Chapter 7
Potential heads of claim

7.1 Foreshortened programme

7.1.1 Contractor's obligation to complete

SBC clause 2.4 requires the contractor to complete the Works 'on or before' the completion date. The completion date is the date for completion stated in the Contract Particulars or any later date fixed by the architect giving an extension of time under clause 2.28. Importantly, the contractor may, if it so chooses, complete the Works before the date fixed under the contract. Many employers, and some architects, believe that they can require the contractor to remain on site until the contract date for completion or any extension of that date. Indeed, it is sometimes said that under the terms of the contract the contractor has undertaken to stay on site until the completion date stated in the contract. That is clearly a wrong view, because clause 2.30 provides that the architect must issue a certificate of practical completion when, in the architect's opinion, practical completion has been achieved whether that occurs before or after the contractual date for completion. Therefore, the contractor does not undertake to stay on site until the contract completion date, but only until the Works have reached practical completion, which may be earlier. The employer's position is understandable, because it may be inconvenient for the employer to take possession of the building before the expected date. Staff to run the premises may not have been engaged, rentals may not have started, the employer may not have the necessary funding to pay the relevant interim certificate.

7.1.2 If the contractor could have completed earlier

The point becomes even more important in the ascertainment of loss and/or expense. Where a contractor is claiming for prolongation of the contract period, it will sometimes argue that the period of time on which the ascertainment will be based should not be measured from the contract completion date, but from an earlier date, i.e. the date when the contractor would otherwise have been able to complete. Therefore, the question is simply whether the contractor suffers loss and/or expense as a direct result of being kept on site longer than it needed to be on site. On that basis, it is

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conceivable that if a contractor can show that, but for the relevant matter relied on under clause 4.24, it would have finished two months before the contract date for completion, it would be able to claim for the full length of the prolongation period, including the two months. That is the theory. In practice, the contractor would be put to proof that it had actually suffered the losses it claimed.

The arguments in favour of that contention are that, if it was not for the relevant matter, the contractor would have completed the Works by its intended date and made a certain profit. It was denied that profit by a relevant matter which under the terms of clause 4.23 entitles the contractor to reimbursement of loss and/or expense. Moreover, the relevant matters in clause 4.24 are in no way tied to a prolongation of the contract period beyond the contract completion date. The only criteria are:

- *whether regular progress has been materially affected:* there can be no doubt that it has been, because if it was not for the relevant matter the contractor would have finished by its earlier date.
- *whether the contractor has suffered direct loss and/or expense:* it must have suffered loss and/or expense by being kept on site longer than would otherwise have been the case.
- *whether it has been reimbursed under some other provision of the contract:* it has not been reimbursed under any other provision for the profit it would have made if it had finished at the earlier date.

The arguments against the contention are that, under the terms of the contract, the contractor is assumed to have allowed for being on site until the contract completion date. Its earlier date is not a contractually agreed date, but simply an attempt by the contractor to try to make more profit. Therefore, it has not suffered any loss and/or expense by staying on site until the completion date. The contractor has already been reimbursed under the provisions of the contract which provide for payment to the contractor of the agreed contract sum.

In *J F Finnegan Ltd v Sheffield City Council*,[1] where the contractor argued that prolongation costs should be calculated from a date worked out by reference to release of batches of houses rather than the contract completion date, the court held that the contract completion date prevailed. The date arrived at by reference to the release of houses was purely a programming date and it was not a date with which the contractor was obliged to comply.

This position is unaffected by the architect 'accepting' or 'approving' a programme from the contractor showing an earlier date for completion than that set out in the Appendix, because the architect has no power to vary the terms of the contract.[2] The situation may be complicated if the contractor has proposed a foreshortened programme at the commencement of the project and the employer, rather than the architect, has accepted or agreed the programme. In such a case, it may be convincingly argued that the parties have effectively varied the contract by agreeing a new completion date to which all are bound to work instead of the original date.

[1] (1988) 43 BLR 124.
[2] See the commentary to *Glenlion Construction Ltd v The Guinness Trust* at 39 BLR 93.

7.1.3 Late information

The position in respect of delay caused by late information from the architect is worthy of separate consideration. Under the previous suite of JCT contracts, late provision of instructions and information was listed as a separate relevant event and a separate matter (e.g. under JCT 98 clauses 25.4.6 and 26.2.2 respectively). The latest JCT suite of contracts has replaced these clauses (and some others) by a 'catch all' clause referring to acts of impediment, prevention or default on the part of the employer or the architect, among others. However, the principle remains the same and the contractor is entitled to an extension of time and loss and/or expense if the architect causes delay by not providing instructions and other information in accordance with the timescale set out in the contract.

