Chapter 6
Points of principle

Although the legal principles involved in formulating and ascertaining claims for direct loss and/or expense are well settled, the application of those principles in practice is far from easy. There are many principles which are common to all claims and it seems convenient to gather them together in one place for ease of reference.

6.1 Measure of damages

Something has been said in the last chapter about the type or kind of damage and the problem of remoteness of damage. The measure of damages is the *amount* of damages. Reimbursement of loss and/or expense is simply a means of putting the contractor back in the position in which it would have been, but for the delay or disruption. Therefore, the loss and/or expense should not be some notional or estimated figure, but the actual amount lost or spent by the contractor.

The principal function of damages, assuming that the loss is not too remote, is to put the injured party into the same position, so far as money can, as if the contract had been performed without breach.[1] This is the basic principle – the right of the injured party to receive precisely what it paid for. If a party contracts to have six apple trees planted and only five are planted, it is clear that the party is entitled to have the additional tree delivered and planted. If, for some reason, the supplier cannot or will not supply and plant the remaining tree, it is open to the purchaser to take action to recover the reasonable costs of purchasing a tree and having it planted. That is a principle which is easy to understand, but it is not applied rigorously. An employer who tries to insist on a house being demolished and re-built, because there is a small error in the overall dimensions is likely to be disappointed. The courts have resisted applying the principle strictly, for example, if some other lesser remedy would suffice and if the cost of strict entitlement is out of proportion to the benefit to be gained thereby:

> 'What constitutes the aggrieved party's loss is in every case a question of fact and degree. Where the contract breaker has entirely failed to achieve the contractual objective it may not be difficult to conclude that the loss is the necessary cost of achieving that objective. Thus if a building is constructed so defectively that it is of no use for its designed purpose the owner may have little difficulty in

[1] *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 PC.

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> establishing that his loss is the necessary cost of reconstructing. Furthermore in taking reasonableness into account in determining the extent of loss it is reasonableness in relation to the particular contract and not at large. . . . However, where the contractual objective has been achieved to a substantial extent the position may be very different.'[2]

The amount of damages recoverable where the contract has been substantially performed depends upon the particular circumstances of each case. It is sometimes said that the proper measure of damages in a building case is the diminution in value of the property. However, that will not always result in a just outcome. The position has been put like this:

> 'It is a common feature of small building works performed on residential property that the cost of the work is not fully reflected by an increase in the market value of the house, and that comparatively minor deviations from specification or sound workmanship may have no direct financial effect at all. Yet the householder must surely be entitled to say that he chose to obtain from the builder a promise to produce a particular result because he wanted to make his house more comfortable, more convenient and more conformable to his own particular tastes: not because he had in mind that the work might increase the amount which he would receive if, contrary to expectation, he thought it expedient in the future to exchange his home for cash. To say that in order to escape unscathed the builder has only to show that to the mind of the average onlooker, or the average potential buyer, the results which he has produced seem just as good as those which he had promised would make a part of the promise illusory, and unbalance the bargain.'[3]

In general, there are no rules which can be applied in all circumstances in order to arrive at the amount of damages recoverable. Each case requires careful analysis.

6.2 Burden of proof

The burden of proof usually lies with the party making a claim. There are some instances where the facts supporting a claim appear so obvious that the burden shifts to the other party to, in effect, prove that the claim is valueless (e.g. see Section 6.3 below). Such instances are rare in building contracts and the general rule is that the contractor must prove its claim. Many architects and even contractors will state that the contractor's task is to convince them that the claim is both viable and worth as much as the contractor states. There is an old adage that 'he who asserts must prove.'[4] That is clearly correct, however, the courts have clearly set down the standard of proof in different circumstances.

There is some misconception surrounding the standard of proof which a contractor must bring to its claim. Crucially, in criminal cases, the Crown must prove its case 'beyond a reasonable doubt'. In civil cases, however, the claimant must prove 'on

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[2] *Forsyth v Ruxley Electronics and Construction Ltd & Others* (1995) 73 BLR 1 at 12 per Lord Jauncey.
[3] *Forsyth v Ruxley Electronics and Construction Ltd & Others* (1995) 73 BLR 1 at 14 per Lord Mustill.
[4] *Joseph Constantine Steamship Line v Imperial Smelting Corporation Ltd* [1942] AC 154 at 174 per Viscount Maugham.

the balance of probabilities' – a very much less onerous standard. The latter is the standard required of a contractor in regard to its claim. In simple terms, the architect must be satisfied that it is more likely than not that the contractor has suffered the loss for the reasons it states.

6.3 Res ipsa loquitur

Literally: 'the thing speaks for itself'. Although earlier it has been said that the onus of proving is on the party making a claim, there are some situations where the facts so clearly point one way that the burden of proof is placed upon the other party to show that it is not at fault.[5] Such a case might be where scaffolding is erected next to a public highway and a passer-by is found on the floor with head injuries. A blood-stained brick of the type being stacked on the scaffolding is found beside the injured person. The facts clearly indicate that a brick has fallen from the scaffolding onto the head of the passer-by, causing the injuries. In any legal action by the injured person, the burden of proof would probably lie with the contractor to show that it was *not* responsible. Rarely, some elements of the contractor's claim may fall into this category. For example, if the architect postpones all work for a period of a week, it is obvious that a delay to the completion date is inevitable. It would be for an architect who disagreed to prove otherwise.

