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COST MANAGEMENT

SESSION TOPICS

- **Direct loss and/or expense: the concept in law**

SESSION OBJECTIVES

To look at the legal and contractual framework in which claims for direct loss and/or expense are dealt with, and to examine the position where there are concurrent causes underlying a claim.

INTENDED AUDIENCE

This programme will be of interest to all surveyors involved in the cost management of construction projects. For those who have had little involvement with claims for loss and expense, the first half of the programme is a useful introduction to the basic principles underlying a claim. For more experienced surveyors, the second half of the programme deals with the more complex problem of concurrent causes and in the accompanying notes there is a section on situations where it may not be necessary to identify separate causes underlying a single global claim.

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SUMMARY

PROGRAMME

In the first half of the programme we consider why most standard forms of contract make provision for payment of direct loss and/or expense. Arbitrator and adjudicator Christopher Dancaster talks about what a contractor is entitled to claim.

The second half of the programme deals with the problem of concurrent causes and our main contributor, Alan Morris, takes us through the relevant rules.

PROGRAMME NOTES

The Programme Notes include references to case law. They also go further into concurrent causes and look at Global Claims.

ABOUT THE CONTRIBUTOR

Alan Morris LLB, MSc, PhD, FRICS runs Alan Morris Training, providing courses in construction contract law and procedure. Alan started his career with chartered quantity surveyors Langdon & Every in 1953, working both in the UK and abroad. He has worked in the areas of higher education, research and consultancy. In 1991 he joined Cyril Sweett & Partners as director and head of legal services. Alan also runs courses to prepare graduates for the RICS Assessment of Professional Competence.

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DISCUSSION POINTS

On direct loss and/or expense: the concept in law

- Why do construction contracts make provision for payment of direct loss and/or expense?
- When are contractors entitled to claim?
- What are they entitled to claim?
- What happens if there is more than one cause underlying a claim?

COST MANAGEMENT

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1 Direct loss and/or expense: the concept in law: introduction

Damages are the normal remedy for a breach of contract at common law. In order to obtain damages, however, it is necessary to make recourse to litigation or arbitration proceedings. Only a judge in the course of litigation, or an arbitrator in the course of arbitration proceedings, can award damages.

However, building contracts, and other contracts, find a way around this. They may provide for the certification by the Contract Administrator of payments for 'direct loss and/or expense' as an alternative to the protracted process of seeking damages in litigation or at arbitration.

2 General rules

2.1 Contract conditions

'Direct loss and/or expense' (shortened to 'loss and expense' here) is only available to the contractor in certain specific circumstances stated in the contract conditions. These circumstances are ones in which the building contractor has been impeded in carrying out the works and for which the employer has responsibility.

So we find for example, in JCT80 clause 26.2, that the contractor is entitled to recover its loss and expense where the contractor is impeded because of:

> Not having received in due time necessary instructions, drawings, details or levels from the Architect/the Contract Administrator for which he [has] specifically applied in writing provided that such application was made on a date which having regard to the Completion Date was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive the same...

This ground for entitlement to loss and expense is referred to in this paper as 'late information'.

If there is late information the contractor will be entitled to recoup from the employer *as part of an ordinary payment under the contract* the loss and expense he has suffered as a result. Provided that certain procedures have been carried out (see below) the contractor's loss and/or expense shall be ascertained and paid. As clause 26.1 of JCT 80 puts it:

> If and as soon as the Architect/ the Contract Administrator is of the opinion that the direct loss and/or expense has been incurred or is likely to be incurred... then the Architect / the Contract Administrator from time to time thereafter shall ascertain, or shall instruct the Quantity Surveyor to ascertain, the amount of such loss and/or expense as has been or is being incurred by the Contractor...

This is a very significant provision of great assistance to the contractor, avoiding the disadvantages that attend an action for damages in the courts or at arbitration.

2.2 Delay and disruption

The contractor's right to loss and expense commonly arises where the completion of the building has been delayed. The contractor has been impeded in respect of *work lying on the critical path*. He has been held back by the employer and compelled to stay longer on the job than was expected at the time of tender. In staying longer he has been caused loss and expense.

This is not the only circumstance in which the contractor may be entitled, however. Loss and/or expense may be payable to the contractor in some circumstances where the completion of the building has *not* been delayed. The contractor may have been impeded in progressing work *not lying on the critical path to the completion:* the contractor has been impeded but the completion of the building has not been impeded.

If that is the case, there is *disruption*: reduced productivity occasioned by disruption of the contractor's orderly process: this is as opposed to *delay in the completion of the building*. The contractor in some circumstances can recover loss and expense where there is *disruption* for which the employer has responsibility as also where there is delay in the completion of the building.

