

# **Loss & Expense Claims in Practice**

**RICS MENEA Region  
Holiday Inn Express, Internet City,  
Dubai, UAE  
29<sup>th</sup> February 2012**

**Matt Molloy**

**MSc FRICS FCI Arb FCIOB MAE Barrister**

**Jonathan Cope**

**BSc(Hons) FRICS FCI Arb FCIOB MAE Barrister**



# Introduction

- The aims of this presentation are:
  - to give an overview of how parties to a construction contract can be compensated for delay and disruption
  - to review the recoverable heads of claim available
  - to review the requirements of proving entitlement

# Areas Covered

- Entitlement under the contract for loss and/or expense
- Entitlement to damages
- The difference between loss and/or expense and damages
- Recoverable heads of claim
- Proving entitlement
- Global Claims

# Entitlement under the contract for loss and/or expense (1)

- Firstly you need a clause/term in the contract that provides for loss and/or expense (“loss and/or expense clause”)
- A loss and/or expense clause will give a right to a party to be paid additional remuneration in the event that a specific event occurs.
- These can be split into:
  - Employer breach e.g. Delay by Employer
  - Employer risk events e.g. Ground conditions

# Entitlement under the contract for loss and/or expense (2)

- The clause may determine how compensation is to be calculated.
- The clause may exclude a claim for damages (an “exclusive remedy” clause).
- The clause may provide for notice provisions that if not complied with will prevent recovery (“condition precedent” clause)
- The purpose of loss and/or expense clause is to determine the circumstances in which and how a party is compensated for delay and disruption
- Not all contracts make clear what can be recovered and may refer to direct loss, loss and expense, additional cost
- If there is ambiguity use general principles of damages.

# Entitlement to damages (1)

- Firstly you need a term of the contract (either express or implied) that has been broken – most obvious example is implied term that an Employer will not hinder or prevent the Contractor from carrying out the work
- Secondly you need a breach of that term – i.e. a failure of one party to comply with the requirements of that term (its obligation)

# Entitlement to damages (2)

- Thirdly the breach must have caused losses of the type which were in the reasonable contemplation of the parties at the time they entered into the contract. Losses which arise naturally from the breach will inevitably be in the reasonable contemplation of the parties, but unusual losses will only be in their reasonable contemplation if the special circumstances which gave rise to the losses were known at the time the contract was entered into.
- *Hadley v Baxendale* (1854) 9 Ex 341
- Purpose of damages is to put the parties back in the position they would have been in if the contract had been performed.

# The difference between loss and/or expense and damages

- Will depend on the wording of the loss and /or expense clause in the contract
- May be no difference at all
- Alternatively, loss and/or expense clause may provide for a “formulaic “ or “contract rates” approach to calculating amount of remuneration – damages must be actual losses incurred or likely to be incurred and will need to be proved in terms of causation and quantum



# Recoverable heads of claim (1)

- Increased preliminaries – e.g. Water/electricity for the works, scaffolding, plant, small tools, site supervision, general attendant labour, telephone bills etc.
- Thickening and prolongation. Will generally be a direct loss i.e. 1<sup>st</sup> limb of *Hadley v Baxendale*.
- How to value prolongation costs?

# Recoverable heads of claim (2)

- Overheads – head office costs specifically proved – e.g. head office staff allocated to job, specific post/telephone calls – however majority of cases not specifically allocated so can only recover if it can be proved that prolongation prevented contractor from obtaining work elsewhere due to loss of turnover (formula acceptable if no better records available)
- Formulae: Hudson, Emden, Eichleay
- Generally a typical percentage contribution of every contract is applied to head office costs for the company as a whole which is then used to establish contractor's loss.

# Recoverable heads of claim (3)

- Loss of Profit – dependant on contractor establishing that if the project had not been delayed, the contractor could have used the turnover profitably.
- Employer potential loss of profit would normally be included in the contract as LADs
- Loss or productivity or uneconomic working – as a result of delay or disruption to contractor's regular progress – costs may include labour, plant or materials costs
- Measured mile and other techniques

# Recoverable heads of claim (4)

- Fluctuations
  - Increased costs of labour plant and materials resulting from inflation as a result of delay.
- Finance Charges
  - Loss of interest on borrowings or investment should be recoverable under 1<sup>st</sup> limb of *Hadley v Baxendale*.
  - Bank interest
  - Direct loss if it is on borrowings

# Recoverable heads of claim (5)

- Interest
  - Express term of contract
  - Implied term of contract
  - Judgment interest (Court/Arbitration)
  - As damages – i.e. only when in the reasonable contemplation of the parties – anomaly arises between recovery of interest as general damages and recovery of interest as special damages

# Proving entitlement (1)

- Loss and/or expense under the contract (not “formulaic” or “contract rates approach”)
  - Note – proof is established on balance of probabilities basis
  - Has event occurred/losses been incurred? (matter of fact)
  - Has event caused loss and/or expense claimed? (this will involve demonstrating linking event to loss and/or expense)
  - Would loss and/or expense claimed be incurred anyway as a result of contractor defaults? ( note concurrent delay may prevent recovery)