The terms of the contract which govern the issue of information deserve careful study. Under SBC, the provision of information is governed by clauses 2.11 and 2.12. Clause 2.11 requires the architect to provide information in accordance with the information release schedule. This schedule should not be confused with the schedule of information said to be required which is often submitted by a contractor at the beginning of a project. Such 'information required' schedules have no particular contractual standing. It is comparatively rare for the architect to produce an information release schedule and where no such schedule is produced or where the schedule does not cover particular details, clause 2.12 provides that the architect must provide the contractor with such further details and drawings as are reasonably necessary to explain the contract drawings and to issue such instructions as are necessary to enable the contractor to complete the Works in accordance with the contract. Essentially, this means that the architect must provide the instructions in time to enable the contractor to complete the Works by the contract completion date. However, in this context there are two important qualifications to that obligation which are often overlooked. They amount to this:

- The architect must provide the information and instructions when reasonably necessary for the contractor to receive them, having regard to the progress of the Works. This means that if the contractor is making slow progress, the architect is no longer obliged to provide the instructions in time to enable the contractor to complete the Works by the contract completion date.
- However, if it seems that the contractor is likely to achieve practical completion before the contract date for completion, the architect may revert to providing instructions in time to enable the contractor to complete the Works by the contract completion date. Therefore, although the employer or architect must not actively prevent the contractor from meeting an earlier date, which it would otherwise have been able to meet, they are not obliged to make any special effort to assist the contractor to do so.

The current JCT provisions appear to have been drafted in response to the judgment in the case of *Glenlion Construction Ltd v The Guinness Trust*[3] which considered a

[3] (1987) 39 BLR 89.

term for the provision of information in JCT 63. One of the questions the court had to consider was:

> 'whether there was an implied term of the contract . . . . that, if and in so far as the programme showed a completion date before the date for completion the employer by himself, his servants or his agents should so perform the said agreement as to enable the contractor to carry out the works in accordance with the programme and to complete the works on the said completion date.'

The court had no hesitation in answering this question in the negative:

> 'It is not suggested by Glenlion that they were both entitled *and* obliged to finish by the earlier completion date. If there is such an implied term it imposed an obligation on the Trust but none on Glenlion. It is unclear how the variation provisions would have applied. [The extension of time clause] operates, if at all, in relation to the date for completion stated in the appendix. A fair and reasonable extension of time for completion of the works beyond the date for completion stated in the appendix might be an unfair and unreasonable extension from an earlier date.'[4]

There was, therefore, no obligation on the Trust or its architect to provide information at any times earlier than necessary to enable the contractor to complete by the contract date. It is, therefore, clear that if the contractor intended to finish earlier than the contract date for completion, it would not have a claim for loss and/or expense associated with being kept on site longer than anticipated if the reason it could not finish on the earlier date was simply that the architect had provided information at such time as to allow completion by the contractual completion date. However, it is sometimes contended that if the contractor, as a matter of fact, had received all the information to allow it to finish at its earlier intended date, it may have a valid claim if it is prevented from finishing on that earlier date by one of the relevant matters in clause 4.24, even though it still finished before or on the contract completion date.

7.2 The 'knock-on' effect

This is often referred to as a 'winter working' claim, but although the principle is probably most commonly encountered in connection with winter working, it could apply to any other situation where a delay arises which inevitably causes the works to be carried out in a situation which is less felicitous than originally envisaged. In the case of winter working, the problem for the contractor is that something which causes it delay and which entitles it to loss and/or expense directly resulting from the delay may also move the programme of work so that site operations requiring good weather to execute may have to be carried out during a period of bad weather. At the extreme, activities programmed for the summer months have to be carried out in the winter. There will be occasions, of course, in which the contractor has had to

[4] (1987) 39 BLR 89 at 103 per Judge Fox-Andrews.

allow in its tender for work to be carried out at a difficult time of year and a delay caused by the employer may actually improve the working conditions. The employer is not entitled to argue that the contractor should reimburse some money in consequence, but it may be appropriate for the architect to take it into account, depending on the facts, when ascertaining loss and/or expense for the delay.

Under SBC, IC and ICD standard forms, a contractor is entitled to an extension of time only for *exceptionally* adverse weather conditions. As a result of one relevant event, some work may be pushed into a period of poor weather. The weather conditions, although not what was envisaged, may not be exceptionally adverse in normal circumstances and may not merit an extension of time. Even if they are sufficiently bad to warrant an extension of time, bad weather is not in itself grounds for a claim for loss and/or expense.

