Chapter 10

Preparation and substantiation of claims

10.1 Preparing a claim

10.1.1 Principles

It is recognised that there will be many occasions when a contractor is not adequately reimbursed by payment of the contract sum or by valuation of variations in the normal way. Variations for example, are often disruptive and they may give rise to prolongation of the contract period. As part of the overall scheme of payment, virtually all standard form contracts make provision for the contractor to recover money which it has either lost or expended as an essential part of carrying out the contract. All such provisions place conditions upon the right to recovery and they generally allow additional or alternative claims for damages for breach of contract at common law. So far as the contract machinery is concerned, the parties must take note of and observe the precise wording of the clause if the contractor is to be properly reimbursed.

In essence the contractor must show not only that it suffered loss or expense due to certain proven events but also that the events are such as to entitle the contractor to be recompensed. This can often be a tricky task. It is common for contractors to simply take the difference between the contract date for completion and the date of practical completion of the Works and to base detailed calculations of loss upon that period without ever trying to prove that the reason for the delay was one of the grounds listed in the loss and/or expense clause. At the other extreme, some contractors wrongly assume that an extension of time is a pre-requisite to claiming financial reimbursement. Yet again, a contractor may spend many pages of the claim document showing that certain things happened which caused substantial delays and other problems, but fail to bring them within the list of grounds in the loss and/or expense clause. Claims for disruption are particularly difficult and, for that reason, they are often either ignored or treated in casual fashion almost as though the contractor is acknowledging that it is unlikely such a claim will succeed. What is certain is that a claim submitted by a contractor in a half-hearted fashion will not succeed. It is probably in regard to claims for disruption that the detailed interrogation of computer-generated programmes is most useful.

Building Contract Claims, Fifth Edition. David Chappell.

10.1.2 The architect's and quantity surveyor's requests

Many architects, quantity surveyors and contractors are uncertain about the way in which to approach the reimbursement of loss and/or expense. If the contractor does not submit adequate supporting information when it makes its application for reimbursement, it is helpful if the architect and in turn the quantity surveyor, if so instructed by the architect, in exercising their powers to request information also take the opportunity to correct any inconsistencies or errors in the contractor's approach. Information should be requested as precisely as circumstances allow.

On no account should the contractor simply be requested to provide 'more information' or 'better proof'. It leaves the contractor unclear as to the kind of information which will satisfy the architect or quantity surveyor. It also gives an unscrupulous contractor the opportunity to submit less information than necessary on the basis that the contractor thinks that is sufficient and it has received no clear indication to the contrary. It is so easy for a contractor, on being requested to supply more information to substantial a claim, to say that in the contractor's opinion the information already provided does substantiate the claim. Then, unless the architect or quantity surveyor is prepared to specify exactly what is required, there is a stand-off. Better for all concerned if the required information is clearly stated at the outset. The following list, which is not exhaustive, includes some of the points which might be raised with the contractor:

- The architect's and the quantity surveyor's powers are limited by the terms of the contract.
- The contractor must strictly comply with the contract machinery.
- Loss and/or expense does not follow automatically from an extension of time.
- A written application should have been made as soon as it has become, or should reasonably have become, apparent that the regular progress of the Works has been or is likely to be affected.
- Each cause should be linked to its effect.
- Amounts claimed should be linked to the relevant matters in the contract.
- Substantiation in the form of invoices, labour returns, pay slips, detailed schedules of plant and equipment, etc. is required of amounts to which the contractor thinks it is due.
- Where prolongation is involved, the actual dates of the events causing the prolongation are required and the sums claimed must relate to those dates not to the period of prolongation at the end of the contract period.
- Only actual costs are acceptable. Notional, provisional or formulaic amounts are not acceptable unless there is a very good reason why actual costs are unavailable.

