal has to decide what would have happened in a hypothetical situation which does not exist, it usually has to approach the matter on the basis of assessing what were the chances or prospect of it happening. The chance may be almost a certainty at one end to a mere speculative hope at the other. The value will depend on how good this chance is. Where, however, the court or tribunal has to decide what in fact has happened as an historical fact, it does so on balance of probability; and once it decides that it is more probable than not, then the fact is found and is established as a certainty.\(^{16}\)

2.34 As stated in *Hudson*, “once it is found that the chance is real and not merely speculative, then the quantification of that chance is a matter of measure of damage and not causation”\(^{17}\).

2.35 This a head of loss rarely claimed in construction cases; however, given the nature of main and sub-contractors where they have teams that they move from project to project, it is often the case that when queried on this matter that

\(^{13}\) *Chaplin v Hicks* [1911] 2 KB 786
\(^{14}\) *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602
\(^{15}\) Robert Clarke *Contract Law in Ireland* (7th ed., Roundhall, 2013) at 684
\(^{16}\) *Porter and another v Secretary of State for Transport* [1996] 3 All ER 693 at 704
\(^{17}\) *Hudson’s Building and Engineering Contracts* (12th ed., Sweet & Maxwell, 2010), para 7-020
potential claimants disclose the fact that they could not tender for a project, or indeed accept an offer of work. The outcome, as with all claims, will turn on sufficient evidence and this is where these claims often fail, see Bridge UK.Com Limited v Abbey Pynford Plc\(^8\) for an example where the court accepted that an executive had been distracted from other revenue generating activities but refused to award damages for loss of opportunity:

The Claimant has also sought to recover a 25% uplift, described as an “opportunity cost”. I am not satisfied that this is recoverable. I therefore allow 100 hours at £48 per hour, making £4,800.00\(^9\)

2.36 This ruling should not be taken as indicative of a reluctance on the part of the courts to accept such claims, it was simply the case that the claimant did not submit sufficient evident to ground the uplift sought.

2.37 One consideration when looking at such a claim is whether or not these losses are direct or indirect losses, as it is often the case that the contract will exclude indirect or consequential losses.

Exclusion clauses:

2.38 In looking at potential heads of loss in construction contracts it is necessary to look at the contracts to ensure certain heads of loss are not excluded and to assess the current approach of the court to such exclusion clauses. While this section is of general application in construction claims, it is simply the fact that most complex disputes arise in relation to delay and/or disruption and include losses that are arguably indirect, hence it is addressed in detail.

*Indirect Losses (Consequential)*

2.39 The most common exclusion is one which may seek to exclude liability for indirect or consequential losses, for example FIDIC clause 17.6\(^{20}\):

2.40 Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss of damage which may be suffered by the other Party in connection with the Contract…

2.41 The PWC exclusion clause is couched in more specific language relative to delay and disruption and is dealt with in the next section.

2.42 For claimants, it is of some comfort to see the approach of the Technology and Construction Courts; in GB Gas Holdings Limited v Accenture and McCain Foods GB Ltd v Echo-Tec (Europe) Ltd\(^{21}\) the Courts took a very broad view of what constituted direct loss.

2.43 In GB Gas Holdings the court was of the opinion that the following damages were direct (arising where Accenture’s IT system failed thereby preventing the British Gas billing their clients among other matters):

- Compensation to customers.
- Increased gas distribution charges.

\(^8\) [2007] EWHC 728
\(^9\) [2007] EWHC 728, para 130
\(^{20}\) FIDIC Clause 17.6
\(^{21}\) GB Gas Holdings Ltd v Accenture and McCain Foods GB Ltd v Echo-Tec (Europe) Ltd [2011] EWCH 66 (TCC)
- Overheads incurred to rectify the problem.
- Losses incurred due to unbilled and/or late billed gas supply.

2.44 The last of these losses obviously including any profit that would be generated as part of the billed supply.

2.45 In McCain Foods the matter was a faulty heat collection and energy generating system to power a plant. Here the court accepted the following constituted direct losses:
- Loss of revenue (they were to sell excess power to the grid).
- Extra cost of buying electricity.
- Mitigation costs.
- Overheads incurred to resolve the issues.

2.46 Again, the first head of loss here would include for profit that would be generated as part of revenue.

2.47 A detailed analysis of the case law was completed in Hotel Services Ltd v Hilton International (UK) Ltd[22] where the court plainly stated that lost profit on the project is a direct loss not excluded by a very precise exclusion clause[23]:

… if equipment rented out for selling drinks without defalcations turns out to be unusable …, it requires no special mutually known fact to establish the immediacy both of the consequent cost of putting it where it can do no harm and — if when in use it was showing a direct profit — of the consequent loss of profit. Such losses are not embraced by the exclusion clause, read in its documentary and commercial context.

2.48 Applying this to the FIDIC clause referred to above, it is clearly the case that profit excluded does not extend to profit of the actual contract in question. This point may seem obvious; nonetheless, it is regularly the case that construction claim practitioners fail to appreciate the settled law in this area and so authorities may be required at a hearing to establish this beyond reasonable doubt.

2.49 There is one head of loss which can prove hard to distinguish as being direct or indirect loss, this being loss of profit from other potential projects. This is head of loss which is often claimed by contractors where they seek profit which they were prevented from making as a result of management being engaged managing a delayed or disrupted project. At first glance under a clause with wording akin to the FIDIC form, such loss will not be recoverable and there appears to be no authority preventing such an exclusion clause operating in such a manner.

2.50 Therefore, it appears that loss of chance profits will not be recoverable if there is such an exclusion clause. In mitigation of this a claimant contractor will often claim for loss of contribution to overheads instead of loss of profit; this is not precluded by such a clause.