Whether or not the contractor can found a claim for loss and/or expense in the circumstances will depend on whether the relevant causation can be established. In this respect it is important to remember that it is the originating delay which is crucial. It does not matter that the period of bad weather in which the contractor finds itself working is not exceptional. It may be quite normal for the time of year. The point is whether the period is worse than that for which the contractor allowed in its price.

The case which is much relied upon in this situation is the Canadian case of *Ellis-Don v The Parking Authority of Toronto*.[5] The basic facts of the case were simply that a contract period of 52 weeks was delayed by a further 32 weeks. Of this delay, 7 weeks were caused by the employer who failed to obtain the appropriate permit so that the project commenced 7 weeks late. This led to further delay in starting up and a total of 17.5 weeks was laid at the door of the employer. Part of the work had to be carried out in winter and the contractor was successful in claiming additional payment.

In essence, however, the principle is simply damages for breach of contract.[6] A court has accepted a winter working claim where a contractor was claiming in respect of the architect's repudiation of its contract with the contractor. The principle is just the same as if the contractor had been claiming under the building contract:

> 'The effect of working through the winter months was that the work was undertaken during extended periods of wet weather rather than in the significantly drier summer months. This was particularly so in the winter 2000–2001 which records showed was the wettest winter since 1766. The effect of this was to require [the contractor] to work in chalk ground conditions which had turned into slurry and in excavations where the sides had a tendency to collapse.
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> There were, in consequence, four additional heads of loss.[7]'

The court went on to identify the heads of loss as:

- additional lean mix concrete required
- additional filling under slabs

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[5] (1978) 28 BLR 98.

[6] See Section 5.2 above and the view of the House of Lords in *Koufos v Czarnikow Ltd (The Heron II)* [1969] 1 AC 350.

[7] *CFW Architects (A Firm) v Cowlin Construction Ltd* (2006) 105 Con LR 116 at 161 per Judge Thornton.

- additional capping layer materials
- crushed concrete and stone materials.

In another case, the judge postulated a knock-on scenario thus:

> 'Assume the following facts: A contract is entered into in this form of contract in May for one year for completion on 31 July of the next. The work is of a tunnelling nature. No tunnelling can be carried out from 1 November to 31 March for seasonal reasons but during that period the contractor will have expensive equipment lying idle. In early April when the works were on course for completion on 31 July the architect issues an instruction under 11(1) requiring a variation the execution of which will add three months to the contract period. At the same time on the contractor's application he grants an extension of time for completion to 31 October. A fortnight before 31 October when the works as varied are on course for completion in due time a strike occurs which continues until 31 March. The contractor recommences work on 1 April but because he had no opportunity to protect his machinery during the six months period it then takes the contractor two months not two weeks to complete. There has been no fault on either party.
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> If the architect grants an extension of time of eight months only under 23(d) I can see no reason why the contractor under the contract cannot still recover all his direct loss and expense under 11(6).'[8]

There are two things immediately to remark about this extract. The first is that the reference is to JCT 63. The principle, however, would be the same under SBC. The second thing is that the mathematics in the extract is wrong in a number of places. For example, it is surprising that a one year contract entered into in May is to be completed on 31 July the following year and the 'six months period' is actually five months. Despite the erroneous arithmetic, the principle remains unaffected.

In the commentary to this case, the editors of *Building Law Reports* note that it is a useful example to demonstrate why there is no necessary link between the grant or the refusal of an extension of time and the success of an application for loss and/or expense. They proceed, however, to disagree with the judge. In their view the contractor's costs flowed directly from the strike, not from the variation. They point out that a contractor takes the risk that a strike may occur not only during the original contract period, but also during any period of extension. They agree that the contractor would be entitled to an extension of the contract period for the strike. This example very clearly highlights the difficulties in considering knock-on claims. The question to be asked in each case is 'What is the direct cause of the winter working?'.[9] If the contractor cannot show that there is a direct connection between the cause of the delay and the necessity to work in conditions which are less advantageous than anticipated at the time of entering into the contract and that there is no compensating saving, its claim will fail. *Bush v Whitehaven Port & Town Trustees* demonstrates the point.[10]

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[8] *H Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106 at 118 per Judge Fox-Andrews.
[9] Causation is discussed in Chapter 8.
[10] (1888) 52 JP 392. This case was disapproved in *Davis Contractors v Fareham Urban District Council* [1956] 2 All ER 145, and should be treated with caution.