6.4 Mitigation of loss

It is also known as mitigation of damage. The idea is to reduce waste. If water is dripping through a defective roof covering, the building owner is not entitled simply to leave it to drip in the knowledge that the cost of repairing or reinstating all the damage to the furnishings can be recovered from the contractor responsible. The building owner would, at the very least, be expected to put out a bucket to collect the drips and take steps to repair the leak.

There is much confusion about the principles of mitigation of loss. They are quite simply stated:

(1) A party cannot recover damages resulting from the other party's breach of contract if it would have been possible to avoid any damage by taking reasonable measures.
(2) A party cannot recover damages which it has avoided by taking measures even if such measures were greater than what might be considered reasonable.
(3) A party can recover the cost of taking reasonable measures to avoid or mitigate (reduce) its potential damages.

This is said to give rise to a duty to mitigate.[6] Although a failure to mitigate will not give rise to a legal liability; it will simply reduce the damages recoverable to what they would have been had mitigating measures been taken.

[5] *Scott v London and St Katherine's Docks Co* (1865) 3 H & C 596.
[6] *British Westinghouse v Underground Railways Company* [1912] AC 673.

That is not to say that the claimant must do everything possible. It need not do anything other than an ordinary prudent person in the course of his or her business would do.[7] Moreover, the innocent party, if faced with different ways of mitigating, does not have to act reasonably in exercising a choice.[8]

The application of this principle is illustrated by the example of plant standing idle as a result of a variation order. The contractor would not be entitled simply to accept the situation, but would be obliged to make reasonable endeavours to use the plant productively elsewhere or to persuade the plant owner to accept an early return. In the first instance, the costs of, say, moving the plant to another site so that it might be used would be recoverable as a part of a direct loss claim, provided of course that this sum did not exceed the costs which would have been otherwise incurred. However, although the injured party must only take reasonable measures and not unreasonable measures, the courts usually will not look too critically in hindsight at his actions in attempting to mitigate. The crucial question is whether, in attempting to mitigate, the injured party acted reasonably.[9] Even if the actions of the injured party resulted in an increase in loss, the cost will be recoverable if the party acted reasonably.[10] Moreover, the injured party must be given a reasonable time in which to decide how to mitigate the loss.[11] The reasonable time may of course be immediately, as in a case where a contractor's piece of machinery develops a fault which causes it to do damage. The contractor must start to mitigate by immediately ceasing to use it. An example of mitigation of loss built into the standard form contracts is the provision in JCT contracts that the contractor is to be permitted to remedy, at its own cost, defects which arise in the Works during the rectification period. An employer who, for no good reason, refuses to allow the contractor to remedy such defects may only recover what it would have cost the contractor to do the remedial work.

It has been argued that the existence of a duty to mitigate losses favours the contract breaker. The effect of the duty to mitigate is that the party in breach of contract is not obliged to pay a sum to represent the whole of the loss, but only such sum as represents the loss after mitigating steps have been, or should have been, taken. Therefore, it is argued, it may sometimes be more cost efficient for a contractor to withdraw its resources from one contract in order to place them in another, more lucrative, contract. Although in breach of the original contract, the contract breaker may overall be better off when the effect of the duty to mitigate is taken into account.

A somewhat similar, but opposite, situation can arise where an employer wrongfully terminates the contractor's employment and the contractor claims damages for the repudiatory breach. It may be that the contractor's removal from site, although wrongful, allows the contractor to put more resources into another project or even to commence a new project which would otherwise have presented a serious problem for the contractor. The amount of damages which the contractor is able to claim for the repudiation would have to take these circumstances into account and may amount to nothing.

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[7] *London and South England Building Society v Stone* [1983] 1 WLR 1242.
[8] *Strutt v Witnell* [1975] 1 WLR 870.
[9] *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452.
[10] *Melachrino v Nicholl & Knight* [1920] 1 KB 693.
[11] *C Sharpe & Co Ltd v Nosawa* [1917] 2 KB 814.