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[23] ibid para 4: Section 14: Liability (1) The Company [HSL] will not in any circumstances be liable for any indirect or consequential loss, damage or liability arising from any defect in or failure of the System or any part thereof or the performance of this Agreement or any breach hereof by the Company or its employees. (2) Without prejudice to paragraph (1) above all and any liability on the Company's part arising in contract or tort (including negligence) or otherwise, for any loss, damage, liability or injury of whatsoever nature arising in any way whatsoever from or in connection with this Agreement and/or the System and any part thereof (including without limitation the use, supply, possession, installation, repair or presence of the same) shall be limited to the net value of the System and the Company's performance of its obligations under Section 9.
**PWC exclusions on delay, disruption, acceleration, loss of productivity**

2.51 There is an exclusion clause in the PWC forms of contract in clause 10.7.4 as follows:

Except as provided in this sub-clause 10.7 [notwithstanding anything else in the Contract] losses or expenses arising from or in connection with delay, disruption, acceleration, loss of productivity or knock-on effect shall not be taken into account or included in any increase to the Contract Sum, and the Employer shall have no liability for such losses or expenses.

2.52 There is little difficulty in understanding the meaning of this clause; the issue that arises is whether or not this exclusion applies to claims under 10.7 alone (delay claims), or also to claims under 10.6 (general valuation of adjustments to the contract sum).

2.53 There are two lines of thought on which of the above is the case.

2.54 In the first instance it is argued that to hold that the clause applies to the entire contract is reading too much into the clause, thereby preventing the contractor from submitting otherwise valid claims arising from the actions of the employer.

2.55 On the other hand, to hold that the clause only applies to 10.7 claims provides a means for contractors to prepare complex delay and disruption claims under 10.6; thereby attempting to override the contractual provisions.

2.56 Given that this clause is in essence an exclusion clause, it is arguable that it ought to be construed strictly and in so doing one needs to look at the use of the words “[notwithstanding anything else in the contract]”. The inclusion of these words clearly, in the author’s view, precludes a contractor from thereafter using another part of the contract to claim what follows as excluded.

2.57 So the question is, what is thereafter excluded; this again is relatively straightforward – “losses or expenses arising from or in connection with delay, disruption, acceleration, loss of productivity or knock-on effect”.

2.58 Notwithstanding the comments above, there remains a lively debate on this particular provision and many commentators take the view that claims can be submitted for losses or expenses arising from or in connection with delay, disruption, acceleration, loss of productivity or knock-on effect notwithstanding the provisions of the clause. Indeed, most practitioners will have faced claims for all of these excluded items, often blatantly titled as one of the headings themselves. In the absence of a court intervention in an arbitration this matter will never be definitively ruled upon; one can only hope that the matter is resolved following the activation of the provisions of the Construction Contracts Act 2013.

**PWC Daily rate**

2.59 One final provision in the PWC form of contract, which it has been argued is an exclusion clause, is the provision in part 2D of the tender schedule limiting the claim a contractor can submit for delay to a tendered daily rate. In reality this is

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24 Public Works Contract FTS1-3, page 24, item 2D
no different to a rate in a contract bill of quantities to which a contractor is bound regardless of the actual cost of the item of work; therefore, it is not an exclusion clause and any argument to this effect ought to be rejected. Nonetheless, if the argument were successful, it is hard to see how this would have any effect on the outcome. This provision is noted under the section on quantum hereunder.
Proofs incl. quantum

2.60 It is not necessary to address the methods of preparing quantum involving the ascertainment of actual loss and establishing the causal nexus thereon where each event can be linked to a specific effect and thereon specific costs can be attributed. The principles in such a scenario are fact specific and there is little to be gained by trying to explain this in any detail.

2.61 On the other hand, in a complex case of delay and/or disruption, the task is far more difficult. In the first instance it is necessary for a contractor to prove that an employers actions have resulted in a delay and/or disruption, then he will have to prove the duration of the delay and/or the effect of the disruption, finally he will have to attribute costs against the durations. There has been a large body of information examining the methods of assessing delay in these matters. The SCL have an excellent document for construction practitioners in relation to delay and disruption: The SCL Delay and Disruption Protocol. In this document there are four main methods of assessing the impact of delay and/or disruption: as-planned v as-built, impacted as-planned, collapsed as-built and time impact analysis:

Calculating the Time-Impact of a delaying and/or disrupting event:

2.62 As noted above, in order to calculate the costs associated with a delay and/or disruption occurrence, it will be necessary to first of all calculate the actual delay and/or disruption with accuracy. Of the four methods of analysis suggested above, the most suitable and useful tool from a financial claims perspective is the time-impact analysis. This is the most forensic method and consists of an analysis of the effect of each delay event on the future programme. In doing so it is possible to assess delay claims as they arise and simultaneously any disruption claims. This method can also take account of mitigation and acceleration as it happens. It is suggested that parties are as well off preparing claims on this basis regardless of the size of the claim as it is the only one without significant weaknesses.

Proving that the Employer is responsible for the delay and/or disruption event

2.63 The next vital component of the claim is the evidential requirement proving that the employer is responsible for the event/s which caused the delay and/or disruption; this includes proving that this was an event for which the employer has accepted responsibility. It is not intended to go into this in any great detail as it is very fact specific. However, practitioners need to be aware of the effect of any contractual provisions in this respect. For example, in the PWC there is a table referred to as Schedule 1K where items are noted as compensation events or not.

2.64 It is suggested that a schedule of each and every event being relied upon with the corresponding effect as extracted from the time-impact assessment (or similar above) be prepared. In so doing it will be necessary to prove that the event in question is an employer risk event.

2.65 In relation to global claims as addressed hereunder, this causation element is the most difficult element to prove.

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25 The Society of Construction Law Delay and Disruption Protocol 2002
26 Public Works Contract FTS1-3: page 11, item 1K
Calculating costs associated with the above proven delay and/or disruption

2.66 Once the above has been completed, the claimant has arguably proven the most difficult elements of a delay and/or disruption claim – namely that there was an event for which the Employer is responsible, which has resulted in a delay and/or disruption. He will now have to ascertain the financial effect of the event on the works. In general this element of the claim will be managed by Quantity Surveyors and/or cost accountants, in fact it is very common for tribunals to instruct parties to make all possible efforts to agree quantum between them, rather than leave it up to the tribunal to decide the matter. Parties need to be very aware that they are the most suited to assessing these issues and a failure to do so risk getting an arbitrary result from a third party who cannot possibly be as familiar with the resources on the project as the two Quantity Surveyors or the like.

