

# **DEFENDING CLAIMS**

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# Lack of notice

- **Often, construction contracts stipulate a time frame for notice of intent to lodge a claim, notice to claim submittals, and notice to disagreement or dissatisfaction to the engineer's decision.**
- **If the contractor fails to give a proper written notice of a claim, the employer may in turn assert this failure as a defence to the contractor's claim.**
- **Will the contractor's failure to serve timely notice necessarily lose his right to lodge a claim at a later stage?**

# Ill-defined claims

- **Comparatively weak claims are seen more as a basis for negotiation, and frequently recover either an adequate portion of the claimed extension of time, or an award of time without money.**
- **These claims are not fully fledged claims but statements of events, usually in a story-type or bullet form without showing the link between causes and effects.**
- **More that is claimed the more will be paid?**

# De-routed claims

- **A dispute settlement forum may investigate the issues only if the issues have been crystallized to a status of a dispute.**
- **Hence, a claim once rejected by the engineer might be reframed and resubmitted directly to an adjudicator, with the intention that it will be investigated in the mode of a dispute.**
- **Can the engineer defend direct reference to adjudication, because he was overtaken, on the basis that it is a fresh claim that was neither reviewed nor decided by the engineer?**

# No damages for delay

- **Enforcement of an exculpatory clause varies depending on the jurisdiction, but ‘no damage for delay’ clause is generally held to be valid and not contrary to public policy.**
- **Even though ‘no damages for delay’ clauses are enforced in some jurisdictions, they are at times disfavoured and strictly construed against those who seek their benefit on the basis that an exculpatory clause releases a party from liability for its own wrongful acts or omissions.**
- **In essence, an exculpatory clause converts an excusable/compensable impact into an excusable/non-compensable impact.**

# No contemporary records

- **The contractor is held liable to keep contemporary records either on site or at any other location acceptable to the engineer as may be necessary to substantiate any claim.**
- **The engineer may after receiving notice, monitor record keeping and instruct the contractor to keep further contemporary records, as the case may be.**
- **Claims fail whenever they are not properly vindicated with contemporary records.**

# No causal link

- **Among the weak claims are those submitted without showing the link between cause and effect, because there can be overlapping causes, such as variations to one part of the works issued at the same time that there are delays in providing drawings for the related part.**
- **The issues, without being attended to in time, might have been entangled in a global form so that a party might be precluded from being compensated, by virtue of the claim, lacks causation.**

# Losses were foreseeable

- **Foreseeability limits the liability of a party for the consequences of its acts to consequences that are within the scope of a foreseeable risk.**
- **Contractor's ability to reasonably foresee makes him non compensable.**
- **It essentially operates, and comes into being, when conditions encountered during the performance of the work differ from those which were envisaged at the time the parties entered into the contract.**

# Failed to mitigate

- **Against a claim is in part by introducing evidence that the contractor failed to mitigate the cost and/or time impacts.**
- **As long as the required amount of effort is made, the performing party will not be in breach of contract, even if the objective is never actually achieved.**
- **This may basically include technical measures such as re-sequencing of work, de-erecting, remobilising, accelerating etc as long as the effects of those measures are kept to a minimum.**
- **As it does not however contemplate the expenditure of a substantial amount of money, the term 'best effort' must be construed objectively.**

# Global format

- *Crosby v Portland UDC (1967)*

The contractor argued that it was not possible to separate out the delay associated with each item but entitled to the total effect of the delays. Acknowledging the fact that the extra cost claims may result in from an extremely complex set of facts, the courts found it difficult or even impossible to make an accurate apportionment between the several causes.

- *In John Doyle Construction Ltd v Laing Management (Scotland) Ltd (2004),*

A claim for direct loss and expense was made under the equivalent of clause 26 of the JCT Standard Form 1980. Considering the way in which the claim was submitted, it was held that it is impossible to demonstrate individual causal link between events for which the employer is responsible and the net resultant loss and expense.