10.1.3 Setting out the claim

It is quite impossible to set out a detailed sample claim which a contractor can complete by simply filling in the blanks and which is suitable for every occasion. The

reason is that every claim is different and the way it is set out must reflect that difference. However, it is possible to highlight some important issues and an outline claim is shown in Section 10.1.4 below. The key points are as follows:

- The contractor must set out the facts which it alleges gives rise to its entitlement to reimbursement and provide any necessary evidence of the facts.
- It must reference the particular contract term which gives the entitlement and set out the financial basis of its claim together with substantiating material.
- Importantly, the contractor must satisfy any conditions precedent to its claim such as the timely submission of an application and the provision of any further details of the loss and/or expense incurred for the purpose of deciding the validity in principle of the claim and to enable the architect or quantity surveyor to carry out the ascertainment.

Although standard form contracts do not expressly require the contractor to submit a comprehensive claim document, setting out in detail and with evidence what the contractor considers to be its entitlement, most contractors do adopt this approach or at least they attempt to do so. The sound reason is that a properly set out claim which is correctly argued and supported by irrefutable evidence is the best way for the contractor to recover the amounts being claimed. It should always be drafted on the assumption that the reader knows nothing about the project. The document will require little alteration to become the key part of a claim document in any subsequent dispute resolution proceedings. If a contractor confines itself simply to providing exactly what is required in the particular contract, it may be all too easy for the architect and quantity surveyor to find gaps in information and issue request after request for clarification. That is not to suggest that all architects and quantity surveyors deliberately adopt a defensive stance, but there is no doubt that many do so. The position is not helped by the fact that some of the grounds for loss and/or expense in standard form contracts may leave the architect open to claims from the employer at a later date.

It may be useful to consider what a contractor is required to do if claiming loss and/or expense for a variation under SBC clause 4.23. Where there is a claim for direct loss and/or expense arising under the relevant matter in clause 4.24.1 in respect of a variation, in order to succeed the contractor must establish the following:

- An instruction amounting to a variation has been properly issued and carried out by the contractor or that some other matter has occurred or some other instruction has been issued which under the terms of the contract is to be treated as a variation.
- The variation is not one for which loss and/or expense has been included in a confirmed acceptance of a variation quotation under the provisions of schedule 2.
- The date of issue and receipt of the variation instruction or of any other instruction which is to be treated as a variation or the date of the occurrence of the matter which is to be so treated. This is an important point because the length of notice of the variation which the contractor is given will have a bearing upon the contractor's ability to reasonably programme it into the Works. There is an obvious and considerable difference between a variation of which the contractor has two

months' notice and one where the architect expects it to be executed immediately. There is nothing in the terms of most standard form contracts which require the contractor to put more operatives on the site in order to carry out an instruction without delaying the progress of the Works. It is unlikely that the obligation to use best endeavours extends to that extent.

- The subject matter of the variation instruction or deemed variation.
- When it was necessary to carry out the work contained in the variation. The key word is 'necessary', because the contractor must be able to show that it did not unnecessarily carry out the variation at a time which caused it to incur more than the amount of any direct loss and/or expense which would otherwise be reasonable. With plenty of notice, the contractor ought to be able to execute the variation at minimum overall cost, because it can pick the most suitable time. If the contractor was obliged, perhaps by the timing of the instruction, to carry out the work at an inconvenient time, the amount of loss and/or expense might be increased and the contractor should give details.
- The carrying out of the variation has directly affected regular progress of the Works. The contractor must establish that the effect upon regular progress was a direct result of the instruction and not the consequence of some intervening event.
- The affect has been more than trivial. SBC provides in clause 4.23 that the regular progress must be 'materially' affected. In other words, substantially and not trivially.
- The way in which, and the extent to which, the work was affected as a direct result of the carrying out of the variation. It is obviously essential to show how and to what extent regular progress was affected by the variation. This is at the very heart of the claim.
- The date on which the contractor made a proper and timely written application to the architect in respect of the direct loss and/or expense being claimed is of great importance, because for sound practical as well as legal reasons, which have been set out elsewhere, the contractor's entitlement to reimbursement under the contract provisions depends upon the administrative machinery of the contract having been satisfied.