2.67 Where the question is one of delay, Part 2D of the Tender Schedule of the PWC includes a section where a contractor must include a figure to be applied for each day of delay\(^{27}\); it is a case of ‘must’ as if he fails to enter a figure, then it is taken as being ‘nil’. In a simple case of delay (falling outside the aforementioned programme float) the cost of delay is calculated by multiplying the working days delayed by the figure inserted in section 2D.

2.68 Where there is not a provision in the contract as there is in the PWC, the Employer’s Representative must ascertain the losses associated with the delay. The question of the level of proof that is necessary to ascertain costs was addressed in *How Engineering Services Limited v Lindner Ceilings Floor Partitions Plc*\(^{28}\) where Dyson J summarised the level of proof as follows:

In my view it is unhelpful to distinguish between the degree of judgment permissible in an ascertainment of loss from that which may properly be brought to bear in an assessment of damages. A judge or arbitrator who assesses damages for breach of contract will endeavour to calculate a figure as precisely as it is possible to do on the material before him or her. In some cases, the facts are clear, and there is only one possible answer. In others, the facts are less clear, and different tribunals would reach different conclusions. In such cases, there is more scope for the exercise of judgment. The result is always uncertain until the damages have been assessed. But once the damages have been assessed, the figure becomes certain: it has been ascertained. In my view, precisely the same situation applies to an arbitrator who is engaged on the task of “ascertaining” loss or expense under one of the standard forms of building contract. Indeed, it would be strange if it were otherwise, since a number of the events which give rise to a right to recover loss or expense under the contract would also entitle the claimant to be awarded damages for breach. I would hold, therefore, that, in ascertaining loss or expense, an arbitrator may, and indeed should, exercise judgment where the facts are not sufficiently clear, and that there is no warrant for saying that his approach should differ from that which may properly be followed when assessing damages for breach of contract.

2.69 In essence this endorses the fact that ascertainment means to reach a decision on the balance of probabilities; something which many tribunals often need reminding about.

\(^{27}\) *ibid*, page 24, item 2D

\(^{28}\) *How Engineering Services Ltd v Lindner Ceilings Floor Partitions Plc* [1999] 2 All E.R. (Comm) 374; 64 Con. L.R. 67
In Bridge UK.Com Limited where, unlike in Aerospace Publishing the claimant did not have detailed records of the time spent by employees, the Court confirmed that working out costs from recollection was acceptable but subject to discount for uncertainty:

123 Such a method of retrospective assessment is, I consider, a valid method of calculation. I have been referred to the judgment of His Honour Judge Peter Bowsher QC in Holman Group v. Sherwood (Unreported, 7 November 2001) where he indicated that in the absence of records, evidence in the form of a reconstruction from memory was acceptable. I respectfully agree. However, it must be borne in mind that such an assessment is an approximation of the hours spent and may over-estimate or under-estimate the actual time which would have been recorded at the time.

124 Some hours have been included for organising the outsourced work at M and M Printing. In addition, I consider that a discount should be applied to allow for the inherent uncertainty in this retrospective method.

2.71 It is suggested that if the methodology utilised to calculate the delay period is done so in a comprehensive manner it ought to provide a useful template for preparation of the costs associated with the event, particularly in relation to head office overheads and site preliminaries. Preliminaries ought to be easily enough quantified in relation to delay. This is not the case in relation to head office overheads where the counter argument is often used that these costs exist for the company regardless and so the contractor fails to prove loss; an argument arguably refuted by submitting the claim as a loss of contribution claim.

2.72 Where claimants are having difficulty establishing the quantum of overheads on a factual analysis, there are a selection of so-called formula used to calculate claims for delay and disruption. These formulas are really only suitable for delay claims, and the strength of these claims will depend on the factual backup to the figures used. These formulas are very simple in what they set out to do and how they do it; they are set out hereunder with a very brief description of the logic behind each one.

2.73 **Hudson’s:**

This formula simply applies the overheads allowed in the tender on a pro rata basis for the delay period in question. In order to succeed with this formula, it will be necessary to show that the resources constituting the percentage overheads would have been otherwise engaged in profitable work or at least contributing to their own expenditure.

2.74 **Emden’s:**

This formula is virtually identical to Hudson’s formula, only the overheads percentage is the overall company overheads. It is suggested that this is a more robust approach given that if the award is not given then in essence the contractor will suffer loss, whereas this is not necessarily the case when relying on Hudson’s. Of course it still suffers from the same weakness as Hudson’s insofar as it will be necessary to show that the resources would have been otherwise usefully engaged.

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29 [2007] EWHC 728
2.75 *Eichleay’s*: 

This again is very similar to both of the above formulas, the difference being that the percentage of overall contractor overheads is calculated for the duration of the contract period and applied pro rata to the value of the contract. The primary advantage of this formula is that if the overheads of the company increased for some reason during the project, then a higher percentage will apply for the delay period. However, if the overheads increased specifically during the contract period, it is likely that these costs relate directly to the contract and a prudent contractor will have these allocated as preliminaries; or conversely they relate to some other factor unrelated to the contract and a prudent defence will be able to draw a tribunal’s attention to this.

2.76 It is notable that certain of the above formula are also used in relation to profit calculations; whereby the average profit of the company is included and profit thereby forms part of the calculation.

2.77 The result of these different formulas is often the same. In fact, providing a contractor has calculated his attributable head office overheads correctly for the duration of the project, then the result should be the same regardless of what formula is used. The only caveat here is that if a project requires a large increase in head office overheads due to expansion or the like, then Emden’s formula may give a slightly lesser value depending on the period used to calculate the annual overheads relative to the project period.

2.78 While it is arguable that these formula should only be used when a claimant is unable to prove his losses in the traditional manner, the courts have accepted the use of formula as an acceptable manner to calculate overheads.

2.79 Finally, in relation to assessing quantum, the comments by Judge Wilcox in *Skanska Construction UK Ltd v Egger (Barony) Ltd* as follows provide useful guidance on the matter:

[323] Mr Williamson [Counsel] submits that:

“the appropriate approach is one based on common sense and practicality. This is not a criminal trial or a 19th Century Chancery Action: the court, taking into account its considerable and specialist experience should adopt a common sense and practical view of the question of whether the SCL have proved their loss. *Perfect proof may on occasion be lacking, but that is no reason for the court not to do the best it can.*” (Emphasis supplied).