# False claims

- **Overstating a claim, with the idea that it will settle for less, is a false claim approach actionable under civil lawsuit, i.e. a liability stems at the submission itself.**
- **Innocent or negligent mistakes are not false claims, especially if notified immediately when it became apparent in the first instance.**
- **Therefore, parties should ensure that claims are truthful, accurate, properly substantiated and free from false records.**

# LD is a penalty

- **A usual defence to a LD reduction is based on legal arguments. If liquidated damages are a penalty rather than a reasonable estimate of damages, then it may not be enforceable.**
- **Misconceptions;**
  - i. They can only be enforced where there is an offsetting bonus to the contractor in the event of early completion.**
  - ii. In the event the liquidated amount is unenforceable so that the contractor has no exposure.**
  - iii. To prove the reasonableness of a liquidated damage clause, the owner may compare the rate stated in the contract with its reasonably anticipated loss, based on the circumstances existing at the time the contract was entered into.**

# No loss argument

- **‘No loss’ argument is where the defendant exploits in legal proceedings that, while it may be in breach of its legal obligations to the claimant, the claimant has not suffered a loss following that breach.**
- **Consequently, the defendant argues that even if the claimant is successful in proving the breach, the claimant should only be entitled to nominal damages. If the defendant shows that the claimant has not suffered a loss or, perhaps more accurately, the claimant cannot prove, on the balance of probabilities, that it has suffered more than a nominal loss, then the defendant has operated the no loss defence.**

# Spoliation

- **If the owner insists that the particular works must be taken over by another, without offering a ‘opportunity’ to attend to defects identified in a site search, then it may well be strongly argued for the cost recovery for the whole of the works that are presumed to be free from defects, simply because it implies a unilateral pause without giving an opportunity to cure.**
- **Also, if the owner himself repairs the work before allowing the contractor to react the existing conditions, the owner risks spoliation sanctions. Therefore, spoliation can be an especially strong defence when a contractor is set aside wrongfully by preventing from undertaking contractual obligations before the owner hires a separate contractor or he himself attends to fix the same.**

# Betterment doctrine

- **When a person hires another to do work for him, and the contract is either not completed or is otherwise rendered un-performable, the person performing may sue for the value of the improvements made or the services rendered to the defendant.**
- **Courts generally hold that the damages awarded should place the plaintiff in the same position he would have been had the contract been performed, but plaintiff should not be awarded more than the benefit they would have received had the promisor properly performed the contract. This is betterment doctrine that exemplifies key issues such as whether an owner can recover for an improvement to or added value over, the products or services for which originally bargained, because another party breached the contract or is otherwise at fault for causing damages.**

# Temporary discomformity

- **Temporary discomformity as a defensive means operates where the defects so identified are said to be temporary only and would have been put right timeously.**
- **As in many other forms, under clause 7.5 of the FIDIC Red Book, the engineer may reject by giving notice to the contractor of any plant, materials and/or workmanship which is found to be defective or otherwise not in accordance with the contract.**
- **The contractor's obligation must then promptly make good the defects and ensure compliance to the specifications. This establishes the contractor's obligation to respond positively by complying with its obligation to make good the defects.**
- **When that preparedness is lacking, the owner needs to consider its position further specifically, the remedies available: termination; reduction in contract price; and having the work carried out by others at the contractor's expense (Red Book Clause 11.4).**
- **However, a difficulty arises when the contractor's work is clearly non-compliant but the owner has no belief that the contractor can or will remedy it.**

# Limitations imposed by law

- **Any limitation clause offers an ability to cap certain types of losses at an agreed ceiling limit. For example, the contractor's liability for loss of use, loss of profit or other consequential losses arising in respect of the contractor's liability may be limited to those specified in the contract.**
- **The theory underlying the waiver is that the owner's damages from loss of use may dwarf and bear no relationship to the amount of the contract sum, exposing the contractors to potentially ruinous liability out of all proportion to the magnitude of the contract.**
- **Consequential damages will only be available as compensation for a breach of contract if they were within the reasonable contemplation of both parties at the time they entered into the contract.**

# Full and final settlement

- **The law has recognized a general right to recover for the cumulative effect of a multitude of owner-directed changes that, when taken collectively, can be greater than the sum of the effects of the individual change orders.**
- **A cumulative impact claim is predicated on the basis of unforeseeable impacts due to changed work on unchanged work.**
- **According to this theory of recovery, the issuance of an unreasonable number (or unusual kind) of change orders creates a synergistic disruptive impact such that the total disruption caused by the changes exceeds the sum of the disruptive impacts caused by the individual change orders when looked at independently.**

**Thank you!**