Appropriate evidence must be provided to substantiate all the above points and it is clearly in the contractor's interests to provide it, whether requested or not and, as previously indicated, a fully calculated document (backed up by supporting evidence) is desirable. The points may all seem straightforward, but the contractor in *M Harrison & Co (Leeds) Ltd v Leeds City Council*,[1] had problems establishing even the apparently simple fact that a variation instruction had been issued. The architect had issued a piece of paper which was headed 'Variation Order No. 1' and the paper contained what to most people would seem to be an instruction. It said that the contractor was authorised to execute work involving a variation to the contract, by omitting a PC sum and instructing the contractor to place an order with a firm for the supply and erection of structural steelwork. Notwithstanding what appeared to be extremely clear words, the court held that it did not amount to a variation under clause 11 of JCT 63 (now SBC clause 5.1) because the definition of variation in that

[1] (1980) 14 BLR 118.

clause was held to be narrow. The court held that, on the facts of the case, it necessitated the suspension of work and, therefore, it amounted to a postponement instruction, not a variation.

Although no particular form is prescribed for a claim (because building contracts do not require a fully detailed claim to be submitted) it is clearly prudent to prepare every claim with the possibility of eventual adjudication, arbitration or litigation in mind. It is therefore good practice to set out the claim in such a form that it can readily be used for the purpose of formal proceedings. Not only will that save time if the matter does eventually come before a tribunal, but the discipline involved in preparing formal claim documents for legal proceedings (formerly and sometimes still referred to as 'pleadings') is aimed at clarifying the basis and logic of the claim together with its supporting evidence.

10.1.4 Outline of a claim document

The following outline is offered with some hesitation to illustrate some of the important, but fairly humdrum matters, which must be addressed in any claim. It assumes that the claim is being made under SBC clause 4.23 for loss and/or expense.

- Table of contents (most important. it should contain page numbers. That seems obvious, but page numbers are often omitted).
- The main facts, e.g.:
  - project title
  - address
  - employer
  - architect
  - quantity surveyor, etc.
  - contract documents including name and edition of contract and any special amendments
  - brief description of work
  - any contractor's designed portion
  - amount of the contract sum
  - date of possession
  - date for completion
  - etc.
- General introduction (not a detailed narrative – see below under Section 10.2.2)
- Unless it is a global claim (check Chapter 9) each relevant matter under clause 4.24 must be dealt with separately. Set out:
  - description of occurrence (refer to evidence)
  - date, time and place of occurrence (refer to evidence)
  - the relevant matter by clause number
  - the effect of the occurrence (refer to evidence) and any relevant facts such as ordering or sub-contract arrangements, requests for information, etc. (refer to evidence)
  - the delaying effect on the activity immediately affected (ignoring knock-on effects to activities leading to the completion date) (refer to evidence).

- Indicate what mitigating action has been taken in respect of each occurrence (refer to evidence).
- If this is a claim for the costs of prolongation, the cumulative effects of all the relevant matters on the completion date must be explained. (If few delays are involved on a simple contract, it may be easy to do this by reference to the contractor's programme and by explaining the way in which the relevant matters affect the completion date. If there are many delays or if the project is complex, the delay to the completion date may be best demonstrated by use of computer analysis of delays).
- Set out the financial heads of claim relating to the period of prolongation such as:
  - on-site establishment costs (refer to evidence)
  - head-office overheads (refer to evidence)
  - loss of profit (refer to evidence)
  - inefficient/increased use of labour/plant (refer to evidence)
  - plant (refer to evidence)
  - increased costs (refer to evidence)
  - winter working (refer to evidence)
  - foreshortened programme (refer to evidence).
- If this is a claim for the costs of disruption, identify the additional costs associated with the occurrence, for example:
  - extra scaffolding, crane or other plant (refer to evidence)
  - additional labour hours (refer to evidence)
  - out-of-sequence working (refer to evidence)
  - compare periods of undisrupted and disrupted working (refer to evidence)
  - etc.
- Indicate that a claim is being made for interest and financing charges.
- Create a collection sheet showing the individual amounts and the total amount being claimed.

10.2 Types of evidence required to support a claim

10.2.1 Introduction

Just because the contractor is quite unable to provide substantiation will not necessarily deprive it of the right to some reimbursement for loss and expense and some estimate must be made.[2] In practice, however, without proper evidence it is likely to receive substantially less than it might think is its due.