[324] I accept that the court should adopt a sensible and pragmatic view. The context is the realities of the construction site, but mere common sense cannot supplant proof, which to be effective needs to be at least “adequate”.

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30 Property and Land Contractors Ltd v Alfred McAlpine Homes North Ltd 47 ConLR 74
31 Skanska Construction UK Ltd (formerly Kvaerner Construction Ltd) v Egger (Barony) Ltd [2004] EWHC 1748 (TCC)

3.1 There are clear notice requirements and time-bar provisions in the Public Works Contract which compel the contractor to inform the design team of any adjustment he will be seeking to the contract sum within set periods, in addition to this the design team have to respond within set time limits.

3.2 Prior to examining the specific provisions of the time-bar clauses in the PWC forms of contract, it is important to understand that once a clause it determined to constitute a time-bar, there is an obligation on a contractor to follow these provisions precisely. In the case of *Ener-G Holdings PLC v Philip Hormell*\(^2\) the Court held that leaving a notice at a premises did not constitute personal delivery in accordance with the terms of the contract. In addition to this, the claimant was held to have missed out on submitting a warranty claim by a single day. The terms of the contract in question were laid in in the judgement as follows:

Clause 13 is headed “Notices”, and it is in these terms:

“13.1 Notice in writing
Any notice or other communication under this Agreement shall be in writing and signed by or on behalf of the party giving it.

13.3 Service
Any such notice may be served by delivering it personally or by sending it by pre-paid recorded delivery post to each party (in the case of the Buyer, marked 'for the attention of directors') at or to the address referred in the Agreement or any other address in England and Wales which he or it may from time to time notify in writing to the other party.

13.3. Deemed service
Any notice delivered personally shall be deemed to be received when delivered (or if delivered otherwise than between 9.00am and 5.00pm on a Business Day, at 9.00am on the next Business Day), any notice sent by pre-paid recorded delivery post shall be deemed to be received two Business Days after posting and in proving the time of despatch it shall be sufficient to show that the envelope containing such notice was properly addressed, stamped and posted."

3.3 The court held that the notice had to be personally handed to the person\(^3\) and this decision was upheld by the Court of Appeal\(^4\).

3.4 Under clause 10.3.1\(^6\) of the PWC, notice provisions are outlined in detail in relation to any claim for an adjustment to the contract sum:

If the Contractor considers that under the Contract there should be an extension of time or an adjustment to the Contract Sum, or that it has any other entitlement under or in connection with the Contract, the Contractor shall, as soon as practicable and in any event within 20 working days after it became aware, or should have become aware, of something that could result in such an entitlement, give notice of this to the Employer’s Representative…

3.5 Clause 10.3.2\(^7\) entails the bar against any claim not satisfying the requirements:

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\(^2\) *Ener-G Holding PLC v Philip Hormell* [2011] EWHC 3290
\(^3\) *ibid* at para 3
\(^4\) *ibid* at para 3
\(^5\) *Ener-G Holding PLC v Philip Hormell* [2012] EWCA Civ 1059
\(^6\) PWC Clause 10.3.1
\(^7\) PWC Clause 10.3.2
If the Contractor does not give notice and details in accordance with and within the time provided in this sub-clause 10.3 … the Contractor shall not be entitled to an increase to the Contract Sum…

3.6 In the Australian case Décor Ceilings Pty Ltd v Cox Constructions Pty Ltd\(^{38}\) the court held that a time-bar clause is a condition precedent once defined time limits were included in the notification section. In support of this requirement the English House of Lords held in Bremer v Vanden Avenne that in order for a time-bar clause to be a condition precedent precise time limits must be stated and loss of rights for failure to comply must be clear. The PWC forms satisfy these requirements; however, the actual wording clause 10.3.1 is very problematic for entirely different reasons.

3.7 The Contractor has to issue the notice if it considers that it has an entitlement; and only after he became aware. This clearly leaves it open to a Contractor to argue that he only became aware of the entitlement at a late stage, such as in the case of a global disruption claim. Of course, the counter argument is that the clause states ‘or should have become aware’; which is an objective test and one would assume will be objective through the eyes of a competent Contractor.

3.8 It is highly unlikely we will ever get a definitive ruling on this issue from the Irish courts and so it is necessary to look to England and other jurisdictions. It ought to be of assistance that Clause 20.1 of the FIDIC\(^{39}\) form of contract is virtually identical in its operative parts to clause 10.3.1:

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Employer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim...

The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

3.9 The vast majority of case law on this matter deals with time-bar clauses vis-à-vis time-bar clauses affecting extension of time claims and ‘the prevention principle’; this relates to the granting of extensions of time thereby preventing time being at large. Certain aspects of this are equally relevant to all other time-bar provisions.

3.10 The problematic wording noted above leaves it open to a Contractor to claim that he only became aware of his overall delay and disruption claim well after the

\(^{38}\) Décor Ceilings Pty Ltd v Cox Constructions Pty Ltd (No 2) [2005] SASC 483, [2006] CILL 2311, Supreme Ct Sth Aus.

\(^{39}\) FIDIC Clause 20.1
events leading to it, as it only arose as a result of the cumulative effect of the events. In *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* the vagueness of the wording caused a situation where no definitive time limit could be imposed:

The obligation set out in cl 11.1.3 as a condition precedent does not comprise or include any absolute obligation to serve notices or supporting information. The obligation imposed upon the sub-contractor is an obligation to do his best as soon as he reasonably can.\(^{40}\)

3.11 Whilst there can be no question that the 10.3 provisions constitute time-bars, it is arguable that the vague wording provisions noted above fall foul of the same issue which arose in this *Multiplex*; though it is suggested that this will be a hard bridge to cross given the clear intention of the contract.

3.12 The ruling of Jackson J in *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* above, whilst not resolving the matter very satisfactorily, is one of the few cases to deal with the construction of the wording of the clause itself. In the first instance he affirmed the *contra proferentum* approach to time-bar clauses from *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*\(^{41}\):

> [70] In *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111, Salmon LJ held:

> 'The liquidated damages and extension of time clauses and printed forms contract must be construed strictly *contra proferentum*. If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employer's own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer.'