The position is, in fact, spelled out specifically in the extension of time clauses of many standard form contracts (e.g. see SBC clause 2.28.6) in relation to delay. The clause expressly requires the contractor to use its best endeavours to prevent delay occurring and to mitigate the effects of a delay once encountered. The position has been clarified in *Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd* where the court addressed the question of mitigation in relation to delay:

> 'It is difficult to see how there can be any room for the doctrine of mitigation in relation to damage suffered by reason of the employer's culpable delay in the face of express contractual machinery for dealing with the situation by extension of time and reimbursement of loss and expense. However that may be as a matter of principle, what is plain is that there cannot be both an extension to the full extent of the employer's culpable delay, with damages on that basis, and also damages in the form of expense incurred by mitigation, unless it is alleged and established that the attempt at mitigation, although reasonable, was wholly ineffective.'[12]

It is clear that clauses like SBC clause 2.28.6 only bite on the contractor's own culpable delays and on delays caused by neutral events. So far as the money claims provisions are concerned, the general law, which imposes a duty to take all reasonable steps and prevents claims for damages which have resulted purely from a failure to take such steps, applies. It is for the party receiving the claim to show that the claimant has failed to mitigate.[13] Therefore, when the contractor submits an application for direct loss and/or expense, it is for the architect to show that the contractor has not mitigated its losses. But although that burden falls on the architect, the architect is entitled to seek relevant information from the contractor in order to form an opinion about the matter.

6.5 Betterment

This is generally understood as being the situation when repair or restoration work results in something which is better in quality or standard than the quality or standard which existed before the repair or restoration was necessary. As a matter of general law, damages will not be awarded for the cost of reinstatement which results in betterment unless the party making the claim has no reasonable choice but to follow that course.[14] Usually, if a party decides that it will re-build a damaged property to a better standard than before the damage took place, it will be unable to claim the total cost of such re-building. Instead it will have to make a claim excluding the cost of reaching the better standard. However, where a party is claiming the cost of rebuilding premises which are destroyed as a result of another party's breach, the injured party is entitled to the full cost of rebuilding even though the effect will be to get new in place of old. In *Richard Roberts Holdings Ltd v Douglas Smith Stimson Partnership & Others*, the position was put like this:

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[12] (2000) Const LJ 316 at 332 per Judge Hicks.
[13] *Garnac Grain Co Inc v Faure & Fairclough* [1968] AC 1130.
[14] *Voaden v Champion* [2002] 1 Lloyd's Rep 623.

> 'I think that the law can be shortly summarised. If the only practicable method of overcoming the consequences of a defendant's breach of contract is to build to a higher standard than the contract had required, the plaintiff may recover the cost of building to that higher standard. If, however, a plaintiff, needing to carry out works because of a defendant's breach of contract, chooses to build to a higher standard than is strictly necessary, the courts will, unless the new works are so different as to break the chain of causation, award him the cost of the works less a credit to the defendant in respect of betterment.'[15]

The question has been dealt with many times in the courts and it was considered again in *Witts & Others v Montgomery Watson Ltd*.[16] Witts and Others were the owners of properties along the seafront at Putsborough Sands in Devon. The owners commissioned Montgomery Watson to produce recommendations for the construction of sea defences. The recommendations were accepted, a design was prepared and the defences were built, but they were subsequently badly damaged by storms. The owners took legal action against Montgomery Watson and liability was settled. The question remaining was the amount of damages payable to the owners. Clearly, the sea defences ought to have been extensive and it was agreed that the amount required to rectify them was more than £500,000 which was far more than the original cost. Montgomery Watson argued that they should only have to pay the original price. If the new defences were better than the old, the owners should pay the cost over and above the cost of reinstating to the original standard. The court considered the effect of Montgomery Watson's negligence. It was reasonably foreseeable that the result of negligent design of the defences would result in their failure. The damages would be the cost of rectifying the failure. The only practical way of doing that was much more expensive than the original scheme. The owners had no real alternative and, therefore, they were entitled to the whole cost. The court held that there was no element of betterment.

Where a party acts in reliance on proper legal advice, it will usually be assumed to have acted reasonably.[17]

6.6 Notices

6.6.1 Requirement for notice

Many contracts require the contractor to give a notice to the employer or the architect as part of the contractual procedure for extension of time and loss and/or expense. Where the contract provides for notice, a question which often arises is whether the architect is entitled or obliged to attend to matters concerning extension of time or loss and/or expense in the absence of a notice or where notice has not been given precisely in the form or manner or at the time prescribed in the contract. The answer to that depends on whether the requirement for notice is a condition precedent.

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[15] (1988) 5 Const LJ 223 at 227 per Judge Newey.
[16] [1999] 11 BLISS 5.
[17] *Lodge Holes Colliery v The Borough of Wednesbury* [1908] AC 323.

A condition precedent is a condition which makes the rights or duties of the parties depend upon the happening of an event. Where there is a condition precedent, the right or duty does not arise until the condition is fulfilled. It acts as a barrier. It is sometimes open to question whether or not a term is a condition precedent unless it is expressly stated to be such and even where expressly so stated, the courts may decline to hold that a term is a condition precedent if to do so would be contrary to commercial sense in a special situation.[18] If a notice provision is to be a condition precedent, it has been held that it must state a time for service and make clear that a failure to serve will mean loss of rights.[19] In practice this strict requirement is often not enforced. Clearly, where the requirement for notice is a condition precedent, the absence of a notice will be fatal to any claim.