Many claims submitted by contractors lack adequate supporting evidence. What is insufficiently understood is that the contractor is making the claim and it is, therefore, a matter for the contractor to prove that the claim is valid. A claimant must proceed on the basis that everything which is said must be authenticated unless is self-evidently correct. The contractor need not prove what are referred as 'notorious' facts. That is, facts which are common knowledge and which it would be absurd to

[2] *Chaplin v Hicks* [1911] 2 KB 786.

prove. However, it is always better to provide proof of everything than to omit to prove something which is important. The old adage 'he who asserts must prove' is very relevant. Some claims consist merely of broad and sweeping assertions of disruption and loss without any hard attempt at proof. Too often, a contractor will simply refer to events which occurred during the progress of the Works and then submit a stack of contemporary correspondence. Although, most standard form contracts do not require the contractor to make a detailed claim as if it was a submission in arbitration, neither do they require the architect to put together the contractor's claim. In any event, despite what the contract may require, the prudent contractor will take pains to put together a convincing claim rather than expecting the architect to piece it together from an unexplained pile of papers.

A contractor who is to provide substantiating evidence must have adequate records. The contractor's obligation is to provide the architect and the quantity surveyor, if instructed, with all the information necessary for them to validate and ascertain the direct loss and/or expense. The information needed will obviously vary according to the project and the claim, but might well include cost records, labour returns, time sheets, salary records, delivery notes and receipts, computer-generated programmes showing actual progress compared with the original programme for the Works, proof of the intended head-office overheads and profit, probably profit and loss accounts and balance sheets, and sometimes a report from a potential expert witness. These requirements place a heavy burden upon the contractor, but unless considerable evidence and detail of this kind is provided it will be difficult for architect and quantity surveyor to properly carry out their duties to form an opinion and to ascertain the amount due. That is a practical consideration as well as a contractual requirement. The point received comment in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*,[3] when the court was dealing with the kind of evidence necessary to substantiate a claim for head-office overheads and loss of profit. The court made the point that not only was the evidence of the contractor's auditor as to profitability relevant, but also

> 'some evidence as to what the site organisation consisted of, what part of the head-office staff is being referred to, and what they were doing at the material times . . . '.[4]

The court suggested in connection with a claim for loss of profit that it would be useful to have an analysis of the contractor's yearly turnover for a period of some seven years in order to establish the level of profitability and the effect of the particular contract disruption and overrun upon it. It is of course very much in the interest of the contractor to keep detailed records of all cost factors related to individual contracts and to be ready to abstract them if necessary for the purpose of substantiating any contract claim.

Contractors sometimes use averages or generalisations or even figures plucked out of the air (typically percentages for lack of productivity). It is the *actual* loss and/or *actual* expense which is required and not figures taken from the bills of quantities or from government or other indices.

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[3] (1970) 1 BLR 114.

[4] (1970) 1 BLR 114 at 122 per Salmon LJ.

The evidence required to substantiate a claim will obviously depend on what is being claimed and the type of claim, but in almost every case detailed cost records and relevant programmes will be necessary, together with references to relevant correspondence, records of site meetings and site diaries. The phrase 'contemporary records' was considered in a Falkland Islands case[5] which was concerned with the FIDIC Conditions of Contract 4th edition which contained a clause (53) requiring contemporary records to be produced. The court concluded that it meant original or primary documents or copies of them. Importantly, they should have been prepared at or about the time the claim arose. The court considered that it would be perverse to allow a contractor who failed to comply with the terms of the contract to introduce non-contemporary records including witness statements to support a claim. However, a witness statement may be used to clarify contemporary records. The courts analysis is generally applicable to all contractual claim situations.

In putting together a claim, the contractor or its advisers often paraphrase parts of such correspondence, site meetings, etc., the better to make their point. Naturally, the best possible gloss is put on such evidence. However, it is essential that such paraphrasing is done with complete accuracy. The recipient of the claim will certainly refer to the original documents and, if it is found that the paraphrasing represents what the contractor wishes was in the documents rather than what is actually there, the whole basis of the claim is compromised. Unfortunately, this scenario is fairly common to a greater or lesser degree in many claims. Substantial misrepresentations of evidence of this kind came to light in a recent adjudication, in which the contractor was claiming nearly £1,000,000. The result was disastrous for the contractor who recovered nothing.