Generally, the term 'delay' is used in this paper for either delay or disruption.

2.3 *Cost, not price*

Ascertainment of the loss and expense is required in order for there to be payment made. For ascertainment, *proof* of the contractor's loss and costs is needed. The requirement for proof can be problematical for the contractor. It imposes a burden on him of record-keeping in order to qualify for payment. Elsewhere there is not this burden on the contractor to prove the cost of resources used; elsewhere the contractor is paid at the prices contained in his quotation for finished work without looking behind to actual cost.

2.4 *Procedures*

There are normally *procedures* imposed by the contract conditions on the contractor as a pre-condition to the right to payment of his loss and expense. The required procedures amount, in essence, to good practice: the contractor must keep the employer informed, and co-operate in the *ascertaining* of the loss and expense.

Here clause 26.1 of JCT 80 provides:

> If the Contractor makes written application to the Architect stating that it has incurred or is likely to incur direct loss and/or expense in the execution of the contract... because the regular progress of the Works or any part thereof has been or is likely to be materially affected by one or more of the matters referred to in clause 26.2 [see above]... [then the contractor shall be entitled provided that] the Contractor's application shall be made as soon as it has become, or should reasonably have become, apparent to him that the regular progress of the Works or of any part thereof has been or is likely to be affected as aforesaid: and the Contractor shall in support of his application submit to the Architect upon request such information as should reasonably enable the Architect to form an opinion as aforesaid: and the Contractor shall submit to the Architect or to the Quantity Surveyor upon request such details of such loss and/or expense as are reasonably necessary for such ascertainment as aforesaid.

The Contractor must work within these procedures if he is to have his loss and expense reimbursed by the means of payment under the contract. If he does not do so there will not be the right (though there may be damages at common law available).

2.5 *Quantum*

The law ascribes a meaning to *direct loss and/or expense*. The payment that is made must be in accordance with this meaning. The payment may fall very short of the contractor's *total* loss/expense.

The quantum (amount) to which the contractor is entitled under a *loss and/or expense* provision is the same as is payable in *general damages* at common law[1]. *General damages* afford only a restricted recoupment of the contractual loss and expense suffered.

2.6 *General damages*

General damages (in the sense in which it is used here - there are other senses in which the term is used elsewhere) derives from the case *Hadley* v *Baxendale*[2]. The court in this case found that the extent of the compensation allowed by way of damages for breach of contract should depend upon the knowledge that the contract-breaker had at the time of entering into the contract. One of the judges, Alderson B, said:

> Where two parties have made a contract which one of them has broken, the damages which the other one ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either

> arising naturally, ie according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

In *Victoria Laundry (Windsor) Ltd* v *Newman Industries*[3], Asquith LJ explained this further:

> Everyone, as a reasonable person, is taken to know the 'ordinary course of things'... This is the subject-matter of the 'first rule' in *Hadley* v *Baxendale*, but to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses of special circumstances outside the 'ordinary course of things' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.

General damages are those damages that arise naturally from the breach of contract. Another way of putting this would be that general damages are decided by reference to knowledge, assumed or actual, of the ordinary course of things. The term *special damages* is used where there is *actual knowledge of special circumstances* and damages are awarded by reference to this knowledge.

Direct loss and/or expense in the contract conditions equates to *general damages*, as said above. The word *direct*, here, is restrictive, restricting to the restricted scope of general damages, *direct* loss and/or expense. *Special damages* are *indirect*, it is said. The ascertainment of loss and expense should not take any account of any knowledge of special circumstances. (If thought best to take account of such knowledge, prior instructions from the employer need to be obtained.)

3 Concurrent causes

3.1 Generally

Contractual conditions often provide for events as if they happened tidily, one at a time. The conditions that list the events leading to delay qualifying for payment of loss and expense provide an instance of this. The events are listed one at a time, but then they sometimes occur two or more at a time. Sometimes there are two events occur together, but one of them is not in the list. Sometimes the event that is not in the list is such to override the listed event.

In short, there may be two or more events each a cause of the delay. These are known by the term *concurrent causes*.

There is a question arises where there are two or more causes of delay - concurrent causes - whether, if one of the causes is the contractor's responsibility, he can still be entitled to recover his loss and expense from the employer based on the other (listed) cause?

Most often the contractor is no longer entitled here. The contractor is *claiming*, it has to be remembered. He has to show that the loss and expense was caused by the listed cause. If he cannot do so, he will not be successful. Yet how can he do so? The contractor's loss and expense was caused just as much by the cause for which he had responsibility. Here is puzzlement for the contractor.