> …

> From this review of authority I derive three propositions:

> …

> (iii)In so far as the extension of time clause is ambiguous, it should be construed in favour of the contractor.

3.13 He then proceeded to look at specific wording within the contract:

> [78] Clause 11.2.1 contains some important qualifications. Clause 11.2.1 does not require the sub-contractor to serve notices immediately when any delay is caused, but rather *to serve notices when such delay becomes or should have become “apparent”*. The sub-contractor's obligation to notify the causes of a delay is not an absolute obligation but rather an obligation to do so “insofar as the sub-contractor is able”.

3.14 The most comparable wording to the PWC notice provisions are underlined for clarity; he went on to comment on the effect of these provisions thus:

> [80] Standing back for a moment from the various sub-sub-clauses, I construe cl 11.2 as requiring the sub-contractor to do his best as soon as he reasonably can. I do not read cl 11.2 as requiring the sub-contractor to serve notices or to provide

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\(^{40}\) *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC), para 82

\(^{41}\) *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111,
supporting details which go beyond the knowledge and information available to him.

3.15 Bearing in mind the ambiguous wording, which is the subject of this section of the paper, the above ruling is particularly relevant and one would think it ought to be of concern to those representing employers under the PWC. However, in relation to the PWC, clause 1.2.4 prevents the use of the contra preferentum rule in interpreting the PWC forms of Contract:

No rule of legal interpretation applies to the disadvantage of a party on the basis that the party provided the Contract or any of it or that a term of the Contract is for the party’s benefit.

3.16 As a result of this provision the mitigation of the contra preferentum rule does not apply to the interpretation of the PWC. In the absence of the ability to rely on this rule, a dispute resolver may find some assistance in clause 1.2.1 which states:

The parties intend the Contract to be given purposeful meaning for efficiency and public benefit generally and as particularly identified in the Contract.

3.17 Although it is suggested that this is such a vague principle that it will lend little assistance to any parties.

Royal Institute of Architects form of Contract

3.18 The RIAI form of contract contains the following notification requirements:

- Clause 13: Any oral instructions … shall, if involving a variation, be confirmed in writing by the Contractor to the Architect within five working days…
- Clause 29(b): If any act or default of the Employer delays the progress of the works then the Contractor shall within five working days of the act or default give notice in writing to the Architect…
- Clause 30: Upon the happening of any such event causing the delay the Contractor shall immediately give notice thereof in writing to the Architect…

3.19 It has long been accepted in Ireland that these provisions are not conditions precedent. This understanding is in keeping with the jurisprudence examined above. In essence without a corresponding time-bar clause one would reasonably expect these not to be held as conditions precedent.

3.20 It is particularly important to note the clauses here do not specifically preclude claims at a later stage and this forms part of the basis upon which these have been held not to be conditions precedent. However, in Steria Ltd v Sigma Wireless Communications Ltd [2008] BLR 79 the Court held as follows:

…in my judgment the phrase, 'provided that the sub-contractor shall have given within a reasonable period written notice to the contractor of the circumstances giving rise to the delay' is clear in its meaning. What the sub-contractor is required to do is give written notice within a reasonable period from when he is delayed, and the fact that there may be scope for argument in an individual case as to whether or not a notice was given within a reasonable period is not in itself any reason for arguing that it is unclear in its meaning and intent. In my opinion the real issue which is raised on the wording of this clause is whether those clear words by themselves suffice, or whether the clause also needs to include some
express statement to the effect that unless written notice is given within a reasonable time the sub-contractor will not be entitled to an extension of time.

In my judgment a further express statement of that kind is not necessary. I consider that a notification requirement may, and in this case does, operate as a condition precedent even though it does not contain an express warning as to the consequence of non-compliance. It is true that in many cases (see for example the contract in the Multiplex Constructions (UK) case itself) careful drafters will include such an express statement, in order to put the matter beyond doubt. It does not however follow, in my opinion, that a clause – such as the one used here – which makes it clear in ordinary language that the right to an extension of time is conditional on notification being given should not be treated as a condition precedent.

3.21 Applying this to the wording of the RIAI; it is arguable that the wording of the RIAI clauses are conditions precedent, though given the absence of the words ‘provided that’ it is unlikely that such an argument would succeed. In WW Gear Construction Ltd v McGee Group Ltd the court held that the wording “provided always that … is often the strongest sign that the parties intend there to be condition precedent”.

3.22 The ruling in London Borough of Merton v Stanley Hugh Leach Ltd shows that it will be necessary to look very carefully at the exact wording of the clause in question. The clause from the JCT Standard Form of Building Contract read as follows:

Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the delay to the Architect/Supervising Officer, and if in the opinion of the Architect … the completion of the works is likely to or has been delayed … then the Architect shall so soon as he is able to estimate the length of the delay … make in writing a fair and reasonable extension of the time for the completion of the Works…

3.23 The court in this instance held that the clause did not prevent the Architect granting an extension of time where the contractor had not complied with the provisions of the clause.

Programme Float

3.24 It is commonplace for forms of contract to provide for float in relation to Extension of Time applications; in essence this provides that even an employer’s action results in the contractor being delayed, unless this delay exceeds the provision of float in the contract there is no need to grant an extension of time.

3.25 The question arises whether a contractor ought to be entitled to compensation for this delay; the Society of Construction Law in their Delay and Disruption protocol advises that unless there is agreement to the contrary that the contractor ought to be entitled to compensation.

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42 WW Gear Construction Ltd v McGee Group Ltd [2010] EWHC 1460 (TCC)
43 London Borough of Merton v Stanley Hugh Leach Ltd [1985] BLR 32
44 Society of Construction Law Delay and Disruption Protocol para 1.12
3.26 The Public Works Contract specifically addresses this matter in clause 9.4.1; so not only does the project contingency cover any possible extension of time that falls within that timeframe, but it also covers any costs associated with this:

9.4.1 references to delay or D are to the total number of Site Working Days’ delay to Substantial Completion of the Works caused by Compensation Events for which the Contractor would otherwise be entitled to an extension and Delay Cost, but for this sub-clause 9.4.