10.2.2 The narrative

At one time every claim used to start with a 'narrative' telling the story of the claim – a piece of writing of dubious value, because it tended to be loosely assembled and worded and poorly substantiated. It is still encountered from time to time. It attempts to compensate for lack of hard evidence by the use of emotive language and wild accusations many times repeated on the basis, presumably, that if something is said often enough, it will eventually be believed. Such text cannot stand up to rigorous examination and it may give entirely the wrong impression that the contractor has no real grounds for its claim. A characteristic of this kind of claim is that much energy is expended on proving that the contractor has had various kinds of difficulties resulting in the loss of substantial sums of money, for example by having to work out of sequence or by having to carry out the same work several times. Notably missing from this approach is any proof that the initial cause lies with the employer or that the contract provides the opportunity to recover the losses. A phrase which is often used to sum up the effects of a serious of events is:

'The work was becoming increasingly complex'

[5] *Attorney General for the Falkland Islands v Gordon Forbes (Falklands) Construction Ltd* (2003) 19 Const LJ T149.

That kind of vague statement invites the following questions which immediately reveal the inadequacies of the statement:

- How complex was the work originally?
- How do you measure complexity?
- At what rate did the complexity increase?
- How complex was it when it had stopped increasing?

to say nothing of such questions as:

- What made it more complex?
- Whose responsibility was that?

Another phrase in common use, but of no assistance whatever to a contractor is: 'Factors outside our control'. Unless the contract expressly states that factors outside the contractor's control will entitle it to claim loss and/or expense, the use of the expression is not helpful. Many things are outside the contractor's control and most of them have to be taken on board as risk items when pricing a tender.

Many contractors seem to approach contract claims in this way and many a potentially valid claim comes to nothing, because it lacks proper substantiating evidence and the contractor is unable to establish a direct link between cause and effect and provide sufficient relevant particulars of the resulting loss and/or expense.

Regrettably, narratives are still employed in order to achieve, by emotive means, what really needs detailed evidential substantiation. If a narrative is used at all, it should be concise and merely for the purpose of setting the scene or perhaps to explain more clearly something which has already been sufficiently evidenced. In such an instance, the narrative is merely assisting the recipient in understanding what the contractor is asserting.

The putting together of a claim requires all the discipline of legal argument or a piece of scholarly research, analytical in nature, leaving nothing out, taking nothing for granted and citing appropriate authority or evidence for every statement.

10.2.3 Cost records

Cost records are the building blocks of the contractor's claim, certainly the financial part. Without adequate records, the contractor will have tremendous difficulties to overcome. Although the advent of computers and the ability to scan material onto an electronic filing system makes the task of sorting information much easier than before, most contractors will have files of material in paper form which must be made available. Items such as signed daywork sheets or delivery notes are included in this category. It will still remain the fact that the adequacy and accuracy of cost records will in great measure depend upon the keeping of detailed time-sheets by operatives and particularly by site supervisory staff.

There are still many small to medium-sized contractors who do not make adequate use of the power of the computer and some, sadly, who are incapable of carrying out competent filing. Such contractors face an uphill struggle when making a claim and probably find that it costs them as much to make a satisfactory and successful claim as the claim is worth. This kind of contractor will often submit a substantial

document composed mainly of copy letters and site meeting minutes and hope to force some kind of reasonable offer. This approach rarely succeeds or at least rarely succeeds to the point of making it worthwhile.

However, an effective contractor with records mostly on computer should not find the calculation of its financial entitlement too traumatic. The idea is that the records should be capable of isolating the precise cost effects of particular events. This is a counsel of perfection, which rarely happens in practice. Despite the impossibility of assembling perfect records, it is important that all time-sheets for site operatives and other forms to be completed in connection with the Works are carefully designed so that they are in a form which enables relevant information to support a particular claim to be readily abstracted. For example, the relevant forms should be structured so that it is easy for operatives to keep work done in connection with a variation entirely separate from the rest of the Works covered by the contract. This also applies to the execution of work which is not itself varied, but nevertheless affected, by the introduction of the variation. Records of plant time and other resources must be similarly apportioned for ready extraction. Records of materials and goods should not present any particular problems. The essential point to be borne in mind is that the cost records relied upon to support a claim must be clearly referable to the particular prolongation or disruption.

