

# Contract Claims



CONTRACTUAL  
INSIGHT

## Rights of claims

- Claims can be made under the contract and, in appropriate circumstances, at common law
- Not all claims under the contract give right to common law claims
- It is unlikely that most contracts exclude common law rights even when there is an express contractual remedy; e.g. late supply of information
- Common law claims avoid/are usually not empowered to deal with common law claims under the contract
- Payment provisions in the contract rarely apply to common law claims
- Recovery under common law claims will cover 'loss and expense'
- Injured party has a duty to mitigate its damages resulting from the breach



## Entitlement to damages

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Injured party in respect of a breach of contract should be entitled to damages as may fairly and reasonably be considered:

- either arising naturally, i.e. according to the usual course of things for 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

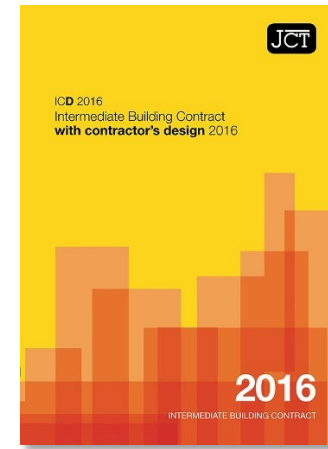


**Common law principle is to put the damaged person in the same position, as far as money can do, as if his rights were observed**

# Claims under standard forms

The basic differences between a claim in accordance with the Conditions of Contract and a common law damages claim:

- the Conditions of Contract usually indicate that the contract administrator (Project Manager) has power to deal with the Supplier's claim and certify sums due. Unless the contract specifically empowers the contract administrator to deal with common law damages claims, he has no power and it will be for the parties to deal with the claim
- the Conditions of Contract will usually require the Contractor to serve a written notice backed up by details
- claims under standard forms will often have a greater range of headings than common law claims. This follows partly from detail and partly from definition
- claims under standard forms are not necessarily restricted to recovery for breach of contract and frequently include matters relating to variations and changes in quantities



## Particulars of standard form claims

- To the Supplier, the particular benefits of standard form claims are:
  - the events giving rise to entitlement to extra cost, loss or expense are clarified
  - the procedures for notification, submission and evaluation are stated
  - an entitlement to interim payment on certification and a right to payment after certification as a debt due
- To the Purchaser there is the benefit that where the claims clauses give entitlement to extensions of time they keep alive the right to deduct liquidated damages if the Supplier fails to complete on time. Furthermore, the notice requirements should enable the Purchaser to be updated on his financial obligations as the Services/works proceed.



## Typical claim headings

- Direct costs - labour and materials
- Uneconomic use of plant
- Loss of productivity of labour
- Additional wastage of materials
- Cost of acceleration
- Increased costs - labour, plant and materials
- Extended overheads
- Profit on direct costs
- Loss of profit on reduced items
- Loss of profit on management resources
- Financing charges
- Interest on late payment
- Costs of preparing the claim



# Loss of profit and loss of opportunity

## Loss of Profit

- Often claimed in respect of loss of opportunity
- Also applied to reduced quantities (in re-measurement contracts) and omitted work
- Mistake in quantities
- Variations
- The Contractor not being allowed to carryout the contracted work

## Loss of Opportunity

- This is usually the legal basis for the recovery of head office overheads and profit in respect of prolongation
- Acceptable in common law claims subject to proof of opportunity and verification of overhead and profit levels
- Potential difficulties for Contractors in recessionary times



# Liquidated damages

- Represent an agreement between the Parties on damages payable by the Contractor for late completion
- The alternative would be unliquidated damages which needs to be proved as a loss
- Liquidated damages which are 'extravagant and unconscionable' will be a penalty and not enforceable
- Liquidated damages clauses are held to operate against the Contractor and must be strictly administered
- Consistency on liquidated damages must apply throughout the contract documents or they become void
- The fact that no losses are suffered does not invalidate liquidated damages
- Damages written as NIL do not allow unliquidated damages to be claimed
- Where a liquidated damages clause does fail unliquidated damages may be claimed





- Strict application of the rules of causation and the burden of proving loss create serious difficulties in contractual global claims
- Frequently the Contractor finds it difficult to identify how much of his losses are his own responsibility and how much should be charged to the contract
- Claiming on a global basis obviously alleviates these difficulties
- Global claims are admissible, but any pre-conditions applicable to claims have to be satisfied
- The Contractor must eliminate from the claim matters that are his responsibility
- The Contractor must show that the nature of the loss makes it impractical to determine it by any other method:
  - a delay resulting from various events whose consequences have a complex inter-reaction which renders specific relation between the event and time/money consequence impossible and impracticable



# Contract administrators

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- When deciding the payment due to a Contractor, the contract administrator should:
  - Act fairly
  - Be objective
  - Apply the contractual machinery of the contract properly
  - Show no favour to either party
- But, they rarely do...
- Contractors frequently are bullied into accepting a lower price than they are entitled to.
- When this happens, seek professional advise.



# Burden of proof

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- The legal burden of proving a claim lies with the applicant
- The legal burden of proving a defence that goes beyond a simple denial lies with the other party
- The burden of proof is removed from a party where:
  - there is a formal admission by either an express admission or a submission
  - there is a failure to rebut an allegation
- Required standard of proof is to ascertain on the balance of probabilities that the assertion made is true



## Primary purpose of records

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- Providing factual proof (evidence) to justify or refute contractual claims
- Primary records: information entered directly (diaries)
- Secondary records: summary of information contained in primary records (weekly, monthly reports)



## Common deficiencies in records

- Missing reports
- Insufficient information
- Insufficient detail
- Illegible handwriting
- Inconsistency of format
- Misleading information
- Inappropriate comments/matters



- 1. The importance of records**
- 2. The importance of records  
and**
- 3. The importance of records**



## Evidentiary weight

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- Contemporary – records made while events occur or shortly afterwards are more likely to be accurate than those recording events that occurred sometime in the past
- Neutrality – records documenting events both favourable and adverse to the party recording them are more likely to be factual than those which only record favourable events
- Formal and consistent process – records taken as part of a formal and regular business process will appear more reliable than those produced on an ad hoc basis
- First-hand – first-hand hearsay records (created from what the recorder sees or perceives directly) are more likely to be treated favourably than multiple hearsay records (created by the recorder based on the assertions of others)

