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Construction Contract Claims

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M
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To my wife Joan

Contents

<i>Foreword</i>	xi
<i>Preface</i>	xiii
<i>Acknowledgements</i>	xv
1 BRIEF HISTORY OF CONSTRUCTION CONTRACTS AND CASE LAW	1
1.1 Introduction	1
1.2 Bills of quantities	4
1.3 Variations	6
1.4 Extensions of time and liquidated damages	8
1.5 Claims for additional payment: damages	14
1.6 Rolled-up claims	18
1.7 Notice	19
1.8 Interference by the employer	21
1.9 Claims against consultants	22
1.10 The future	23
2 CHOICE OF CONTRACTS	24
2.1 The first steps	24
2.2 Clients' objectives	25
2.3 Contracting methods	26
2.4 Standard forms of contract	32
2.5 The Joint Contracts Tribunal standard forms of contract:	33
The Minor Works Form, MW80	33
The Intermediate Form of Building Contract, IFC84	34
The Standard Form of Building Contract, JCT80	34
The Standard Form of Contract with Approximate Quantities	34
The Fixed Fee Form of Contract	35
The Standard Form of Management Contract	35
The Standard Form of Building Contract with Contractor's Design	35
2.6 Other forms of contract	36
2.7 Special conditions and contract documents	37

3	TENDER AND ACCEPTANCE	39
3.1	Selection of tendering contractors: prequalification	39
3.2	Time allowed for tendering	41
3.3	Exploitation of poor tender documents by contractors	44
3.4	Preparing the estimate: adjudication: the tender	44
3.5	Qualified tenders	45
3.6	Tender programme	47
3.7	Evaluation criteria	48
3.8	Rejection: acceptance: letters of intent	49
4	MONITORING DELAY AND DISRUPTION CLAIMS: PREVENTION	54
4.1	Contracts administration	54
4.2	Possession of site: commencement	55
4.3	Pre-commencement meeting	55
4.4	Regular progress meetings	56
4.5	Instructions and drawing issues	57
4.6	Site instructions: verbal instructions	57
4.7	Form of instructions	58
4.8	Programme and progress	58
4.9	Notice: records and particulars	59
4.10	Delays after the contract completion date	63
4.11	Minimising exposure to claims: prevention	64
5	FORMULATION AND PRESENTATION OF CLAIMS	68
5.1	Extensions of time claims	68
5.2	Presentation of extensions of time claims	70
5.3	Delays after the contract completion date	80
5.4	Summary on presentation of extensions of time claims	85
5.5	Recovery of loss and/or expense and/or damages	86
5.6	Notice of intention to claim	87
5.7	Particulars and further information to support a claim	87
5.8	Prolongation claims:	88
	Site overheads or preliminaries	88
	Prolongation of individual activities	93
	Valuation at cost or using contract rates for preliminaries	93
	Head office overheads in the event of prolongation	93
	The Hudson formula	94

Emden's formula	94
Eichleay's formula	95
Profit	97
Hudson, Emden or Eichleay? Percentage to be used: period for calculating the relevant percentage	99
Adjustment for overheads and profit in variations	105
Adjustment for non-recoverable delays	105
Concurrent delays	106
Delayed release of retention	108
5.9 Disruption and loss of productivity	110
5.10 Claims for acceleration	112
5.11 Variations	115
5.12 Dayworks	118
5.13 Fluctuations	118
5.14 <i>Quantum meruit</i>	119
5.15 Finance charges	121
5.16 Cost of preparing the claim	122
5.17 Assessment and evaluation	123
5.18 Summary on presentation of claims for additional payment	124
5.19 Formal claim submission:	124
Introduction: contract particulars	125
Summary of facts	125
Basis of claim	125
Details of claim	125
Evaluation of claim	126
Statement of claim	126
Appendices	126
 6 SUBCONTRACTORS	 127
6.1 Subcontracting generally	127
6.2 Nominated subcontractors	129
6.3 Contractor's rights to object to nominees	131
6.4 Subcontractors' programmes	139
6.5 Extensions of time for completion of subcontract works	141
6.6 Delay by nominated subcontractors	141
6.7 Architect's consent to grant an extension of time to a nominated subcontractor	142
6.8 Design and drawings provided by the subcontractor	142
6.9 Variations to the subcontract works	143
6.10 Delay and disruption claims	144