10.2.4 Programmes and similar documents

The usefulness of a construction programme in substantiating a time or monetary claim depends on the way in which the programme was prepared. If the contractor has employed a professional programmer to prepare the initial programme, not when a claim is envisaged but at the beginning of the work, it will considerably add to the authority of the programme. The more detail which can be incorporated: the better. Details of plant and labour resources are always helpful. Essentially, the contractor's original programme, the 'master programme' referred to in SBC clause 2.9.1.2 should be a network containing all the logic links, showing the critical path and be provided to the architect on a computer disc.[6] It is this programme which should be the basis of any consideration of progress. Although under most standard forms, the contractor's programme is not a contract document, it does clearly indicate the contractor's intentions. These intentions are important, because it is established that the contractor is entitled to plan and perform the work as he pleases, provided that it is finished by the completion date in the contract. In *Wells v Army and Navy Co-operative Society* it was said:

> 'The plaintiffs were entitled to do the work in what order they pleased.'[7]

Many contractors still supply only a Gantt or bar chart without any indication that it is substantiated by a full network. That is a mistake. Gantt charts are very useful as the base on which to plot actual as against proposed progress, but they give no

[6] *John Barker Construction Ltd v London Portman Hotels Ltd* (1996) 50 Con LR 43.
[7] *Hudson's Building Contracts* (1902) 4th edition 346 at 352 per Wright J quoted with approval by Staughton J in *Greater London Council v Cleveland Bridge & Engineering Co Ltd* (1984) 8 Con LR 30.

indication of the effects of delays on succeeding activities. After any extension of time, SBC clause 2.9.2 requires the contractor to provide the architect with two copies of any amendments and revisions to the master programme to take account of that decision. It is essential that such amendments are done on the network before generating the new Gantt chart. The contractor's programme is unlikely alone to be sufficient to substantiate a claim without more evidence. Nevertheless, subject to the reservations expressed in Chapter 8, Section 8.2, it is powerful persuasive evidence that the contract has turned out to be entirely different to what the contractor planned.

The architect can make life very much simpler for all concerned if the master programme to be provided under SBC clause 2.9.1.2 is required by the preliminaries to the contract bills to be in network form, fully resourced and indicating the logic links. Although other contracts do not expressly require that a programme be provided, there is nothing to prevent the architect inserting a requirement for a construction programme into the preliminaries part of the specification of any contract. It should state full details of the information required to be shown on the programme. If all architects requested this kind of information and if all contractors submitted such programmes without being asked, the process of analysing delays and their effect on the completion date would be easier and to the benefit of both architect and contractor. The architect should make full use of every modern aid in dealing with claims and an architect has been criticised for failing in this respect:

> '[The architect] did not carry out a logical analysis in a methodical way of the impact which the relevant matters had or were likely to have on the plaintiffs' planned programme.
>
> He made an impressionistic, rather than a calculated, assessment of the time which he thought was reasonable for the various items individually and overall'.

The judge continued:

> 'I recognise that the assessment of a fair and reasonable extension involves the exercise of judgment, but that judgment must be fairly and accurately based.'[8]

10.2.5 Correspondence and similar documents

Copies of any letters, e-mails, memoranda, etc. relevant to the claim should be attached to the claim, together with copies of the relevant applications, etc. required by the terms of the contract. In passing, it is worth noting that many architects, contractors and others conduct virtually the whole of their business by e-mail. When putting the claim documents together, the task of locating relevant e-mails on several PCs and laptops is formidable and can greatly increase the cost of assembling the evidence to support a claim. To avoid this, all significant e-mails should be printed out as they are sent and filed in the normal way. That may not be seen as environmentally friendly, but there is no realistic alternative.

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[8] *John Barker Construction Ltd v London Portman Hotels Ltd* (1996) 50 Con LR 43 at 67 per Mr Recorder Toulson.

