Quantification and Substantiation of Contractual Claims

(A short series of articles addressing some difficult and challenging areas.)

2. Claims for unproductive working or disruption

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In this second of a series of articles addressing elements of claims brought in construction and engineering contracts, the subject will be the one which is most challenging to quantify. That difficulty is one that besets the claimant (often the Contractor), but also the payee (the Employer) or claim assessor (the Architect/CA/Engineer in the first instance).The principle of a claiming party being entitled to recover additional cost incurred by the intervention of certain circumstances that render its performance inefficient is well established.

Essentially, the basis of such a claim is that either the contract terms permit such recovery in defined circumstances or the prevailing law entitles recovery where it can be argued that a party has failed to discharge certain obligations upon it, such that any costs of inefficiency arising for the claiming party can be recovered. So far, so uncontentious. The challenge comes in relation to what the claiming party has to demonstrate to succeed in its claims. For our purposes, and for convenience, we shall talk of the Contractor being the claiming party and the Employer the party against whom the claim is brought. It could as easily be a Sub-contractor bringing a claim against a Contractor, or a claim brought by a Consultant – the principles are identical.

It should be stated that, whatever rule of law applies to a contract (civil, common or sharia law, for example), the onus is generally borne by the claiming party to substantiate the amounts claimed to be due and payable.

So far as disruption claims are concerned, however, the thorny questions are: How can that substantiation be achieved? And what has the paying party a right to demand be established by probative evidence?

Therein lies the particular difficulty. The Contractor pursuing such a claim will often well know that its performance has been affected detrimentally by something done or not done by the Employer or on the Employer's behalf. That act might constitute something not done by the other party that the contract expressly or impliedly required, such as failing to give possession or access as required by the contract, or failing to give instructions or information. It might amount to an act that the contract forbade or did not allow, such as interfering with the sequence of the Works or attempting to give instructions not expressly permitted by the contract. Or it might amount to an event that the contract expressly contemplated, but made a remedy available to the Contractor, such as encountering unforeseeable physical conditions (see clause 4.12 of typical FIDIC contracts) by which a Contractor can recover additional costs incurred as a consequence of any of the events listed in the contract.

The principle of recovery is not generally contentious; the quantification of the Contractor's claimed additional costs is the difficult issue, and there are generally two reasons (linked) for that. The Contractor, firstly, will normally be required to prove what amount of additional costs have been incurred and, secondly, to relate those costs (or those which are attributable) to the disruptive event(s) giving rise to the claim.

It is often the case that disruption claims are pursued in parallel with claims for delay to completion, but it does not have to be so. It is perfectly possible for a Contractor to pursue a valid claim for disruption even though the project is completed on time, or even early; though that principle sometimes causes confusion.

As an example of that, the case of Glenlion Construction – v – The Guinness Trust can be cited[1]. In that case, the claiming Contractor, having (to the knowledge of the Employer) priced the project on the basis of a foreshortened contract period and then programmed to carry the project out in that timescale, sought to recover the additional costs of being kept on site longer than allowed in the tender (though completing still within the Contract Period) as a result of matters that the contract provided would allow an extension of time and recovery of loss and/or expense. The court held that, since the Contractor had completed before the Completion Date, it was not entitled to an extension of time. No problem. However, the Contractor was also denied any financial recovery; a determination that was widely accepted at the time, but which never amounted to (and probably was never intended to) constitute a statement of the law of general application.

The fact is that if a Contractor is caused to be on site longer than it otherwise would be (remember, a Contractor is perfectly entitled, by most contracts in general use, to complete early), as a consequence of some impediment caused by or on behalf of the Employer, then (certain of) the Contractor's losses or additional costs can be (in principle) recovered, either by the application of the terms of the contract or by entitlements under the applicable law (for example as damages for breach of contract). It all depends on what the disruptive event is, and what the head(s) of claim are.