6.6.2 Whether a condition precedent

Traditionally the requirement for the contractor to give notice of delay under JCT contracts has not been treated as a condition precedent. It has been held that the architect ought to give an extension of time if it seemed warranted, even where the contractor had not submitted a notice of delay, in order to avoid the possibility that time would become at large and the employer would be deprived of the opportunity to recover liquidated damages. The right to an extension of time was not to be unaffected by the contractor's failure to give notice. The architect was entitled to take the contractor's breach of obligation into account when deciding upon the extension of time by ensuring that the contractor did not get a greater extension of time than would have been the case if notice had been timeously given. [20]

The idea that a contractor was entitled to an extension of time if the employer committed any act of prevention whether or not notice had been given came to a head in an Australian case;[21] but subsequent courts in Australia and in England declined to follow the decision.

There seems to be no obstacle to making such a notice a condition precedent if that is what the parties agree in clear words. In *City Inn Ltd v Shepherd Construction Ltd*,[22] the court considered JCT 80 with amendments. One such amendment, clause 13.8.5, stated:

> 'If the Contractor fails to comply with one or more of the provisions of Clause 13.8.1, where the Architect has not dispensed with such compliance under Clause 13.8.4, the Contractor shall not be entitled to any extension of time under Clause 25.3.'

Clause 13.8.1 required the contractor to submit within a specified timescale written details after receipt of an architect's instruction. It was somewhat like provision for a variation quotation in DB schedule 2, paragraph 4.2. It was argued by the defendants that clause 13.8.5 constituted a penalty. This was rejected by the court:

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[18] *Koch Hightex GmbH v New Millenium Experience Company Ltd* [1999] EWCA Civ 983.
[19] *Bremer Handelsgesellscaft MBH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109.
[20] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.
[21] *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] (2005) 21 Const LJ 71.
[22] [2001] ScotHC 54; decision upheld on appeal: [2003] BLR 468.

> 'It was perfectly legitimate for the employer to require and the contractor to accept that, in relation to architect's instructions, the employer should be forewarned of anticipated consequential delay, and for it to be agreed that, in the event of the contractor failing to provide such forewarning in accordance with clause 13.8.1, the risk of loss through delay should shift from the shoulders of the employer to those of the contractor. Such provision did not constitute a penalty.'[23]

A factor taken into account by the court was that the amount specified as liquidated damages was genuinely pre-estimated and could not be considered 'extravagant, penal or oppressive'. In another case, the court considered whether the requirement for notice was a condition precedent:

> '. . . the principle which applies here is that if there is genuine ambiguity as to whether or not notification is a condition precedent, then the notification should not be construed as being a condition precedent, since such a provision operates for the benefit of only one party, i.e. the employer, and operates to deprive the other party (the contractor) of rights which he would otherwise enjoy under the contract.'[24]

A heavily amended MF/1 form of contract was being used in which clause 6.1 required the sub-contractor to give written notice to the contractor within a reasonable period of any circumstance which entitled the sub-contractor to an extension of time. This requirement is similar to many standard extension of time clauses in building contracts. The court examined the clause and considered whether it was a condition precedent even though it did not set out all the criteria in the *Bremer Handelsgesellscaft* case. The judge had this to say:

> 'Turning to the wording of the clause, in my judgment the phrase, "provided that the sub-contractor shall have given within a reasonable period written notice to the contractor of the circumstances giving rise to the delay" is clear in its meaning. What the sub-contractor is required to do is give written notice within a reasonable period from when he is delayed, and the fact that there may be scope for argument in an individual case as to whether or not a notice was given within a reasonable period is not in itself any reason for arguing that it is unclear in its meaning and intent. In my opinion the real issue which is raised on the wording of this clause is whether those clear words by themselves suffice, or whether the clause also needs to include some express statement to the effect that unless written notice is given within a reasonable time the sub-contractor will not be entitled to an extension of time.
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> In my judgment a further express statement of that kind is not necessary. I consider that a notification requirement may, and in this case does, operate as a condition precedent even though it does not contain an express warning as to the consequence of non-compliance. It is true that in many cases (see for example the contract in the *Multiplex Constructions (UK)* case itself) careful drafters will include such an express statement, in order to put the matter beyond doubt. It

[23] [2001] ScotHC 54 at paragraph 8 per Lord MacFadyen. decision upheld on appeal: [2003] BLR 468.
[24] *Steria Ltd v Sigma Wireless Communications Ltd* (2007) 118 Con LR 177 at 203 per Judge Stephen Davies.

> does not however follow, in my opinion, that a clause – such as the one used here – which makes it clear in ordinary language that the right to an extension of time is conditional on notification being given should not be treated as a condition precedent. This is an individually negotiated sub-contract between two substantial and experienced companies, and I would be loathe to hold that a clearly worded requirement fails due to the absence of legal "boilerplate".'[25]

In another case, the court considered whether another phrase, 'provided always that' was indicative of a condition precedent. It occurred in a standard trade contract (TC/C) which the parties had amended. It is notable that the phrase also occurs in SBC clause 4.23 (see Chapter 13, Section 13.1.4 *Timing of Application*) and in other contracts where such contracts stipulate that certain things may happen 'provided always that' other thing are done:

> 'This type of wording is often the strongest sign that the parties intend there to be a condition precedent. What follows such a proviso is usually a qualification and explanation of what is required to enable the preceding requirements or entitlements to materialise.'[26]

As the court said, this is probably one of the clearest indications of the presence of a condition precedent.