Bush entered into a contract to lay a water main and carry out other work in Cumbria. The contract was made in June and it was understood that Bush would get possession of the site to allow it to proceed with the Works immediately. In fact, the whole of the site was not available until October. As a result of this delay, what should have been a summer contract became a winter contract and Bush incurred substantial extra costs. As a result it took action against the Trustees. The fact that Bush was successful may be considered surprising in view of an express term of the contract which stipulated that if there was delay in giving possession, the contractor would not be entitled to additional money. The Court of Appeal held that Bush was entitled to a *quantum meruit* (as much as it had earned). *Sir Lindsay Parkinson Ltd v Commissioners of Works and Public Buildings,*[11] explained the *Bush* judgment as based on an implied term regarding the circumstances in which the Works were to be executed.

Some of the difficulties in formulating a claim for winter working were highlighted in a case where a contractor was claiming against a specialist consulting civil engineer.[12] Part of the claim related to delays caused by winter working. The court quickly went to the heart of the problem when dealing with the conclusions of Costain's expert:

> 'Part of [the expert's] analysis maintains that an additional delay period of 14 working days should be added to the overall period of delay for which Haswell was responsible on account of winter working. The basis for this argument is as follows. [The expert] asserts that the critical delays to the RGF identified by him in the period October 2002 to January 2003 pushed all the works into delay. This meant that the pipework installation between and within the buildings, instead of being carried out and completed during the summer of 2003, as programmed by Costain, was pushed into October and November 2003, a period of winter working which caused further delays resulting from low productivity inherent in working outside during the short days and bad weather of winter. For this purpose [the expert] takes winter as commencing on 1 October 2003 and he opines that working after that date would take 1.33 times longer than working in the summer. It is this factor of 1.33 from which he derives the additional delay of 14 working days.
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> In cross-examination, [the expert] frankly accepted that this claim and his calculation of it was purely theoretical since he had done no research into the actual effect of winter working on the productivity of works such as pipework installation. He also accepted that 1 October 2003 was an arbitrary date to commence the calculation since, as we all know, the weather in October can be drier and more settled than in any of the summer months. [The expert] also accepted in evidence that the factor of 1.33 might be overstated since he had no solid basis upon which to make it.
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> I have no hesitation in rejecting this part of [the expert's] analysis. It is wholly theoretical and based on nothing but the meteorological records for the relevant period and [the expert's] experience and hunch. It seems to me to be unlikely that,

[11] [1950] 1 All ER 208.
[12] *Costain Ltd v Charles Haswell & Partners Ltd* (2009) 128 Con LR 154.

> as a matter of course, productivity of outside building works in October and November is always measurably lower than for, say, the months of August and September. In this country the productivity of outside work depends to a great extent upon the weather which can be changeable at any time of year and there can be no presumption that it will be generally worse in October and November than in any other month. In the absence of hard facts and figures to support such a claim related to the facts of this case, which do not exist, in my judgment, this claim has not been established on the balance of probabilities.'[13]

Essentially, a knock-on claim flows naturally from the breach, whatever it was, which caused the delay. It is by no means easy to identify the chain of causation correctly and contractors should not rely upon the kind of example put forward in the decision in *H Fairweather & Co Ltd v London Borough of Wandsworth*.[14] In *Davis Contractors v Fareham Urban District Council*[15] the contractor tendered on the basis that adequate supplies of labour would be available. Unfortunately, the letter containing this qualification was held by the court not to be part of the contract. Therefore, when shortages of labour caused the work to go slow causing substantial extra expense for the contractor, the court held that it was not entitled to any extra payment. It was said that 'it by no means follows that disappointed expectations lead to frustrated contracts'.[16] Generally, whatever the expectations of either party, it is wise to enshrine them in the contract so that in the event of a departure from the expectations, the appropriate remedy will be available. The foregoing cases indicate, perhaps more than anything else, the uncertainties inherent in this type of claim.

A contractor is obliged to take responsibility for those delays which it has caused, but it is not bound to take the unforeseeable into account. Prolongation of a contract which means working through an additional winter period almost inevitably results in 'direct loss and/or expense' to the contractor. There are occasions, of course, when a delay during the progress of the works may have the result of pushing work into a summer period to the contractor's advantage.