3.27 The RIAI and FIDIC forms of contract do not provide for float and therefore this principle does not apply to these forms.

3.28 There is an excellent paper by Hamish Lal\(^4\) on the issues of time-bar clauses which goes into far more detail that this overview and provides a wealth of information on this issue.

\(^4\) Hamish Lal The Rise and rise of time-bar clauses for Contractors’ claims: Issues for Construction Arbitrators (Society of Construction Law September 2007 142)
4.0 Global claims and modified total cost claims

4.1 The concept of a global claim is not incompatible with most standard forms of contract. However, any conditions precedent present in a contract must be met in order to plead such a claim, and given the nature of a global claim this can be problematic. There are many detailed papers on this topic; parties facing a global claim are advised to read beyond the summary of the topic herein.

4.2 A global claim is defined in *Hudson* as follows:

A global or total cost claim is simply, as it names implies, one in which the cost of the work incurred by the Contractor in its execution is compared with the tender or contract allowance for that work to arrive at the claimed amount.\(^{46}\)

4.3 And in *Keating*:

A global claim … is one that provides an inadequate explanation of the causal nexus between the breaches of contract or relevant events/matters relied upon and the alleged loss and damage or delay that relief is claimed for.\(^{47}\)

4.4 The progression of cases has shown a tendency for the courts to view global claims in a very practical sense. However, it is arguable that in *John Doyle Construction v Laing Management (Scotland) Ltd*\(^{48}\) the courts went a step too far in permitting a claimant to submit a global claim, but then allowing individual awards on each individual item pleaded in support of the global claim as they deemed fit, which is the ultimate effect of the ruling:

Even if it could not be said that events for which the employer was responsible were the dominant cause of the loss, it might be possible to apportion the loss between the causes for which the employer was responsible and other causes.\(^{49}\)

Notice provisions and time-bars specific to global claims

4.5 In a global claim where there are a multitude of events being relied upon, it is necessary that contractual pre-conditions need to be complied with in relation to each and every event.\(^{50}\)

4.6 Therefore, where a contractor submits a global claim, he will be required to submit proof as a matter of fact that each event upon which he relies was brought to the attention of the employers representative as an event potentially giving rise to delay/disruption. In reality this rarely happens; a contractor submits a plethora of change orders or the like and upon these tries to infer an effect of delay and/or disruption.

4.7 It is suggested then at the outset in preparing or defending a global claim that counsel ought to prepare a schedule of the events relied upon and a corresponding column noting whether or not the event was flagged at the time.

Specific global claim requirements:

\(^{46}\) *Hudson’s Building and Engineering Contracts* (12\(^{\text{th}}\) ed., Sweet & Maxwell, 2010), para 6-080

\(^{47}\) *Keating on Construction Contracts* (9\(^{\text{th}}\) edition, Sweet & Maxwell, 2012), para 9-041

\(^{48}\) *John Doyle Construction Ltd. v Laing Management (Scotland) Ltd.* [2004] BLR 295,

\(^{49}\) Ibid, para 3

\(^{50}\) *London Borough of Merton v Leach*, note 6, pages 102-3; *Mid Glamorgan County Council v Devonald Williams and Partners* (1992) 8 Constr LJ 61, 29 Con LR 129 (OR) and *Lilly*, note 3, paras [462]-[470] and [486(b)]
There are certain objections in principle to global claims, and both sides in preparing such a claim ought to be aware of these matters.

The comments in Boyajian v. United States on the matter are referred to in part in Hudson and are generally relevant:

The court, after stating that "this total cost method of proving damage is by no means satisfactory, because, among other things, it assumes plaintiff's costs were reasonable and that plaintiff was not responsible for any increases in cost, and because it assumes plaintiff's bid was accurately computed, which is not always the case, by any means", flatly stated that its opinion in Great Lakes Dredge "was not intended to give approval to this method of proving damage, except in an extreme case and under proper safeguards," and that "approval was not given to proof of damages for breach of contract by showing the difference in plaintiff's bid and his costs on the entire job."51

It is possible to extract two pertinent issues here, which remain the law on this matter today in this jurisdiction as much as they applied in the above case:

- That the plaintiff’s costs as submitted are reasonable – this needs to be proven as a matter of fact, therefore potential claimants need to keep meticulous records. In general with larger contractors this is not an issue as they ought to have significant cost reporting structures in place on a project.

- That the plaintiff’s bid was accurately computed – this can prove problematic, especially in a very competitive tender market where contractors may price a project below cost in order to maintain market share.

Hudson go on to state that there “are rarely situations in a construction project … where, provided proper site records have been kept, a total cost basis of claim can be justified”52.

A comprehensive statement on when a global claim will be permitted, as argued by counsel, was adopted by the Supreme Court of Victoria in Nauru Phosphate Royalties Trust v Matthew Hall Mechanical and Electrical Engineers Pty Ltd and Anor:

"A total loss claim will only be permitted... if the following conditions are satisfied. Namely:

- it is impossible or highly impracticable to determine the losses with any reasonable degree of accuracy...;
- the plaintiffs contract price must be shown to have been realistic;
- the actual cost incurred must be reasonable;
- the contractor must be shown not to have contributed in any marked degree to added expense (or indeed, it may be added any other events for which the owner is not responsible)."53

This harsh approach to global claims has been mitigated in subsequent rulings; however, a party preparing a claim would be well advised to refer to this strict

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51 Boyajian v United States (1970) 423 F.2d 1231
52 Hudson’s Building and Engineering Contracts (12th ed., Sweet & Maxwell, 2010), para 6-080
approach and see if they can satisfy the requirements therein. Likewise, a party defending such a claim ought to raise these issues depending on the extent to which a claimant fails to reach the high threshold set out.

**General claim requirements applied to global claims**

4.14 The following general statement on claims for loss and expense, not limited to global claims, needs to be considered when preparing or defending a claim:

Ultimately, claims by contractors for delay or disruption-related loss and expense must be proved as a matter of fact. This meant that the contractor had to demonstrate on a balance of probabilities that: first, events occurred which entitled it to loss and expense; secondly, that those events caused delay and/or disruption; and thirdly, that such delay or disruption caused it to incur loss and/or expense (or loss and damage as the case may be).  

