

WEBINAR:

Principles and tips for successful loss and expenses claims

with Felicity Dynes of Atkin Chambers (UK)
and Scott Coulton of Nexus Consult (UK)

25 January 2024 | 11:00am UK (GMT)



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Principles and tips for successful loss and expense claims

Felicity Dynes

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Today's agenda

- What is a claim for loss and expense?
- Basis for entitlement
- Example of JCT
- Types of loss and expense
 - Prolongation costs
 - Disruption costs
 - Formula claims for HOO and P
- Global claims and total cost claims
- Key points to remember

What is a claim for loss and expense?

Claim for the additional costs directly incurred as a result of delay or disruption, or other impediment, prevention or default for which the employer is responsible.



What is the basis for entitlement to loss and expense?

- Claim for damages at common law
- More commonly, standard contracts provide express direct loss and expense provisions and codify the basis for and route to entitlement under the particular contract
- Causal link between event for which the employer is responsible, impact on the contractor and costs or loss incurred by the contractor

Loss and expense under JCT SBC w. Q

- Distinction between events giving rise to an entitlement to EOT (Relevant Events – listed in clause 2.29) and events giving rise to entitlement to loss and expense (Relevant Matters – listed in clause 4.22)
- Examples of Relevant Matters:
 - Variations
 - Certain types of Architect/Contract Administrator’s instructions
 - Antiquities
 - Where Approximate Quantity not reasonably accurate forecast
 - *“any impediment, prevention or default, whether by act or omission, by the Employer...except to the extent caused or contributed to by any default, whether by act or omission, of the Contractor...”*

Clause 4.20 JCT SBC w. Q

Matters materially affecting regular progress

- 4.20.1 If in the execution of this Contract the Contractor incurs or is likely to incur any **direct loss and/or expense** as a result of any deferment of giving possession of the site or part of it under clause 2.5 or **because regular progress of the Works or any part of them has been or is likely to be materially affected by any Relevant Matter**, he shall, subject to clause 4.20.2 and compliance with the provisions of clause 4.21 be entitled to reimbursement of that loss and/or expense.
- 4.20.2 No such entitlement arises where these Conditions provide that there shall be no addition to the Contract Sum or otherwise exclude the operation of this clause 4.20 or to the extent that the Contractor is reimbursed for such loss and/or expense under another provision of these Conditions.

Clause 4.21 JCT SBQ w. Q

Notification and ascertainment

- 4.21.1 The Contractor shall **notify** the Architect/Contract Administrator **as soon as the likely effect** of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from a deferment of possession **becomes (or should have become) reasonably apparent** to him.
- 4.21.2 **That notification shall be accompanied by or, as soon as reasonably practicable, followed by the Contractor's initial assessment of the loss and expense incurred and any further amounts likely to be incurred,** together with such information as is reasonably necessary to enable the Architect/Contract Administrator or Quantity Surveyor to ascertain the loss and/or expense incurred.

Clause 4.21 continued

- 4.21.3 The Contractor shall thereafter, in such form and manner as the Architect/Contract Administrator may reasonably require, **update that assessment and information at monthly intervals** until all information reasonably necessary to allow ascertainment of the total amount of such loss and expense has been supplied.
- 4.21.4 Within 28 days of receipt of the initial assessment and information and 14 days of each subsequent update of them the Architect/Contract Administrator or Quantity Surveyor shall notify the Contractor of the ascertained amount of the loss and/or expense incurred, each ascertainment being made by reference to the information supplied by the Contractor and in sufficient detail to enable the Contractor to identify differences between it and the Contractor's assessment.

Notification of claim

- Timing:
 - “as soon as the likely effect of a Relevant Matter on regular progress ...becomes (or should have become) reasonably apparent to him”
 - Intention is that claims are made (and updated) contemporaneously, rather than appearing only at the end of the project in a final account
- Content:
 - Identify that it is a notification under the relevant clause (4.21)
 - Identify the Relevant Matter and state effect on regular progress
 - Accompanied by (or followed by) Contractor’s assessment of loss and expense and supporting information to allow the Architect/Contract Administrator to ‘ascertain’ the loss and expense incurred
- Monthly updates of assessment to be provided