There is a danger for architects which was referred to in the *London Borough of Merton* case. That was that if the architect wrongly decides that notice from the contractor is a condition precedent to some action of the architect and consequently does nothing, the employer might be severely disadvantaged, for example, by time becoming at large and liquidated damages being irrecoverable. The court was there considering whether the contractor was entitled to an extension of time even if it failed to give the required notice.

There is a suggestion that an architect who is at all unsure might simply proceed on the basis that notice is not a condition precedent. This is essentially good practical advice. However, it overlooks the fact that, if the notice is a condition precedent, the architect has no power under the contract to act if the condition is not satisfied. That leaves the architect open to the criticism, at the least, of acting outside his or her powers. It is suggested that where an architect is unsure whether the notice requirement is a condition precedent and, therefore, opts to treat it as if it was not a condition, the architect's client should be informed and authority obtained to waive any condition which may exist. The position with regard to waiver is considered below.

The key message from these cases seems to be that where the giving of notice is a condition precedent to an extension of time, the failure to give such notice will prevent the giving of an extension of time, but time will not become at large. Unfortunately, there is no golden rule which can be automatically applied to these clauses in order to decide whether there is a condition precedent or not. However, it is tentatively suggested that where extension of time or loss and/or expense clauses

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[25] *Steria Ltd v Sigma Wireless Communications Ltd* (2007) 118 Con LR 177 at 203 per Judge Stephen Davies.
[26] *WW Gear Construction Ltd v McGee Group Ltd* (2010) 131 Con LR 63 at 75 per Akenhead J.

are concerned, notice (and possibly other actions such as provision of information) will be a condition precedent:

- if a time for service of the notice is stated and the clause makes clear that a failure to serve will mean loss of rights, or
- if the requirement for notice is preceded by the words 'it is a condition precedent that', or
- if the requirement for notice is preceded by the words 'provided always that' or probably 'provided that', or
- if the language used makes clear that the parties intend the requirement to be a condition precedent.
  It will be more likely to be a condition precedent where the contract is individually negotiated between parties who are experienced in the industry.

However:
If there is any ambiguity, it is unlikely to be a condition precedent.

6.6.3 Waiving the requirement for notice

Although the giving of notice may be a condition precedent, the party entitled to rely on the condition may waive it at its discretion. In a case not connected to the construction industry, the court had to consider an accident insurance policy that provided that it should be a condition precedent to recovery that notice should be given within 14 days of the accident, and, in the case of death, the representatives of the deceased should agree to a post-mortem examination, if required by the insurers. The insured met with an accident and died about a month afterwards, but notice of the accident was not sent to the company until three days before his death. After the death, the insurers wrote to the widow requesting a post-mortem examination of the deceased in accordance with the conditions of the policy. Nothing was said in the letter about reserving any objection to failure to give timeous notice. The widow gave her consent to the post-mortem examination. The court held that the insurers, by demanding a post-mortem examination, had waived the defence of want of timeous notice.

> 'On the whole matter, I am of opinion, with the Lord Ordinary, that in making the demand upon the widow for a *post-mortem* examination, without giving her any notice of their intention to put forward the want of timeous notice as a preliminary defence to her claim, the company must be held to have waived their right to state that defence.'[27]

And later:

> 'But they made a demand for a *post-mortem*, and I think they must be taken to have done so on the footing of having waived any defence they had on the ground of notice. They were entitled to waive it. That is not doubtful.'[28]

[27] *Donnison v The Employers' Accident and Livestock Insurance Co Ltd* (1897) 24 R. 681 at 686 per Clerk LJ.
[28] *Donnison v The Employers' Accident and Livestock Insurance Co Ltd* (1897) 24 R. 681 at 686 per Lord Young.

6.6.4 Essential elements of a notice

Whether or not any communication ranks as a notice for the purpose of the relevant clause is a question which can only be answered by reference to all the circumstances. However, it is possible to obtain some guidance from the cases. Clearly, the requirements for a notice will be satisfied if it is sent in the form of a letter which sets out everything which the clause requires. Usually, it is sufficient if a notice is sent by ordinary first class post to the last known or notified business address of the recipient. In the case of a limited company it is normally enough if it is sent to the registered office. However, some contracts stipulate that notices are to be given to certain addresses or sent in a particular way. If so, they must be sent in that way. For example, SBC clause 1.7.4 requires certain notices (for example, of termination) to be sent by recorded signed for, special delivery or to be delivered by hand.