Taking each of these step by step:

4.15 That the events occurred; this ought not to pose too many problems for a claimant; however, the comments on time-bar provisions need to be considered in relation to the said events.

4.16 That the events caused delay and/or disruption; this is one of the major obstacles in a global claim, as the claimant will not be able to point to the exact delay resulting from the event, rather he will be referring to a multitude of events and seeking to draw an inference that a delay resulted.

4.17 That such delay or disruption caused it to incur loss and/or expense; the problem here goes back to the earlier comments noting that the claimant may have difficulty proving how he arrived at his original computations which he now seeks to compare to the actual costs. In addition to this he has the issue of proving the causal nexus between the event and the alleged loss or expense. In support of the above it was stated in *Lilly*, that the contractor:

…will generally have to establish (on a balance of probabilities) that the loss which it has incurred (namely the difference between what it has cost the contractor and what it has been paid) would not have been incurred in any event. Thus, it will need to demonstrate that its accepted tender was sufficiently well priced that it would have made some net return.

4.18 Some particularly relevant comments by Justice Aikenhead in *Cleveland Bridge UK Ltd v Severfield-Rowen Structures Ltd* are laid out hereunder in full as they ought to be considered carefully in preparing or defending a global claim:

Although this issue will not in fact turn on the question of burden of proof, that burden is on CBUK in relation to establishing grounds for non-compliance or for, in effect, an EOT in relation to the December Programme; it seeks to excuse its non-compliance with that programme by reliance upon various events. CBUK relies on three things as delaying it: the edge beam variation, late instructions and information and late release of free issue steel. The job of proving such delay would, whilst arguably tedious, not be a difficult one; it would involve

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54 Walter Lilly & Company Ltd v Mackay [2012] EWCH 1773, para [486](a)
55 Ibid para [486](d)
56 Cleveland Bridge UK Ltd v Severfield-Rowen Structures Ltd [2012] EWCH 3652 (TCC)
identifying the particular aspect of the variation or the key late receipt of information/instruction which impacted on progress and providing explanatory evidence as to how it did impact. A similar exercise could be done in respect of late issue of materials with evidence showing how the fabrication programme was put back and when by such material not being available. CBUK has chosen not to try to prove any such delay in this way but simply to rely upon assertions that variations were issued, that information was provided somewhat later than the December Programme might infer was appropriate, that free issue steel was issued in January to March 2010 and ultimately upon an inference that it must have been delayed by these factors. That, in my judgment, is simply not anywhere near enough [emphasis added]. In all these delay cases, it is necessary to show that the claiming party was actually delayed by the factors of which it complains; it simply does not follow as a matter of logic, let alone practice, on a construction or fabrication project, that, simply because a variation is issued or that information is provided later than programmed or that free issue materials are issued later in the programme than envisaged originally, the claimant is delayed. If the real cause of the delay is, say, overwork or disorganisation within the claimant, the fact that there have been variations, late instructions or information or late issue of materials is simply coincidental.57

4.19 Whilst the above quotation relates to a ruling in relation to a claim for delay; it is equally relevant in relation to claims for delay and disruption where claimants point to a multitude of change orders and baldly make a claim that an inference ought to drawn entitling them to costs for disruption.

4.20 There is one other fundamental weakness in a global claim submission which is often overlooked; this is that the nature of the claim fails to take account of voluntary acceleration. A contractor can only claim for acceleration costs where he is instructed to accelerate, either explicitly or constructively. In a global claim it is very hard to account for such an occurrence; there is further commentary on this hereunder.

Brief commentary on Walter Lilly

4.21 As a result of the ruling in Walter Lilly claimants will now often try to frame what is in essence a global claim in such a manner so as to apparently avoid the evidential difficulties that arise in global claims. Counsel need to be cognizant of such efforts and need to understand on what exact basis Judge Aikenhead reached his decision.

4.22 The argument was accepted in Walter Lily where the Court held that each set of costs was ‘related solely to the periods of the delay for which it is asserted that it was entitled to extensions of time’58. Looking at this in detail, the reasoning behind this section of the ruling is that the claim was divided into precise monetary amounts related to specific delays, to which they asserted they were entitled to extensions of time, in support of which a detailed narrative in support of each delay was advanced.

4.23 Claimants believe that by splitting their costs compared to the tender allowances on a detailed trade by trade basis, that they fulfill the criteria as set in Walter Lilly and thus are not seen to be submitting a global claim, thereby facing the examination such a claim attracts.

57 [2012] EWHC 3652 (TCC), para 98
58 [2012] EWHC 1773, para [485]
4.24 If a contractor merely divides out each trade and allocates a trade loss against each one, therein claiming a multitude of events led to the delay; then in essence each and every trade claim is a mini-global claim in relation to that trade insofar as they rely on a multitude of events and fail to draw the causal nexus therein to the losses claimed other than on a lump sum basis.

Contract provisions negating the ability to submit a global claim at all:

4.25 A major issue that arises in relation to global claims is whether the contract under which the claim is submitted permits such a claim in any event. The PWC has the following provisions for handling variations and it is arguable that there is no scope for a contractor to submit a claim which is not provided for in the contract. In particular attention is drawn to clause 10.1.2 which states:

The Contractor’s sole remedies for a Compensation Event shall be those stated in the Contract.

*Adjustments valued under 10.6*

4.26 Adjustments to the contract sum are valued in accordance with clause 10.6; wherein there are provisions for the pricing of works in various instances. It is clearly the case that this covers the valuation of adjustments in full; and therefore contractors are limited to the provisions therein.