Particular paragraphs in the correspondence can be referenced by numbers and referred to in the claim document and cross-referenced to cost records, progress schedules and so on. However, it should be noted that the inclusion of large amounts of copy correspondence is no substitute for careful linking of cause and effect. Letters must be read with care and always in the context of other letters and documents. They may have been written especially to support a future claim. They may not mean what they appear to mean at first sight. Moreover, correspondence may be supportive or it may tend to discredit the claim. There is always some correspondence which is less than supportive of the claim. Careful thought must be given to the best way of dealing with such correspondence. It is fatal for the contractor simply to ignore it, because inevitably the architect will have a copy on file and will raise awkward questions.

10.2.6 Records of site meetings

Notes, records or so-called 'minutes' of site meetings may provide useful supporting evidence. Usually, such records are prepared by one party without reference to the other. On that basis, their value may be no more than the internal notes of a meeting taken by one of the participants. However, as they are usually produced by the architect or other contract administrator, they can be very helpful if they support a contractor's case, because the author of the records will have difficulty refuting his or her own statements. Usually, the records will be taken as a good record of what transpired at the meeting, because on receipt of their copies, all parties will check it carefully and challenge any alleged inaccuracies, ambiguities or misrepresentations at that time and ensure that the relevant corrections are recorded both in correspondence and in the record of the next meeting. If such inaccuracies are not challenged contemporaneously, with the passage of time it will become increasingly difficult (though not impossible) to establish that they are not an accurate record of what actually happened. Such records form the mainstay of many claims, because matters are recorded there which are not referred to elsewhere. Moreover, they usually contain very useful progress reports. A contractor who is recorded as regularly reporting a project as being on time may find it difficult to argue later that it was in delay, when seeking an extension of time. Minutes that are not recorded as agreed in later minutes have a reduced value, somewhat similar to personal notes.

10.2.7 Site and other diaries

Diaries are useful, but often the diaries kept by the contractor and the clerk of works will differ in what they say about the same events. One such situation was considered by the court in *Oldschool v Gleeson (Construction) Ltd*, where the conflict was between the diaries kept by a consulting engineer and the site agent. The judge said:

> 'I found [the agent's] diary entries unsatisfactory, in the sense that they do not record warnings and complaints when, as I believe, these were given. I cannot believe that the district surveyor could have written in these terms on 21 March if [his assistant] had not in fact given the same warning, and yet not a hint of it appears in [the agent's] diary; which, together with other instances, leads me to

> think that he was not anxious to record criticisms or complaints when they were made, and where such appear in [the engineer's] diary and not in the diary of [the agent], I am bound to say that I have no hesitation in accepting [the engineer's] contemporaneous record as being the accurate one.'[9]

Diaries can be very helpful if one of the parties is trying to prove that the architect was or was not on site at a particular time on a certain day. If it can be shown that the site agent's diary regularly and as a matter of course noted down when the architect was on site, the fact that there is no note of the architect on a particular day will tend to substantiate an allegation that the architect was not on site. It is less likely that the site agent has simply forgotten to log the architect in the diary if the contractor can show a pattern of entries on past occasions. Usually an entry showing that someone was on site on a particular day is unlikely to be deliberately entered incorrectly at the time, because there is always the danger that the particular person can prove beyond doubt that he or she was elsewhere.

The evidence of the diary may be quite crucial if there is no other evidence and it may be tempting for a party to manufacture certain diary entries only when a claim is contemplated. Sometimes attempts are made to erase an inconvenient entry. Forensic science is very sophisticated and, depending on the value of the alleged claim, diary entries are sometimes subjected to forensic analysis. It is possible to identify later additions, erasures and changes without too much difficulty. It hardly needs to be said that the submission of what amounts to a fraudulent diary, as part of what otherwise would be a set of convincing evidence, can fatally damage a contractor's chances of recovery of the amount claimed.