It has been held that service by fax was sufficient in cases where the contract stipulated 'actual delivery'.[29] Service by e-mail may be sufficient if sent to an e-mail address which has been held out to be the address of the recipient.[30] Where the contract makes clear that only notices served in the manner and time prescribed will be considered valid, notices sent by any other method will usually be invalid. However, where a method is stipulated, but it is not said that it is the only method which will be valid, any other method which is not less advantageous to the recipient will be acceptable.[31] The point has also been made in a case dealing with acceptance of an offer:

> 'Where, however, the offeror has prescribed a particular method of acceptance, but not in terms insisting that only acceptance in that mode shall be binding, I am of opinion that acceptance communicated to the offeror by any other mode which is no less advantageous to him will conclude the contract.'[32]

and in a subsequent case:

> '. . . in the absence of a very clear indication of a contrary intention, it would not be reasonable to construe a provision for service by registered mail as excluding the giving of notice by other equally expeditious means which do in fact result in the actual receipt of the notice by the offerer, e.g. personal delivery or unregistered mail, although of course in the latter event the offeree will run the risk of non-delivery.'[33]

However, it is not necessarily relevant to the validity or otherwise of the notice that the person who needs to see it actually knows the notice has been served:

> 'If a claimant is required to serve X and, mistakenly purports to serve Y, the mere fact that Y informs X of the purported service so that X knows of it, cannot convert Y's receipt of the documents into good service upon X.'[34]

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[29] *Construction Partnership UK Ltd v Leek Developments* [2006] EWHC B8 (TCC).
[30] *Bernuth Lines Ltd v High Seas Shipping Ltd* (2006) 1 Lloyd's Rep 537.
[31] *Yates Building Co Ltd v Pulleyn and Sons (York) Ltd* (1976) 237 EG 183.
[32] *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593 at 1597 per Buckley J.
[33] *Spectra Pty Ltd v Pindari Pty Ltd* [1974] 2 NSWLR 617 at 623 per Wootten J.
[34] *Lantic Sugar Ltd v Baffin Investments Ltd* [2009] EWHC 3325 (Comm) at paragraph 40 per Gross J.

It is often asked whether mention of delay in the minutes of a site meeting is sufficient notice for the purposes of the contract? This question has been considered in relation to a sub-contract:

> 'I also consider that the written notice must emanate from [the sub-contractor]. Thus for example an entry in a minute of a meeting prepared by [the consultant] which recorded that there had been a delay by [the employer] . . . and that as a result the sub-contract works had been delayed, would not in my judgment by itself amount to a valid notice under cl 6.1. The essence of the notification requirement in my judgment is that [the contractor] must know that [the sub-contractor] is contending that relevant circumstances have occurred and that they have led to delay in the sub-contract works.'[35]

In another case, it seems to be suggested that a note in site meeting minutes recording an oral representation by the contractor during that meeting is not a valid notice.[36] That appears to be a correct view. The position may be different where a contractor, during the course of a site meeting hands a progress report to the architect which indicates delays and the reasons therefor.

What must be included in the notice depends entirely on what the contract clause requires. The courts will commonly interpret notices given by business people in a fairly broad way, in the sense that provided it is clear from the notice what is intended by the person serving, the form of wording used may not be important. Nevertheless, the starting point for the content of the notice must be the clause itself:

> 'In my judgment, the requirement for [the sub-contractor] to give notice of the circumstances giving rise to the delay cannot be extended to include a requirement that the notice must make it clear that it is a request for an extension of time under cl 6.1, or to include a requirement that it gives an assessment of the delay. Both would involve reading into the clause words which are not there, and which do not meet the stringent requirements for implication of such terms. I do not however accept [the sub-contractor's] argument that all that is required is a notification that particular relevant circumstances have occurred. In my judgment it is necessary for [the sub-contractor] to notify [the contractor] first that identified relevant circumstances have occurred and second that those circumstances have caused a delay to the execution of the sub-contract works. In my judgment the latter is required, either by a process of purposive construction or by a process of necessary implication, because otherwise it seems to me that the notice would not achieve its objective . . . '[37]

6.6.5 Giving, issue and receipt of notices

Most building contracts refer to the giving of notices and the issuing of certificates. The word 'issue' suggests a more formal process than 'giving', but in each case there is the sense that something passes from the giver (or the issuer) and the recipient.

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[35] *Steria Ltd v Sigma Wireless Communications Ltd* (2007) 118 Con LR 177 at 201 per Judge Stephen Davies.
[36] *John L Haley Ltd v Dumfries and Galloway Regional Council* (1988) 39 GWD 1599.
[37] *Steria Ltd v Sigma Wireless Communications Ltd* (2007) 118 Con LR 177 at 201 per Judge Stephen Davies.

However, to speak of a notice being 'given' is usually to say that it has also been received. Thus, if a contract provides that the employer shall give notice within 10 days of an event, it is clear that the notice must not only leave the employer but must arrive with the recipient within the 10 days.