Types of loss and expense claimable

- *Prolongation costs*
 - *Costs of extended period completing the works, e.g. extended preliminaries costs*
- *Thickening costs*
 - *Extra resource required, e.g. additional labour for a certain period*
- *Disruption costs*
 - *E.g. costs incurred as a result of not being able to progress the works in the intended manner due to employer default such as costs of repeat visits, offhiring and rehiring plant etc.*
- *Claim for loss of profit and contribution to head office overheads*
 - *If head office resources are deployed and detained in dealing with employer delay and disruption and not compensated elsewhere, it may be possible to claim such costs (either specifically or by application of a formula)*

Formula claims for delay related head office overhead and profit

“a well established basis of claim whereby a contractor, which has suffered delay on compensable grounds seeks the losses which it has suffered as a result of not being able to take on other projects as a result of that delay and disruption, that loss being the loss of its opportunity to defray its head office overheads over those other projects and the loss of profit from those lost jobs”

Paragraph 540 of Akenhead J’s judgment in **Walter Lilly v Mackay** [2012] EWHC 1773 (TCC)

Paragraph 543 in *Walter Lilly*

- (a) A contractor can recover head office overheads and profit lost as a result of delay on a construction project caused by factors which entitle it to loss and expense.
- (b) It is necessary for the contractor to prove on a balance of probabilities that if the delay had not occurred it would have secured work or projects which would have produced a return (over and above costs) representing a profit and/or a contribution to head office overheads.
- (c) The use of a formula, such as Emden or Hudson, is a legitimate and indeed helpful way of ascertaining, on a balance of probabilities, what that return can be calculated to be.(d)
- (d) The "ascertainment" process ... does not mean that the Architect/Quantity Surveyor or indeed the ultimate dispute resolution tribunal must be certain (that is sure beyond reasonable doubt) that the overheads and profit have been lost. HHJ Lloyd QC [in *Alfred McAlpine v Property and Land Contractors* (1995) 76 BLR] was not saying that assessment could not be part of the ascertainment process. What one has to do is to be able to be confident that the loss or expense being allowed had actually been incurred as a result of the [employer compensable] delay or disruption causing factors.

Global claims and total cost claims

*“In principle, the loss or delay attributable to each cause relied upon by a contractor should be separately identified, particularised and proved. A global claim, however, is one that provides an **inadequate explanation of the causal nexus between the breaches of contract or relevant events/matters relied upon and the alleged loss and damage or delay that relief is claimed for.** A total cost claim is a form of global claim where the contractor has calculated has quantified its alleged entitlement to further payment by subtracting the expected cost of the works from the final actual costs.”*



- Keating on Construction Contracts, 11th Ed., para 9-064

Key points to remember

- Check the terms of the contract to identify matters for which a claim for payment of loss and expense can be made (in the absence of express loss and expense provisions consider a claim for damages)
- Check for amendments to any standard terms
- Ensure that the Contractor's representative is appropriately briefed at the outset to ensure that any notices are given promptly and in accordance with the terms of the contract
- Consider drafting a pro forma notice that can be easily adapted in the event of delays or disruption occurring
- Give timely and adequate notices for claims
- Keep contemporaneous records of effects of delay/disruption and of the ensuing costs of reacting to delay or disruption
- Provide updates to loss as and when required by the contract

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Thank you for listening!



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Scott Coulton
Director



Practical Tips for Successful Loss and Expense Claims

Agenda

- Introduction
- Preparing a Robust Claim
- Prolongation Costs
- Case Study
- Key Take Aways

Introduction - Nexus Consult

- Established: 2019
- Operating: UK and Dubai
- Work With: Subcontractors, Contractors, Employers and Law Firms
- Services: Quantity Surveying;
Construction Cost Claims; and
Quantum Expert Services

Introduction - Who Am I

- Scott Coulton
- 20 years experience
- Trainee QS to Director
- Work With: Subcontractors, Contractors and Employers.
- Instructed by Law Firms
- UK, Middle East and South Africa



Preparing a Robust Claim

A robust claim is underpinned by four pillars:

- **Cause:** Identify the event that gives rise to claim (what happened?).
- **Effect:** Explain the direct impact upon the works from the event (when did it happen? what was the impact?)
- **Entitlement:** Demonstrate that you have a contractual or legal entitlement to claim (have the procedural requirements been performed, timely? Is there a contractual entitlement to cost?).
- **Substantiation:** Prove what you say through reference to the contemporaneous records established during the concurrency of the project.