10.2.8 Labour returns

Labour returns or time sheets are invaluable as a record of the amount of labour and other resources used on a project. This is particularly the case where a claim for disruption costs is being made. Many contractors are in the habit of providing such sheets to the architect or the quantity surveyor on a regular basis and sometimes the preliminaries section of the contract bills or specification requires such sheets to be provided by the contractor every week. Obviously, if they are to have value, they must be accurate. A file full of labour returns provided by the contractor with the claim and each one bearing the same handwriting and with every indication that they were all written at the same time (long after the event) is not likely to assist a claim. However, a contractor that regularly and contemporaneously submits sheets without adverse comment ought to be in a strong position if wanting to rely on those sheets to back up a subsequent claim.

10.3 'Scott schedules'

A Scott schedule is a document which is often used in litigation or arbitration and to a lesser extent in adjudication. Where it is necessary for the judge or arbitrator to

[9] (1976) 4 BLR 103 at 117 per Sir William Stabb J.

decide a large number of issues, such as where an arbitrator is being asked to decide the value of the final account, it sets out the issues in dispute in the form of a table. There is no particular format prescribed, but the object is to present the issues in dispute as clearly and concisely as possible. The Scott schedule was invented by Mr G A Scott QC almost 100 years ago.

It has become common practice for any schedule listing a series of issues in dispute to be referred to as a Scott schedule. That is to use the term wrongly. The key thing about a Scott schedule is that, not only are all the issues listed but that columns are provided to allow the parties to state their summarised cases. It is good practice to agree the headings for the various columns at an early hearing before the judge or at the preliminary meeting before the arbitrator. For example, if the dispute is about the final account, it might be agreed that the Scott schedule will list all the items in the final account and the first column will list what the claimant thinks the items are worth, while the third column will brief state the reasons in each instance. The fourth and fifth columns will contain the same type of information, but this time what the respondent thinks each item is worth and the respondent's reasons. The final columns might be left for the arbitrator, judge or adjudicator to fill in with the amounts as decided with reasons if appropriate. It is usual for some of the issues to be resolved at this stage, as the parties realise that in many cases there is little or nothing between them, leaving just the key items and thus simplifying and shortening the dispute resolution process.

Obviously, the main part of any claim and the response to that claim in an arbitration or litigation environment will be set out in considerable detail with proper supporting evidence. The purpose of the Scott schedule is merely to summarise the position. The way in which the parties to a dispute should approach the completion of a Scott schedule was considered by the Court of Appeal in *Petromac Inc v Petroleo Brasileiro SA (Petrobas) and Another*.[10] The Court was considering some preliminary issues and the question arose regarding the particulars which must be provided. The Court said:

> 'What then are the proper particulars? That in detail is a matter for the judge or whichever other judge carries the resolution of this dispute forward. The structure of the particulars should, I think, be determined in detail by the court ordering the structure and headings to the columns of the Scott schedule.'

In considering whether a party had given sufficient particulars in the schedule, the Court said:

> 'The giving of particulars of this kind is always burdensome. If it becomes necessary for the judge to determine whether essentially compliant particulars are adequate, it will be appreciated that oppressive requests for yet further particulars should not be used by the requesting party as a means of excusing themselves from completing their part of the Scott schedule. The practical reality of litigation such as this is that disputes are usually compromised when both parties have completed their parts of a Scott schedule, if not before.'[11]

[10] (2007) 115 Con LR 11.
[11] (2007) 115 Con LR 11 at 47–8 per May LJ

Reference Number	Nature of Variation	Claimant's		Respondent's		Amount in dispute	Arbitrator's comments	Arbitrator's amount
		Details	Amount claimed	Comments	Amount agreed			

Figure 10.1 A typical Scott schedule

The judgment makes clear that it is not sufficient for the arbitrator or judge simply to require the parties to produce a Scott schedule. The requirement must set out in detail what the schedule must contain. Moreover, a party cannot avoid completing its part of the schedule by claiming that it needs more particulars from the other party first. Although it is probably inappropriate to submit a claim in such a form initially, the claim should be prepared so that the factual information in it can, if necessary, easily be transferred to such a schedule. Particularly where a claim is based on a large number of variations or even the final account, a simplified version of the schedule can be useful to give an overview and keep control over which parts of the claim are agreed and which disputed. There is no standard form for a Scott schedule and every case will generate its own schedule. Figure 10.1 is an example of a typical schedule relating to a contractor's claim resulting from variations arising under SBC clause 3.14.