7	RESPONSE TO CLAIMS: COUNTER-CLAIMS	146
7.1	General policy	146
7.2	Extensions of time:	147
	Late information	149
	Information and variations issued after the completion date	150
	Omission of work	150
	Concurrent delays	152
7.3	Claims for additional payment	154
7.4	Counter-claims: liquidated damages: general damages	155
7.5	Claims against subcontractors	157
8	AVOIDANCE, RESOLUTION AND SETTLEMENT OF DISPUTES	160
8.1	Commercial attitude and policy	160
8.2	Claim submissions	161
8.3	Negotiation	165
8.4	Resolution of disputes by third parties:	167
	Third party expert opinion	167
	Conciliation	168
	Mediation	168
	Arbitration:	169
	Preliminary meeting	171
	Pleadings	171
	Discovery of documents	171
	Agreed bundles	172
	Witnesses: proofs of evidence	172
	The hearing	173
	The award	173
	APPENDIX: SAMPLE CLAIM FOR EXTENSION OF TIME AND ADDITIONAL PAYMENT	175
	REFERENCES	210
	Books and publications	210
	List of cases	212
	Abbreviations used in case references	215
	Forms of contract	216
	Miscellaneous abbreviations	217
	INDEX	219

Foreword

The preparation and negotiation of claims has become an industry within an industry. In fact, during a period of recession it is one of the few sections of the construction industry which flourishes. It is not surprising therefore to see the publication of another book which deals with claims. There are a number of books on the market to do with claims but Reg Thomas's *Construction Contract Claims* has a number of features which are not very well catered for by the others.

The section dealing with claims prevention should be studied particularly by architects and engineers. Reg Thomas draws attention to the oft-adopted policy of assuming that the issue of information to contractors can be delayed with impunity on the grounds that the contractor himself is already in delay. The book argues that the contractor, in support of an application for an extension of time or a claim that time has become at large, may argue that even though he is in delay, completion to time would in any event have been impossible due to the late issue of information.

Claims settlement invariably becomes protracted and difficult where records are poor or non-existent. Great assistance is provided by the book with regard to the type of records which should be kept.

Most books dealing with construction law contain numerous interesting and relevant cases. This book is no exception. An advantage which this book has to offer is that as many construction cases have been brought before the courts in the last few years they are all included. A case which is likely to have a long-lasting effect upon the way in which claims are prepared and presented is *Wharf Properties and Another v. Eric Cumine Associates and Another* (1988). This case has thrown doubt on the preparation of global rolled-up claims and is dealt with in the book.

A criticism I levy against many books dealing with construction law is that they answer all the simple questions but studiously avoid those which are thorny. Reg Thomas seems to have developed his theme by highlighting the difficult contractual problems and providing cogent answers. In particular I like the sections dealing with concurrent delays and the contractual effect of variations issued after the contract completion date but before the date of practical completion.

The recovery of head office overheads is comprehensively dealt with in

the book and an interesting aspect is reference to and explanation of the Eichleay formula used in the USA.

Whether a book is read or not is often dependent upon the style in which it is written. Some books are heavy going from the first page. Reg Thomas's *Construction Contract Claims* is written with a light touch and is easy to read, understand and digest and I have no hesitation in recommending it to all involved in the construction process, whether building, civils or engineering services.