The best example is, perhaps, where a Contractor is close to completion (early) and the Employer authorises a variation that keeps the Contractor on site longer (though still, perhaps, completing on time) (this being an example of the proper operation of the contract terms), or where the Employer (wrongly) excludes the Contractor from the project for a period (in breach of contract), permitting the Works to be re-commenced only in time for timely completion to occur. In either event, it is suggested, the Contractor could legitimately claim for certain of the financial consequences of the events that occurred, though possibly not, it is accepted, for all of those consequences. In other words, though delay costs might not be recoverable (since, in these examples, the Contractor still finishes by the due date), costs of disruption to the Contractor's proposed working methods or resourcing (such as management or labour down-time, re-mobilisation and the like) could be recovered.

To recap; disruption costs could legitimately be claimed where the contract is properly operated (such as where valid variations are authorised) or where the contract is breached by or on behalf of the Employer.

The other complicating factor that should be mentioned is the fact that disruption claims are often claimed on a "global" basis and, thus, suffer the difficulties inherent in the pursuit of "global claims"[2].

These are matters of principle that are often contentious and hotly debated. What is not contentious but is, if anything, even more problematical is the fact that (subject to the claim being valid in principle) the Contractor generally bears the burden (by contract dictate or application of the applicable law) to prove what sum is due in the circumstances.

It is a regret that the various published works that address disruption and its consequences always do so in tandem with delay to completion (which topic always takes significant priority). The result is that there appears to be little, if anything published that applies a detailed focus upon disruption and how a claiming party might go about proving its claim. An exception is a

recent publication of the Institution of Civil Engineers in the UK[3], in which disruption is given appropriate coverage.

Even the Society of Construction Law (SCL) Protocol[4] gives disruption scant consideration. The parties are, therefore, largely left to their own devices as to how to proceed.

Disruption is defined in the SCL Protocol as: "…. **Disturbance, hindrance or interruption to a Contractor's normal working methods, resulting in lower efficiency. If caused by the Employer, it might give rise to a right to compensation either under the contract or as a breach of contract**." The expression "*lower efficiency*" effectively gives the lead as to what exactly might be expected from a claiming Contractor to prove its entitlement; the word "*lower*" being a comparative adjective, suggesting that a comparison is expected to be made.

The basis of such a claim is always, essentially, a comparative one: there have been costs incurred that would have been avoided had the circumstance(s) relied upon by the claimant not come about. Inevitably, that means that the calculation made by a claimant would be expected to feature two components; one factual and the other assumed. There is nothing exceptionable in that approach; in fact, there is no avoiding it, except by the entirely false and unpersuasive application of notional figures (such as a percentage applied to actual costs to represent the degree of disruption).

The task facing the claimant is a straightforward one, though often very difficult (or sometimes impossible) to achieve. That is to relate the causative event(s) relied upon, to the costs actually incurred. This linking of cause and effect is not only essential to the greatest chance of a claimant achieving a successful outcome to its claim, but it is also often the source of considerable disagreements between parties.

Actual costs incurred during the construction process are generally, these days, accurately recorded in the claimant's costing systems, which are often highly sophisticated. If that is not the case, then a claiming party (Contractor or Sub-contractor) faces an uphill battle to persuade the paying party to accept liability. The message should be abundantly clear to potential claiming parties – ensure, from the very start of the project that sufficiently robust and comprehensive cost recording systems are in place. Indeed, clause 20.1 of FIDIC forms requires the Contractor to "[…] *keep such contemporary records as may be necessary to substantiate any claim* […]" though no indication is given as to what such records might amount to or the amount of detail that should be provided.

It is a very sensible practice that both parties arrange, from the very start of a project, to either keep their own records of resources actually expended, but (even better) to keep a single record that is jointly agreed between them (perhaps weekly or even daily). Such a record should contain not only numbers of the labour force and plant utilised, but also should set out details of who and what was working where, and on what element of the works. Records of difficulties encountered, periods of efficient working, plant and labour down-time, plant breakdowns and the like should also be recorded and signed off by both parties, ensuring that a comprehensive record is maintained throughout the project. Being agreed as the project progresses, it will assist the parties in avoiding disagreements as to the facts.