Focus on Prolongation Costs

- What are Prolongation Costs
- Typical Approaches
- Typical Heads of Claim
- How is Prolongation Assessed

What Are Prolongation Costs

- Delays cost Contractors (and Employers) money
- A prolonged duration means Contractors likely incur additional time-related costs
- Objective of a Prolongation Claim:

“The objective is to put the Contractor in the same financial position it would have been if the Employer Risk Event had not occurred.”

SCL Delay and Disruption Protocol, 2nd Edition (2017)

Typical Approach to Prolongation Claims

- The Contractor has established an entitlement to an EOT, therefore it must be entitled to prolongation costs.
- The Contractor's actual costs exceed its planned costs, this is due to the delay, therefore this is the amount of the prolongation costs.
- The Contractor's prolongation costs should be valued based on the Prelim rates in the Contract, and for the extended period between the contract Completion Date and the actual completion date.

Typical Prolongation Heads of Claims

- Site Management and Staff
- Other Preliminaries
- Contractors Subcontractors
- Head Office Overheads and Profit
- Site Welfare and Consumables
- Contractors Design Consultants
- Increase in Costs
- Interest and Finance Charges

Site Management and Staff, Site Welfare and Consumables

- Site Management and Staff
- Site Welfare & Consumables
- Plant & Equipment
- Temporary Services

Increase In Costs

- Work Carried Out Later Than Planned
- Increase Labour, Plant and Material Costs
- Effects of Inflation

Prolongation: Good Records

- Internal cost reports/ledgers detailing payments made
- Payroll records
- Site Diaries/Labour Allocation Sheets/Time sheets
- Labour, Sub-Contractor and Consultant Agreements
- Sub-Contractor/Supplier Claims and Responses
- Receipts and Invoices
- Relevant contemporaneous correspondences/minutes

Loss of Overhead and Profit

What are Overheads?

- *Off-site Overheads*
- *Cost of Administrative and Management Costs – over and above site costs.*
- *May include costs of: office, running costs, company cars, depreciation, expenses, staff costs, administration costs, legal and audit costs etc*

Loss of Overhead and Profit

Basis of Claim:

- *Where the Head Office has provided additional support during the prolonged period*
- *Loss of Overhead and Profit Contribution because the Contractor cannot reallocate its on-site resources to other works on which it could make an OHP contribution through other turnover.*

Loss of Overhead and Profit – Emden Formula

The Emden Formula produces a calculation using:

<u>Ref.</u>	<u>Description</u>
EM1.	Total annual HO overhead cost & profit (from audited a/cs)
EM2.	Total annual turnover of claimant (from audited a/cs)
EM3.	HO Overhead and Profit as % of turnover
EM4.	Original Contract Price
EM5.	Original contract period (in days)
EM6.	Period of delay (in days)
EM7.	Recoverable HO Overheads and Profit

Loss of Overhead and Profit - Success

To Succeed in its claim the Contractor must establish and evidence that:

- Establish that the Employer Delay caused a loss.
- It declined opportunities that would have secured and from which it would have recovered the claimed contribution.
- It experienced a drop in turnover
- There is no double recovery of OHP (i.e. OHP on increase of Contract Sum)
- Provide Good Records

Case Study – Emden's Claim for £500k

- Claim: Loss of Overhead and Profit Claim circa £500,000
- Basis: 2-page calculation
Walter Lilly v McKay 2012
- Opinion: £nil
- Decision: £nil

Stay in Touch

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- Email me at **scott.coulton@nexusconsult.co.uk**
- Visit us at **Alderley Park, Cheshire, SK10 4TG**



QUESTIONS



NEXT WEBINAR

15 February 2024 | 11:00 AM UK (GMT)

**Concurrent Delay – Where does the law stand after
Barnes v Blackburn Council?**

with Lynne McCafferty KC of 4 Pump Court (UK)

and

with Michael Mcilwrath, Founder and CEO of MDisputes
and Chair of ICC Governing Body for Dispute Resolution
Services (Italy)

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Thank You



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