7.3 The more common heads of loss

7.3.1 General principles

The following are not intended to be exhaustive heads of loss, but simply those that most generally apply. The basic principle to be borne in mind is that, subject to the restrictions of directness and foreseeability, the contractor should be put into the financial position which it would have been in had the delay or disruption not occurred. If this general principle is borne in mind, there should be no difficulty in judging or putting forward other heads of loss where the particular circumstances

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[13] *Costain Ltd v Charles Haswell & Partners Ltd* (2009) 128 Con LR 154 at 216 per Richard Feryhough QC sitting as a Deputy Judge of the High Court.
[14] (1987) 39 BLR 106 at 118 per Judge Fox-Andrews. See the commentary at page 110 of the judgment.
[15] [1956] 2 All ER 145.
[16] [1956] 2 All ER 145 at 163 per Lord Simonds.

permit. There are no limits to the possible heads of loss other than the ingenuity of the contractor in putting together a valid claim.

Loss and expense is the equivalent of damages at common law. The measure of such damages can be quite complex, but the starting position is to put the injured party in the same position, so far as money can do it, as if the contract had been correctly performed.[17] In recovering such damages, the law will allow only the recovery of losses actually suffered or expense actually incurred. The contractor should recover its actual costs if it has the records to substantiate them in preference to its tender costs, even though its tender costs are part of its tendered and accepted price.

In practice, there is no doubt that both contractors and professionals tend to approach the presentation and ascertainment of claims in a manner which is merely a loose approximation of what is required by law. This is probably a mixture of misunderstanding and an unwillingness to spend the requisite time to properly prepare the claim and to ascertain its value. Generally, a contractor will devote its energies to obtaining an extension of time. Having secured as long an extension of time as possible, the contractor will match the relevant events under which the extension was given to the relevant matters in the loss and/or expense clause. Having established how much of the extension of time is 'cost-related' (as commonly called), the contractor then seeks to obtain an amount of loss and/or expense based on multiplying the number of 'cost-related' weeks to the weekly amount of preliminaries in the bills of quantities.

In its favour, it has to be said that the system is simple and certain, once the extension of time has been given. Against it of course is that it results in the wrong amount being paid; whether that amount is greater or less than the amount to which the contractor is strictly entitled. Some parties are prepared to sacrifice a strictly correct result in favour of the economy in arriving at it. The courts recognise that such simple methods of arriving at the amount due are perfectly valid, albeit not in accordance with the contract, provided that both parties agree.[18] However, architects and quantity surveyors who follow this route without the agreement of the employer run the risk that they may be held negligent if the quick system results in the employer paying more money to the contractor than would have been the case if the process had been properly observed. It is the difference between establishing precisely what is contractually due to the contractor and a very rough approximation.

7.3.2 On-site establishment costs

This is the correct term for what is often called site overheads or commonly simply 'preliminaries' or 'prelims', because the prices are normally found in the preliminaries section of the bills of quantities. As noted earlier, the bills of quantities prices are not normally to be used to calculate the loss and/or expense. Actual costs should be used. On-site establishment costs are perhaps the easiest head of claim to establish because

[17] *Robinson v Harman* (1848) 1 Ex 850.
[18] *Alfred McAlpine Homes North Ltd v Property & Land Contractors Ltd* (1995) 76 BLR 65.

all the relevant data should be readily accessible by the contractor in respect of the particular periods of delay. They will consist of the site accommodation, health and safety facilities, plant including vehicles, equipment, tools, telephone, and electricity charges, costs of welfare and sanitary facilities, light and heat where not covered by electrical charges, supervisory and administrative staff engaged upon the site of the particular contract.

Not all of these items are time-related. Some are clearly dependent on work or value and care must be taken that inappropriate items are excluded. For example, a crane or scaffolding may be held on site during a delay period; alternatively there may be equipment that is off site during a delay period. Care must be taken that the on-site staff are really necessary and not simply transferred to site during a period of delay, because there is no work for them elsewhere. Rather, the contractor should take steps to move unnecessary people and plant off-site. Relevant labour returns should be provided by the contractor to show what people were doing and why the particular resources were on site. It is always important that a contractor can demonstrate that what is on site during a delay period is necessary. On the other hand, the pattern of resourcing on a project is that there are some days or weeks at the commencement when the resources are being built up and probably a somewhat longer period at the end of the project when the site establishment will be running down. It would be wrong simply to take the costs from the date when the Works should have been completed to the date of practical completion.