4.27 Where a contractor has the level of information necessary to prepare standard claims, though which they have not done for the reason that they would fail to satisfy the pre-conditions for such claim, and/or the valuation of the event would apply unfavourable rates in keeping with the provisions of the clause. It is often a tactical decision to approach a claim in such a manner to circumvent the provisions of the contract, this should not be tolerated. In this respect the comments from *John Holland Construction & Engineering v Kvaerner RJ Brown* are of particular relevance:

…if, in such a case, the plaintiff fails to demonstrate this causal nexus in sufficient detail because it is unwilling or unable to do so, then this may provide the occasion for the court to relieve the defendant of the unreasonable burden which the plaintiff would impose on it.39

*Extensions of time assessed under clause 9.3*

4.28 The contract provides for extensions of time; many global claims ought to be dealt with under these provisions. However, in the present tender market there is a tendency for contractors to value delay days at ‘nil’ and therefore it is of minimal financial advantage for them to pursue such a claim. Instead they seek to couch the claim as a global disruption claim and recoup delay costs in another manner.

*Clause 10.7.4 exclusionary clause*

4.29 As noted previous there is a broad exclusion clause in the PWC forms of contract in clause 10.7.4 as follows:

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39 *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* [1996] 82 BLR 81 (Supreme Court of Victoria)
Except as provided in this sub-clause 10.7 [notwithstanding anything else in the Contract] losses or expenses arising from or in connection with delay, disruption, acceleration, loss of productivity or knock-on effect shall not be taken into account or included in any increase to the Contract Sum, and the Employer shall have no liability for such losses or expenses.

4.30 Referring to the previous commentary on that provision it is suggested that there is a strong argument that this exclusion clause precludes the submission of a global claim in an event.

A note on acceleration and mitigation

4.31 Closely associated with disruption claims is the topic of acceleration claims. In its simplest form acceleration consists of an instruction from the employers representative to accelerate the works. This can be implemented in various ways, but most commonly by increasing the number of operatives on the site and/or the site management. This scenario does not give rise to much controversy; an order has been given and accordingly costs will need to be agreed.

4.32 Where the issues arise is where a contractor elects to accelerate the works of his own volition. In the first instance a project is running behind schedule due to a variety of factors, the contractor has a duty to mitigate the delay; and he does so by increasing the resources on the project and he finishes on time. The second instance where this arises and poses problems is where a variety of employer's change orders are issued, the value is agreed based on contract rates, the contractor is aware that EOT's may not carry costs with them and so he increases resources and finishes the additional works within the original contract framework.

4.33 Acceleration costs are not payable without an explicit or implicit instruction from the Employer; in any event acceleration costs are not permitted under the PWC contract at all, see clause 10.7.460.

4.34 Judge Hicks QC gives a very simple and succinct summary of the objections to such claims, albeit in relation to mitigation in Ascon v Alfred McAlpine:

It is difficult to see how there can be any room for the doctrine of mitigation in relation to damage suffered by reason of the employer's culpable delay in the face of express contractual machinery for dealing with the situation by extension of time and reimbursement of loss and expense.61

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60 10.7.4 Except as provided in this sub-clause 10.7 [notwithstanding anything else in the Contract] losses or expenses arising from or in connection with delay, disruption, acceleration, loss of productivity or knock-on effect shall not be taken into account or included in any increase to the Contract Sum, and the Employer shall have no liability for such losses or expenses.

61 Ascon Contracting Ltd v Alfred McAlpine Constructing Isle of Man Ltd (1999) 66 ConLR 119, 16 Const LJ 316, para [56]
### 5.0 Summary

5.1 The examination of this area of construction claims has dealt with delay and/or disruption together in order to avoid the repetition which would otherwise occur. Practitioners need to be recall that these claims are distinct and need to be examined separately when claims arise. The heads of loss available for each type of claim are outlined hereunder along with the associated issues.

<table>
<thead>
<tr>
<th>Heads of Loss</th>
<th>Delay and/or Disruption</th>
<th>Unique proofs</th>
<th>Common barriers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct additional resources</td>
<td>Both</td>
<td>None</td>
<td>Argument they are acceleration or mitigation costs</td>
</tr>
<tr>
<td>Preliminaries</td>
<td>Both, but for disruption specific additional preliminaries make up the claim (above)</td>
<td>None</td>
<td>Contractual limitations on figures</td>
</tr>
<tr>
<td>Overheads</td>
<td>Both, but mainly delay</td>
<td>That they would have been otherwise utilised</td>
<td>As above; Argument that resources remained static despite the issues</td>
</tr>
<tr>
<td>Loss of contribution</td>
<td>Both, but mainly delay</td>
<td>Historical contribution</td>
<td>Argument that company was operating at a loss</td>
</tr>
<tr>
<td>Loss of project profit</td>
<td>Both</td>
<td>That the project would have turned a profit</td>
<td>No valid ones</td>
</tr>
<tr>
<td>Loss of productivity</td>
<td>Both, but mainly disruption</td>
<td>That projected productivity was reasonable; That projected productivity was achieved elsewhere</td>
<td>Argument that anticipated productivity was unreasonable and that poor productivity arose through poor site management</td>
</tr>
<tr>
<td>Global losses</td>
<td>Both, but mainly disruption</td>
<td>That projected costs were reasonable</td>
<td>Exclusion clauses; Argument that project costs were unrealistic; Failure to establish causal nexus</td>
</tr>
<tr>
<td>Lost chance</td>
<td>Both, but mainly delay</td>
<td>The actual likelihood of securing the work in question</td>
<td>Exclusion clauses for indirect losses; Argument that the chance was too remote</td>
</tr>
<tr>
<td>All the above</td>
<td>Both</td>
<td>Compliance with conditions precedent</td>
<td>Subject to exclusion clauses; Failure to comply with conditions precedent</td>
</tr>
</tbody>
</table>
5.2 It is obvious that most of the heads of loss are available for both of the types of claim; however, there are differences in the nature of the claims under these heads of loss, the proofs required and the obstacles to pursuing such claims. In addition to this it is clear that certain heads of loss are more suited to different claims.

5.3 The other issue that ought to be apparent from this paper is that these claims are very fact specific and good record keeping by the contractor will make the process a lot easier from a Contractor’s perspective; and conversely, good record keeping by the Employer and his representatives will make the matter of defending a claim much easier too. That said, there is many a case with good record keeping by both parties, yet massive differences exist in what both parties maintain, in such an instance, the best course of action is to engage with a legal professional familiar with construction activities.