On the other hand, if a contract refers to an architect issuing a certificate within 10 days of an event, it simply means that the certificate must leave the architect within 10 days. 'Issue' means 'send forth'.[38] Therefore, it is wrong to use the words indiscriminately. The issue of a notice is not the same as the receipt of the notice, neither is it the date on which it was served.[39] If the contract refers to a notice being issued, it is the date when it was sent out which is the relevant date no matter what date is written on the notice itself.[40]

A notice can neither be issued nor given if it does not leave the person issuing or giving it. Therefore, a notice which is properly made out, signed and dated, but put in a drawer, has no effect whatsoever. A court has held:

> 'In the ordinary meaning of the word "issue", it seems to me plain that something more is needed for a certificate to be issued . . . than the mere signature of the architect upon it, whether he be employed under a contract of service or as an independent agent.'[41]

6.7 Categories of claim

6.7.1 Prolongation and disruption claims

There is no limit to the categories of claim which a contractor may bring under the terms of the contract other than limits imposed by the ingenuity of the claimant. Therefore, in referring to prolongation and disruption claims, there is no intention to suggest that these are the only categories of claims which can be made. In practice, however, these are the two most common categories of claim and a contractor attempting to advance a claim under some other category will have to convince the architect that it is entitled to make such a claim under the terms of the particular loss and/or expense clause before starting the process of substantiating the claim itself. Many of the heads of claim dealt with later in this chapter could be applied to both categories.

Prolongation occurs when there is a delay in completion of the Works beyond the contract date for completion. Disruption may occur together with prolongation or it may be entirely separate. An example of disruption would be if delays are caused to non-critical activities which, therefore, do not affect the overall period of time required to carry out the Works. Not every such example will allow a contractor to recover loss and expense of course. Disruption claims are notoriously difficult (but not impossible) to prove and every case will depend on the surrounding circumstances.

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[38] *The Concise Oxford Dictionary*.
[39] *Glen v The Church Wardens & Overseers of the Parish of Fulham* (1884) 14 QBD 328.
[40] *Cantrell & Another v Wright and Fuller Ltd* (2003) 91 Con LR 97.
[41] *London Borough of Camden v Thomas McInerney & Sons Ltd* (1986) 9 Con LR 99 at 111 per Judge Esyr Lewis.

It is often contended that there is no such thing as a claim for disruption as part of loss and expense. Rather, it is said, such a claim is properly the subject of valuation of variations which standard form contracts provide for by adjustment of rates and even the creation of new rates to deal with changes of circumstances. There is some merit in such arguments, but they do not successfully deal with all types of disruption and especially cannot cover disruption which is not the result of a variation.[42]

6.7.2 Prolongation

A prolongation claim is probably the commonest category of claim. It is also the simplest and most straightforward to prepare and to understand. In essence it simply states that the employer or architect has acted in such a way, or failed so to act, that the contractor has been unable to complete the Works by the contractual date for completion, but has been obliged to complete later, i.e. the contract period has been prolonged. Moreover, the actions or inactions fall under grounds set out in the loss and/or expense clause in the relevant contract (e.g. one of the matters in SBC clause 4.23). The claim then proceeds to quantify the loss and/or expense involved. Despite, or perhaps because of, its simplicity, many contractors are slovenly in its preparation. A 'claim' for extension of time is the usual precursor to a prolongation claim, to the extent that many contractors and architects believe that unless the contractor is given an extension of time first, it is not eligible for a prolongation payment. Nothing could be further from the truth.[43] Notwithstanding that, it is often convenient for the contractor to get its extension of time first, because the evidence in support of entitlements for extension of time will often be the same as the evidence required to establish an entitlement to loss and/or expense, although it will not establish the quantum.

Once the architect has been satisfied about the duration of the prolongation period, the contractor must establish the loss and expense suffered as a result. Because it is actual loss and actual expense which is to be ascertained, the practice of using the priced preliminaries in the bill of quantities to arrive at the figure is not acceptable (unless perhaps it is quite impossible to establish actual figures). The actual cost to the contractor of being onsite the extra period of time must be established. In considering the amounts due as a result of delays, a court has recently set out the important difference between a contractor's claim for damages for delay and a claim for extension of time on account of the delay as follows:

> 'When an extension of time of the project completion date is claimed, the contractor needs to establish that a delay to an activity on the critical path has occurred of a certain number of days or weeks and that that delay has in fact pushed out the completion date at the end of the project by a given number of days or weeks, after taking account of any mitigation or acceleration measures. If the contractor establishes those facts, he is entitled to an extension of time for completion of the whole project including, of course all those activities which were not in fact delayed by the delaying events at all, ie they were not on the critical path.

[42] See also Chapter 14.
[43] *H Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106.