7.3.3 Head-office overheads

The principle

It is important to understand that the contractor is not claiming that it has actually *lost* overheads. It has not been called upon to spend money. What is being claimed is the loss of the opportunity to contribute to head-office overheads by carrying out another contract or contracts immediately following the date when the contract, which is the subject of the claim, is supposed to be finished. Where a contractor was kept on site longer than the contract period, it used to be assumed as a matter of course that it would be able to recover its overhead costs for the period of delay. Although it is still possible for a contractor to recover head-office overheads as part of its claim for loss and/or expense, it is no longer an automatic presumption and recovery of head-office overheads has become far more difficult.

It is usually argued that the contractor must be able to show that it had other work which it could have done during the delay period, otherwise, even if the contract had finished on time, the contractor would have been unable to make any contribution during the period and, therefore, would suffer no loss under this head during any period of prolongation.[19] An exception has been made where a contractor was able to show that it carried out one project at a time.[20]

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[19] *J F Finnegan Ltd v Sheffield City Council* (1988) 43 BLR 124.
[20] *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd* (1995) 76 BLR 65.

Difficulties in proving loss of opportunity

It is inevitable that in regard to any contract, periods of delay or disruption will lead to an increase in direct head-office administrative costs dealing with the problems caused by the delay and disruption. Obvious examples are contract managers having to spend more time than usual in organising additional labour, ordering additional materials, re-scheduling supplies, re-arranging plant hire and revising programmes. The contractor may face difficulties in recovering some of such costs if the staff would not have been fully employed, but for the delay. It could be argued that it would have incurred such costs as part of its head-office costs whether or not there was a delay. It has been said:

> '. . . it is for [the contractor] to demonstrate that he has suffered the loss which he is seeking to recover . . . it is for [the contractor] to demonstrate, in respect of the individuals whose time is claimed, that they spent extra time allocated to a particular contract. This proof must include the keeping of some form of record that the time was excessive, and that their attention was diverted in such a way that loss was incurred. It is important, in my view, that [the contractor] places some evidence before the court that there was other work available which, but for the delay, he would have secured, but which, in fact, he did not secure because of the delay; thus he is able to demonstrate that he would have recouped his overheads from those other contracts and thus, is entitled to an extra payment in respect of any delay period awarded in the instant contract.'[21]

Significantly, the problem, identified by the arbitrator and confirmed by the judge, was that the delay was not sufficient to deter a building contractor of the size and standing of the contractor in this case from tendering for other work. The recovery of head-office overheads as part of prolongation costs is likely to be difficult in future where large contractors are concerned. Indeed, it is always difficult for a contractor to show that it has been prevented from using its workforce on another project, because the current project is delayed. In practice, few contractors nowadays keep a large permanent workforce on the books; much if not all of the workforce will be sub-contracted. In any event, the types of operatives engaged during a period of delay at the end of a contract are finishing trades and not the groundworkers and other early trades needed for a new project. Even the supervisors will often be finishing foremen. Therefore, it may be difficult to show that a contractor could not have carried out other work. It is usually only by being able to show that it actually turned work away that the contractor can prove its point. The smaller the contractor, the easier it should be for it to prove that a delay on one contract prevented it from earning a contribution to overheads on another contract. A slightly different approach was accepted by the court in *CFW Architects (a firm) v Cowlin Construction Ltd*[22] and

[21] *AMEC Building Ltd v Cadmus Investment Co Ltd* (1997) 13 Const LJ 50 at 56 per Mr Recorder Kallipetis. See also *City Axis Ltd v Daniel P Jackson* (1998) 64 Con LR 84, *Norwest Holst Construction Ltd v Co-operative Wholesale Society Ltd* (No 2) [1998] EWHC Technology 339 and *Beechwood Development Company (Scotland) Ltd v Stuart Mitchell (t/a Discovery Land Surveys)* [2001] ScotCS 30 where the criteria for head-office overheads are set out. The importance of the availability of other work is common to all.

[22] (2006) 105 Con LR 116.

pushes the claims doors further ajar. This approach is considered under 'Use of formulae' below.

A more recent view was taken of this problem by the Court of Appeal in a case which did not concern construction but the damages resulting from flooding. However, the principles are applicable:

> 'I consider that the authorities establish the following propositions. (a) The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the claimant to adduce is not adduced, he is at risk of a finding that they have not been established. (b) The claimant also has to establish that the diversion caused significant disruption to its business. (c) Even though it may well be that strictly the claim should be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time.'[23]

Efficient contractors will require their staff to keep time records and where this is done the direct costs involved should be readily ascertainable.