Apportionment is not thought an available basis for the contractor faced with concurrent causes (but see *Contributory Negligence as a Defence in Contract*[4]).

3.2 Sufficient cause, contributory cause

There are two types of concurrent cause: a *sufficient* cause and a *contributory* cause. A sufficient cause would have *on its own* caused the delay in question. A contributory cause would not on its own have caused the delay. A contributory cause causes delay in consort with another contributory cause. Neither of these causes would, on its own, have caused the delay.

3.3 The claims process

The claims process, where there are concurrent causes, typically is this. The contractor claims loss and expense. Then the contract administrator shows a concurrent cause for which responsibility is the contractor's.

Then the law asks: was the contractor's part a *sufficient* cause, sufficient to have caused the loss on its own? If so, it can be reckoned that the contractor is not entitled to his loss and expense.

Alternatively, was the contractor's part a *contributory cause*, such that on its own would not have caused the loss? If it was, then further questions are asked: was one of the causes the *dominant cause*? And if so, which was the *dominant cause*? Was it a cause for which the employer was responsible?

If there was a dominant cause - dominant above the other cause or causes of the loss and expense, and if it was one for which the employer was responsible, then the way is open: the contractor is entitled to recover his loss and expense from the employer.

3.4 Examples of concurrent causes

The following are illustrations of what has been said about *sufficient* and *contributory* concurrent causes.

3.4.1 Two concurrent sufficient *causes*

1 There is late information, sufficient on its own to prevent the work from continuing for four weeks; and

2 Concurrently, for the same four weeks, there is severe weather, also sufficient on its own to prevent the work from continuing.

Notes:

- Late information ordinarily qualifies for loss and expense.
- Severe weather does not qualify for loss and expense. It is at the responsibility of the contractor.

Here the severe weather is a *sufficient* cause: because, occurring on its own - without there being late information - it would have prevented the work from continuing. The contractor is not entitled to recover its loss and expense.

3.4.2 A sufficient *cause which follows on as a* contributory *cause*

1 There is a variation substituting one type of brick for another, causing the work to be delayed for eight weeks; and

2 It is followed by (subsequent to the placing of the order for the substituted bricks) a breakdown of plant at the brickworks, which causes the work to be delayed for an additional four weeks.

Notes:

- A variation ordinarily qualifies for loss and expense.
- The breakdown of plant does not qualify for loss and expense. The additional four weeks' delay is in breach of contract by the contractor.

Here the variation starts as a sufficient cause. The contractor is entitled to recover his loss and expense for the initial period of eight weeks.

Then the period of delay extends: the variation is now a contributory cause, with the breakdown at the brickworks also a contributory cause. If there had not been the breakdown then the extended period would not have occurred. If there had not been a variation the breakdown would not have affected the works.

Was there a dominant cause? Yes - the breakdown of the plant was the dominant cause, it is submitted (see indicators and questions below). So the extended delay was the contractor's responsibility. The contractor is not entitled to its loss and expense.

3.5 Dominant cause

How to decide the dominant cause? There are these indicators for help in deciding:

- 'Which cause is dominant is a question of fact, which is not solved by the mere point of order in time' (*Leyland Shipping* v *Norwich Union*[5]).
- The dominant cause is 'decided by applying common sense standards' (*Yorkshire Dale Steamship* v *Minister of War Transport*[6]).

Further help, is suggested, may be derived from addressing these questions:

1 Two causes - one is a breach, the other something neutral. Is the breach the dominant cause?

2 Two causes - one is an event, the other a standing condition. Is the event the dominant cause?

3 Two causes - one is a human intervention, the other, another cause. Is the human intervention the dominant cause?[7]

4 Global claims

Prior to this point, concurrent causes where each party has the responsibility for one of the causes has been considered. It is necessary to consider further the position where the contractor claiming loss and expense, based on one of the matters listed as qualifying for loss and expense in the contract conditions, comes against another cause of the loss and expense in which both of the causes are *the responsibility of the employer.*

The law requires that claims must be set out clearly - with *cause, effect, quantum,* worked through, one cause at a time, generally. This is to give the employer a proper basis against which to build his defence.

If there are concurrent causes, *each the responsibility of the employer,* it is not always possible realistically to follow each cause, individually, through to *quantum of loss.* There will then be available to the contractor an exception to the general position of the law requiring the separation of causes: it is where the circumstances of the work do not permit a meaningful separation to be made. The exception as to separation is very limited in these terms. The exception is also confined to the *quantum* stage of the claim, is said (the amount of money claimed): each of the *causes* and *effects* leading to the *quantum* has to be identified and traced through separately.