> But a claim for damages on account of delays to construction work is rather different. There, in order to recover substantial damages, the contractor needs to show what losses he has incurred as a result of the prolongation of the activity in question. Those losses will include the increased and additional costs of carrying out the delayed activity itself as well as the additional costs caused to other site activities as a result of the delaying event. But the contractor will not recover the general site overheads of carrying out all the activities on site as a matter of course unless he can establish that the delaying event to one activity in fact impacted on all the other site activities. Simply because the delaying event itself is on the critical path does not mean that in point of fact it impacted on any other site activity save for those immediately following and dependent upon the activities in question.
>
> It seems to me that [the contractor's] claim in respect of its prolongation costs has fallen between the two stools described above. The claim is put on the basis that the delays to the foundation works caused critical delay to the whole project of over 12 weeks and the whole project's general site costs are claimed on that basis. Those costs are evaluated as at October 2002 to January 2003 and not at the end of the project which occurred well over two years later in May 2005. But no evidence has been called to establish that the delaying events in question in fact caused delay to any activities on site apart from the RGF and IW. That being so, it follows, in my judgment, that the prolongation claim advanced by [the contractor] based on recovery of the whole of the site costs of the . . . site, fails for want of proof.'[44]

Here the court highlights a very important point: that non-critical activities may not be affected by a delay to the critical path and, therefore, no damages are claimable for them. This sets out a much stricter test for ascertaining loss and/or expense than has been common practice.

Although the period of prolongation tends, for obvious reasons, to be measured as starting from the contractual completion date and extending on as appropriate, this is not necessarily the time frame within which the costs should be ascertained, because the true costs resulting from a delay will usually follow the date the delay occurred. In the case of several delays, the relevant periods may be scattered throughout the contract period. The few weeks at the beginning and end of a contract will be characterised by a build up then a reduction respectively of site-related costs. Therefore, if the costs of prolongation were to be ascertained in respect of the final weeks of a contract, the contractor may get much less than its true entitlement.

Therefore, if a contract is prolonged for a period of six weeks which the contractor can establish is a direct result of some clause 4.24 relevant matters, the six weeks may be made up of several delaying occurrences taking place at differing times during the contract period. The task of identifying each delay and its monetary consequences is not always easy, but it must at least be attempted. Many architects will agree to take a representative slice of the appropriate number of weeks' prolongation from somewhere in the middle of the contract period. This seems, at first sight, to be a reasonably good empirical method of establishing appropriate costs, but it is not an

[44] *Costain Ltd v Charles Haswell & Partners Ltd* (2009) 128 Con LR 154 at 212 per Richard Ferneyhough QC sitting as a Deputy Judge of the High Court.

ascertainment in the proper sense and it is difficult to substantiate if challenged. However, in practice, if both employer advised by the architect and quantity surveyor and the contractor find that or some other approximate system is acceptable, there is nothing more to be said.

An important restriction on recovery of loss and/or expense by the contractor was highlighted in a case which considered concurrent delay:

> 'The general rule in construction and engineering cases is that where there is concurrent delay to completion caused by matters for which both employer and contractor are responsible, the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by the delay. In the case of the former, this is because the rule where delay is caused by the employer is that not only must the contractor complete within a reasonable time but also the contractor must have a reasonable time within which to complete. It therefore does not matter if the contractor would have been unable to complete by the contractual completion date if there had been no breaches of contract by the employer (or other events which entitled the contractor to an extension of time), because he is entitled to have the time within which to complete which the contract allows or which the employer's conduct has made reasonably necessary.
>
> By contrast, the contractor cannot recover damages for delay in circumstances where he would have suffered exactly the same loss as a result of causes within his control or for which he is contractually responsible.'[45]

This is an important difference between concurrent responsibility for delay and concurrent responsibility for loss and/or expense.

6.7.3 Disruption

Disruption is usually claimed separately from prolongation. It may be present with or without prolongation. Disruption has always been very difficult to establish with any precision and even more difficult to ascertain in monetary terms. Traditionally, a contractor's claim for disruption has relied both for substantiation of the fact of disruption and the ascertainment of its costs on the comparison of anticipated against actual labour costs. This bald approach does not bear consideration and it has been roundly condemned.[46] There may be many reasons for the actual costs of labour being greater than the costs anticipated by the contractor other than reasons for which the employer or the architect are responsible.

Commonly, disruption amounts to delays in non-critical parts of a project, but not to the extent that those parts become critical in programming terms. For example, the task of fitting external balcony railings on the front of a hotel project may not be critical. The contractor may have anticipated and priced for it to take three weeks during a five week available time slot. Therefore, if the work is delayed by one of the clause 4.24 relevant matters so that it takes four instead of three weeks, there will be

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[45] *De Beers UK Ltd (Formerly: The Diamond Trading Company Ltd) v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC) at paragraphs 177 and 178 per Edwards-Stuart J.

[46] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

no resultant prolongation of the contract period, but the contractor will no doubt incur additional costs. That is a relatively simple example and, provided the contractor has kept proper records, there should be little difficulty in identifying the costs involved. Other instances are more complex.

The classic method of evaluating disruption is to compare the value to the contractor of the work done per man during a period of no disruption with the value per man doing the disrupted period and then to apply the ratio to the total cost of labour.[47] In order for the method to work, it must be possible to identify a period free from disruption and the compared outputs must relate to similar work.

[47] *Whittal Builders Co Ltd v Chester-le-Street District Council* (the 1985 case) [1996] 12 Const LJ 356.