One element of the calculation of the consequences of alleged disruption (the actuality) is thereby settled. That will not be enough, however, to persuade either the contract determiner (the Engineer in the first instance) or a tribunal (a DB or arbitrator) that particular sums should be declared payable. The claiming party also needs to establish (to the applicable degree of proof) what its costs would have been had the event(s) relied upon not occurred and, crucially, the extent to which the actual costs (albeit accurately recorded) were incurred as a direct consequence of those events. The challenge is therefore to establish a persuasive and reliable

means of calculating what costs would have been incurred but for the disruptive event(s) and to establish the cause and effect relationship that must fundamentally underpin such a claim. How can that be done?

It is for the claimant to demonstrate what costs would have been incurred had the event(s) relied upon not taken place, and the best way to achieve a persuasive case is to have available reliable records that demonstrate what output (of labour and/or plant) was achieved when working productively. This is commonly known as the "Measured Mile" approach (one which has received judicial approval[5]), in which the claimant's outputs when working productively are recorded, enabling comparisons to be made with periods of alleged non-productive working. The more accurate and detailed those records (such as recording precise periods of time, particular locations of work and specific trades, activities or plant items), the more persuasive a case can be made out. The essential point is this: that although on the facts it is (even, very) probable that the claiming party was disrupted, without evidence supporting the quantification of that disruption, any sum claimed as due becomes tainted with speculation.

The agreed record-keeping referred to earlier will also facilitate the application of the Measured Mile approach (so long as there were periods of non-disrupted working, of course). In the absence of such records, resort must be had to less persuasive means of calculation.

One of these means utilises the Contractor's tendered outputs, which again is a legitimate means of facilitating comparative calculations. The problem here is that questions are often raised about the accuracy or reliability of such outputs. Those representing the party receiving the claim will point to the fact that the Contractor is likely to have been successful in being awarded the project following a competitive process that has the effect of driving down prices. It may even be suggested that the Contractor was successful in its bid precisely because its projected outputs were either inaccurate, were unrealistically high, or were priced in error. These are legitimate concerns and it is for the claiming Contractor to anticipate them and to take steps to ensure that persuasive arguments can be put forward as to the reliability of the calculations. Support for tendered outputs may be garnered from comparisons with published outputs from pricing books or from market comparisons (other projects etc.). Again, all of this is perfectly legitimate, and merely reflects that an attempt must been made to demonstrate what the effect would have been if the disruptive event(s) had not occurred. That effect may also, of course, have prevented a Contractor from achieving better outputs than were originally priced.

It all comes down, as so much that relates to contractual claims, to the quality (and thus the persuasiveness) of the records that the claiming party has available to it. The paying party, and any tribunal, has a proper entitlement to expect to be persuaded by the evidence that the claimant can bring. The standard to be applied will be determined by the express contract terms and the prevailing law and both the party receiving the claim and any tribunal should not seek to apply any higher or lower standard of proof than the prevailing law requires.

The messages in all this should be patently clear. Firstly, a claimant may well possess a clear entitlement in principle to the recovery of the additional costs arising from the disruptive effects of the event(s) relied upon. Secondly, the fact that the calculation that will be made contains a notional component is inevitable and is no bar to recovery in principle. Thirdly, the key to the parties settling, by agreement, the quantification of the claim is directly related to the persuasiveness of actual records kept. The parties should maintain joint agreed records (appropriately detailed) of the resources actually used on the project. Finally, the Contractor should provide from the outset, details of its outputs used in its pricing of the project at bid-

stage, so that both parties have available to them the source data that might be relied upon by the claimant.

[1] Glenlion Construction Ltd – v – The Guinness Trust [1987] 30 BLR 89

[2] the subject of global claims will be addressed in a later article.

[3] "Delay and Disruption Claims in Construction" (Ali D.Haidar and Peter Barnes) ISBN 978-0-7277-5967-2

[4] Society of Construction Law Delay and Disruption Protocol (October 2002)

[5] John Doyle Construction Limited – v – Laing Management (Scotland) Limited [2004] 1BLR 295

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