Head-office overheads include not only costs of staff engaged upon individual contracts but also such general ongoing and largely unchangeable items as rent, rates, maintenance, light, heating, cleaning, clerical staff, telephonists and general renewable costs such as stationery and office equipment. It is important to distinguish between these two elements of overhead costs however calculated. One set of overhead costs is costs which are expended in any event: rates, electricity and the like. The other is managerial time which is directly allocatable to the project and to no other.

In order to make a claim involving either overhead levels or profit levels (or both), it appears that actual overheads and profits must be identified – not merely theoretical or assumed levels. If direct loss and/or expense is the equivalent of what is claimable as damages for breach of contract at common law, the common law principles must apply. Force has been given to this argument by the courts:

> 'Managers are of course employed to sort out problems as they arise. If, however, the magnitude of the problem is such that an untoward degree of time is being spent on it then their costs are recoverable. Looking at the hours recorded, I am quite satisfied that is the position in this case. The costs of course go beyond those of managers and represent staff cost that would not have been incurred but for the defendant's breach. The plaintiffs might have provided an alternative quantification by reference to the additional costs to them of employing others but I do not consider that they are obliged to do so if they can satisfactorily demonstrate the cost to them of time unnecessarily spent and therefore lost. It is for the defendants to show that the losses *prima facie* incurred are not the correct measure of damage and this [the defendants] failed to do.'[24]

[23] *Aerospace Publishing v Thames Water Utilities* (2007) 110 Con LR 1 at 30 per Wilson LJ.
[24] *Babcock Energy Ltd v Lodge Sturtevant Ltd* (1994) 41 Con LR 45.

There is some authority to the effect that, if all other methods of calculating loss fails, then provided that it is clear that some loss has been sustained, a court will accept an estimate which in some instances, may be little more than speculation.[25]

Use of formulae

Norwest Holst Construction Ltd v Co-operative Wholesale Society Ltd (No.2)[26] was an appeal by the contractor against the award of an arbitrator in favour of a sub-contractor. Among the questions to be answered by the court was the question whether the arbitrator had correctly decided that the sub-contractor was entitled to overheads by using a formula. This was just one of a series of questions considered over several trials. The court set out the following findings of the arbitrator with which the court agreed:

> '1. The delay caused [the sub-contractor] some additional costs. This was represented by additional time being spent by senior management working on administrative tasks on this contract in the period of delay.
> 2. Some loss and/or expense in respect of Head Office costs occurred because of the delay on this contract. This loss and/or expense was a combination of rates, lighting, heating and the like.
> 3. A claim for a "loss of contribution to overhead recovery" would be justified if [the sub-contractor] could show that it had suffered loss.
> 4. The additional time spent on this contract would have been spent productively on other contracts had it not had to be spent on this contract.
> 5. [The sub-contractor] suffered a "loss of contribution to overhead recovery" caused by senior management spending less time on other contracts because, in the period of delay, they were working on this contract.
> 6. It was not possible to accept that the "loss of contribution to overhead recovery" was as much as would be provided for by the Emden formula.
> 7. The appropriate way of compensation for both types of loss was to award the sub-contractor a composite sum per week for the 19 weeks in question. This loss was calculated by taking one fifth of the Emden formula weekly recovery.'[27]

The use of the Emden formula is sanctioned by a court if used in appropriate circumstances albeit the arbitrator in the circumstances had felt it appropriate to reduce the effect of the formula substantially. His reason for the reduction was that he believed that the sub-contractor had suffered some loss, but not as much as would be recovered using Emden. The arbitrator had proceeded on the basis that that there was a significant likelihood, although not a certainty, that loss had been caused to the sub-contractor. That was because the sub-contractor had to prove that a number of third parties over which it would have had no control would have acted in a different way if the sub-contractor's head-office management had been able to devote

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[25] *Chaplin v Hicks* [1911] 2 KB 786. See also the Canadian case of *Wood v Grand Valley Railway Co* (1913) 16 DLR 361 and the more recent *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91.
[26] [1998] EWHC 339 (TCC).
[27] [1998] EWHC 339 (TCC) at paragraph 342 per Judge Thornton.

more of its time to other contracts. The sub-contractor did not need to prove such assumed actions on the balance of probabilities, but rather that there was a real or substantial chance of such actions.[28] It is the chance of such action which the arbitrator had to assess. The court's view was that these were findings of fact with which the court could not interfere.