# Proving entitlement (2)

- Damages
  - Level of proof = balance of probabilities.
  - Has there been a breach of a term/have losses been incurred? (matter of fact)
  - Has breach caused damages (losses) claimed? (cause and effect linkage)
  - Would losses be incurred anyway as a result of contractor defaults? (e.g. concurrent delay)
  - Are the losses claimed deemed to be in the contemplation of the parties at the time the contract was entered into either by imputed or special knowledge

# Proving entitlement (3)

- Proving the loss and expense:
- Records, records, records.
  - Prolongation costs – completion date must have been delayed
  - Disruption - will need to compare actual costs incurred with those contemplated
  - loss of contribution to head office overheads – records or formula
  - loss of profit
  - Finance charges



# Notices as Conditions Precedent

- Where notice must be given before a claim will be valid
- Does failure to give notice bar a claim?
- Judicial support for condition precedents but only if clause expresses this in clear terms otherwise it will not be a condition precedent.
- Condition precedent may be waived in practice

# Summary

- Reimbursement for delay and disruption can be either as a result of the inclusion of a term/clause in the contract or by way of damages arising from a breach of a term
- The amount of loss and/or expense or damages may be the same
- Ordinarily you need to link causal event with financial effect (losses) (although global claims can succeed subject to certain criteria)
- Level of proof is on balance of probabilities

# Global Claims

1. What is a global claim?
2. What are the objections to global claims?
3. What are the requirements of a successful global claim?
4. How can a global claim be defeated?
5. What happens if a global claim is defeated?
6. How can a contractor avoid having to make a global claim?

# Global Claims

- *John Doyle Construction Limited v Laing Management (Scotland) Limited* [2004] BLR 295

# Q1: What is a global claim?

- A contractor must prove
  1. One or more events for which the employer is responsible
  2. Loss and expense suffered by the contractor
  3. A causal link between the event and loss and expense
- Global claim is a modification of this principle

# Q1: What is a global claim?

- Definition from *Hudson (11<sup>th</sup> edition)*
  - *“Global claims may be defined as those where a global or composite sum, however computed, is put forward as the measure of damages or of contractual compensation where there are two or more separate matters of claim or complaint, and where it is said to be impractical or impossible to provide a breakdown or sub-division of the sum between those matters.”*
- Justification for global claims
- “Total cost claim”
- “Composite claim” & “Rolled-up claim”

## Q2: What are the objections to global claims?

1. Offend generally accepted legal position and reverse the burden of proof
2. Ignore other explanations of causes of additional costs
3. Can result in a lump sum or remeasurement contract being converted into a cost reimbursable contract
4. Invariably avoid pleading the precise case to be met

# Q3: What are the requirements of a successful global claim?

- Requirement 1: Claim must be pleaded with sufficient particularity to enable the defendant to know the case against it
- Requirement 2: All other contractual requirements for a valid claim must have been complied with
  - Notice requirements
  - Particulars of the delay or loss



# Q3: What are the requirements of a successful global claim?

- Requirement 3: It must be impossible or impractical to separate the consequences of each of the events
  - What must contractor prove?
  - How complex must interaction between a group of events be for it to become impractical or impossible to identify causal links and apportion loss?
  - What evidence is required?

# Q3: What are the requirements of a successful global claim?

- Requirement 4: Any significant matters the employer is not responsible for must be eliminated
  - Pre *John Doyle*: Global claim would fail if employer could demonstrate that at least part of the loss had been caused by a “not merely trivial” event that was not its responsibility
  - Post *John Doyle*: Global claim will only fail if employer can demonstrate that at least part of the loss has been caused by a “significant” event that is not its responsibility
  - Dominant cause approach to causation

# Q3: What are the requirements of a successful global claim?

- Requirement 5: All parts of the claim where a causal link can be demonstrated must be pleaded separately
  - Why?
    - More chance of success
    - Different heads of claim may have different legal or contractual bases
    - Some matters may already have been agreed
  - How?
    - Variations – note all encompassing
    - Prolongation costs
    - Disruption costs – “measured mile”

# Q3: What are the requirements of a successful global claim?

- Requirement 6: There must be sufficient evidence to support the losses claimed

# Q4: How can a global claim be defeated?

- Defences
  - Employer demonstrates that it is not responsible for a “significant” cause of the delay or loss, and that this was the dominant cause
- Applications to strike out

# Q5: What happens if a global claim is defeated?

- *John Doyle:* A claim can still succeed
- *John Doyle:* Tribunal can apportion or find a causal link between an individual event and an individual loss
- Difficulties of apportionment
- *London Underground Limited v Citylink Telecommunications Limited [2007] EWHC 1749 (TCC)*

# Q6: How can a contractor avoid having to make a global claim?

- The importance of records
- The importance of records
- AND
- THE IMPORTANCE OF RECORDS.....

# The end

Further information at [www.mcms.co.uk](http://www.mcms.co.uk)

Thank you