The Privy Council has recognised the exception in these terms:

> In cases where the full extent of extra costs incurred through delay depends upon a complex interaction between the consequences of various events, so that it may be difficult to make an accurate apportionment of the total extra costs, it may be proper for an arbitrator to make individual financial awards in respect of claims which can conveniently be dealt with in isolation and a supplementary award in respect of the financial consequences of the remainder as a composite whole. This has, however, no bearing upon the obligation of a plaintiff to plead his case with such particularity as is sufficient to alert the opposite party to the case which is going to be made against him at the trial[8].

4.1 Example

There are two unconnected delaying events in different parts of the site under consideration, each of which qualifies for *direct loss and/or expense.* Each of the events, each at the same time, was the cause of *disruption* within the confines of its own area; and each event was a *sufficient* cause causing delay in the completion of the works beyond the existing completion date. One of the causes was of longer duration than the other, causing there to be a further period of over-run on its own account.

- *Should the loss and expense caused by each cause separately in its own area, in respect of the period of concurrency, be certified for payment?* The answer is yes - to the extent that it is identified and proved to attach solely to the cause claimed.
- *Should the loss and expense caused by the two causes during the period of concurrency, which by its nature can not be identified and proved to attach*

other than to the two causes jointly, be certified for payment? Yes - to the extent that it is identified and proved to attach solely to the two causes claimed.

- *Should the loss and expense caused by the further period of over-run be taken on its own - separate from the rest - and certified for payment in full?* The straightforward answer is yes.

The restricted scope for global claims comes out strongly in the well-known case *Merton LBC* v *Stanley Hugh Leach Ltd*[9]. The judge in this case said, in respect of claims made on a global basis:

> The architect must ascertain the global loss directly attributable to the two cases, disregarding any loss or expense which would have been recoverable if the claim had been made under one head taken in isolation and which would not have been recoverable under the other head also taken in isolation.

If a claim is made on a global basis then it must be cut down to that part which by its nature has to be on a global basis. For the rest, the burden is on the contractor, the claimant, to show *cause, effect, quantum,* for each head in isolation. The claim must be made 'with such particularity as is sufficient to alert the opposite party to the case which is going to be made against him at the trial' (above) - see further *British Airways Pension Trustees Ltd* v *Sir Robert McAlpine Ltd*[10].

5 Summary

A summary of the position outlined regarding what is included and what is excluded in *loss and/or expense* runs like this:

- Direct loss and/or expense equates to general damages: that is, it is subject to *remoteness* as in general damages.
- What is *remoteness* and what are *general damages*? Remoteness is a limiting factor, limiting the extent to which the loss and expense may be recovered. It makes its appearance in two contexts - amounting to two steps, causation and contemplation.
  1. *Causation*: what *caused* the loss and expense? Was the cause as claimed, or was it something else?
  2. *Contemplation*: what type of consequence was 'in the *reasonable contemplation* of the parties at the time that they entered into the contract'?
- The meaning of *direct* loss and/or expense:
  1. *Direct* is as opposed to *consequential* (which carries the connotation of *special* damages *consequential upon there being special knowledge*)
  2. Direct loss and/or expense equates to general damages as opposed to special damages.
- In addition, the claim must be made 'with such particularity as is sufficient to alert the opposite party to the case which is going to be made against him at the trial'.

6 Further reading

The following sources for further reading are recommended by the author:

Construction Law Digest, published throughout the year by Construction Law Digest Ltd

Construction Industry Law Letter, published throughout the year by Legal Studies and Services Ltd

Emden, *Construction Law,* Butterworths, loose leaf, regularly updated

3 References

[1] See *Minter (FG)* v *Welsh Health Technical Services Organisation* (1980) 13 BLR 1 CA

[2] *Hadley* v *Baxendale* (1854) 9 Ex 341 Exchqr

[3] *Victoria Laundry (Windsor) Ltd* v *Newman Industries* [1949] 2 KB 528 CA

[4] *Contributory Negligence as a Defence in Contract,* Law Commission Working Paper No 114 (1990)

[5] *Leyland Shipping Co* v *Norwich Union Fire Insurance Society* [1918] AC 350 HL

[6] *Yorkshire Dale Steamship* v *Minister of War Transport* [1942] AC 491 HL

[7] See *McGregor on Damages* (15th ed, 1988) Sweet & Maxwell

[8] *Wharf Properties Ltd* v *Eric Cumine Associates (no 2)* (1991) 52 BLR 1 CA Hong Kong

[9] *Merton LBC* v *Stanley Hugh Leach Ltd* (1985) 32 BLR 51

[10] *British Airways Pension Trustees Ltd* v *Sir Robert McAlpine Ltd* (1994) 72 BLR 26