Roger Knowles
FRICS FCIArb, Barrister

Preface

There are a number of excellent text books on construction law, contracts and claims. The author has referred to *Hudson's Building and Engineering Contracts, tenth edition* for a number of early cases, and readers are advised to refer to this invaluable source for a better understanding of many issues discussed in this book. Publications by James R. Knowles listed in the bibliography have also been invaluable in the preparation of this book and are recommended for further reading. Knowles' publications and summaries of the cases cited in References may be purchased from Knowles Publications, Wardle House, King Street, Knutsford, Cheshire WA16 6PD. The contents of this book are intended to present to readers a general view of the practical problems which exist and how they might be avoided or resolved. The views expressed by the author represent several years' experience of looking backwards at projects which have gone wrong. In practice, many projects go well, are completed without major claims, and where they do occur, they are often settled promptly, professionally and amicably. Unfortunately, there is an increasing incidence of claims, most of which are brought about by financial pressures which stretch the resources of consultants, contractors and subcontractors alike. Many firms do not have sufficient allowances built into their fees, or into the contract price, to carry out their obligations properly. Some firms lack sufficient staff with the skills required to manage projects efficiently and to deal with claims in a professional manner. Insufficient attention to training staff, so that they can be better prepared to deal with claims, is another reason for many of the problems which exist in the industry. Whilst many claims are well presented and dealt with professionally by the recipient, some of these failures are evidenced in the presentation and quality of some claims submitted by large and small firms alike and in the response made by some architects, engineers and quantity surveyors.

The chapters which follow attempt to guide readers through the history of developments in law and contracts so that they may understand more fully the reasons for good contracts administration as a means of avoiding or minimising the effects of claims for delay and disruption.

Some of the arguments and methods of quantifying claims in this book should be regarded as possible means of persuasion according to the

circumstances and records which are available to support a claim. In some cases, a lack of records may not be fatal to a claim, but it may be an uphill battle to persuade the recipient of a claim to pay out large sums of money on the basis of hypothetical calculations which have no real foundation. Readers should be aware that there is no real substitute for good records when it comes to quantifying a claim for an extension of time or for additional payment. Nevertheless, if the contractor has been delayed at almost every turn, it must be right that he receives some relief and compensation so far as it can be established by applying commonsense according to the circumstances. As a consultant to contractors and subcontractors, a duty is owed to them to use every means available, providing that they are honest and justifiable, to obtain the best possible settlement of their claims. As a consultant to employers (or to contractors defending a claim from subcontractors), a duty is owed to them to defend all claims and to discredit any unmeritorious claims. Nevertheless, employers (and contractors as the case may be) will need to be advised on the possible worth of a claim in order to facilitate a decision as to settlement or arbitration or litigation.

Whilst some practitioners may seek refuge in cases in which claims have been rejected on the grounds that the records and/or the method of quantification were lacking, the author supports the view expressed in *Penvidic Contracting Co. Ltd v. International Nickel Co. of Canada Ltd* (1975) 53 DLR (3d) 748 (Quoting Davies J. in *Wood v. Grand Valley Railway Co*) – see *A Building Contract Casebook* by Dr Vincent Powell Smith and Michael Furmston at page 316.

‘It was clearly impossible under the fact of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me clearly laid down there by the learned Judges that such an impossibility cannot “relieve the wrongdoer of the necessity of paying damages for his breach of contract” and that on the other hand the tribunal to estimate them, whether jury or Judge, must under such circumstances do “the best it can” and its conclusion will not be set aside even if *‘the amount of the verdict is a matter of guess work.’* (emphasis added).

However, the above quotation should not be relied upon to cure all ills. The terms of the contract and other circumstances may require a more robust approach when defending any claim which is clearly deficient in the essential ingredients to justify anything less than total or partial rejection.

It is hoped that this book will provide useful guidance for those responsible for dealing with claims so that they can be resolved with the minimum cost and without any party being seriously disadvantaged.

Reginald W. Thomas
Spring 1992

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Thanks are also given to Professor Ivor H. Seeley and the publishers for their support and constructive advice on the preparation and production of all stages of this book.

Last, but not least, to my wife, Joan, for her tolerance and support during the long evenings and weekends that I have taken to write this book.