The use of formulae for calculating head-office overheads and profit was not approved by the High Court in *Tate & Lyle Food and Distribution Co. Ltd v Greater London Council*[29] especially if other more accurate systems are available, but the contractor fails to take advantage of them. The court held that use of managerial time spent in remedying an actionable wrong committed against a trading company was claimable at common law as a head of special damage. It has been said that this case throws doubt on the legitimacy of charging a percentage to represent head-office or managerial time spent as a result of delay or disruption, unless there is clear proof. Although the court ruled on an important principle, the claim was unsuccessful, because no records had been kept of the amount of managerial time which had been actually spent on remedying the wrong and, therefore, there was no substantiating evidence. This was not a case involving a building contract, but it is suggested that the principles set out are of general application. The case was appealed to the House of Lords, but not on this point. In what has become a well-known paragraph, the court said:

> 'I have no doubt that the expenditure of managerial time in remedying an actual wrong done to a trading concern can properly form the subject-matter of a head of claim. In a case such as this it would be wholly unrealistic to assume that no such additional managerial time was in fact expended. I would also accept that it must be extremely difficult to quantify. But modern office arrangements permit of the recording of the time spent by managerial staff on particular projects. I do not believe that it would have been impossible for the plaintiffs . . . to have kept some record to show the extent to which their trading routine was disturbed . . . In the absence of any evidence about the extent to which this has occurred the only suggestion . . . is that I should award a percentage on the total damages . . . While I am satisfied that this head of damage can properly be claimed I am not prepared to advance into an area of pure speculation when it comes to quantum. I feel bound to hold that the plaintiffs have failed to prove that any sum is due under this head.'[30]

In a further case, the judge has made observations of general importance, albeit there were some special circumstances which the arbitrator, from whom the case was heard on appeal, had taken into account on the basis that the claimants only carried out one major project at a time and, therefore, all their overheads were referable to that project. The judge noted with approval some 'clear and sensible conclusions' of the arbitrator:

> 'Efficient contractors normally require their staff to keep accurate time records which allow actual costs related to projects to be ascertained. This is a duty

[28] *Allied Maples Group Ltd v Simmons & Simmons* (1996) 46 Con LR 134.
[29] [1982] 1 WLR 149
[30] *Tate & Lyle Food and Distribution Co Ltd v Greater London Council* [1982] 1 WLR 149 at 152 per Forbes J.

> commonly left to the respective quantity surveyors, although the use of a formula would perhaps be appropriate where no such records are available or where there is an agreement between the parties that the 'broad brush' approach would be acceptable. Practitioners are generally sceptical about the application of such formulae on the grounds that it is the actual loss and expense which is admissible and that the contractor must specify precisely the expense which has been incurred. It is clear in my mind that this was the intention of the JCT standard form in respect of clause 26.'[31]

Later the judge added:

> 'The requirements that the loss or expense should be "direct", that it should not "be reimbursed by a payment under any other provision in [the] contract" and that the architect or quantity surveyor is to "ascertain the amount of such loss and/or expense", all suggest strongly that the amount of direct "loss and/or expense" will not exceed what might have been recoverable as damages. In particular the requirement that the amount should not be reimbursed under another provision of the contract is likely further to limit the occasions on which a formula might be appropriate, (although like the use of preliminaries to measure prolongation costs a formula is not infrequently agreed by the contracting parties to be a convenient short cut even though it would not otherwise have been legitimate). Furthermore "to ascertain" means "to find out for certain" and it does not therefore connote as much use of judgment or the formation of opinion had "assess" or "evaluate" been used. It thus appears to preclude making general assessments as have at times to be done in quantifying damages recoverable for breach of contract.'[32]

Therefore, it appears that the use of formulae cannot generally be justified as a method of ascertaining the contractor's entitlement under the contract terms unless supported by adequate evidence and provided that the principle has been clearly established. This reference to ascertainment was considered in a later case dealing with an appeal from an arbitrator's award where the duty to 'ascertain' was softened to allow some measure of judgment to be used:

> 'A judge or arbitrator who assesses damages for breach of contract will endeavour to calculate a figure as precisely as it is possible to do on the material before him or her. In some cases, the facts are clear, and there is only one possible answer. In others, the facts are less clear, and different tribunals would reach different conclusions. In such cases, there is more scope for the exercise of judgment. The result is always uncertain until the damages have been assessed. But once the damages have been assessed, the figure becomes certain: it has been ascertained. In my view, precisely the same situation applies to an arbitrator who is engaged on the task of 'ascertaining' loss or expense under one of the standard forms of building contract. Indeed, it would be strange if it were otherwise, since a number of the events which give rise to recover loss or expense under the contract would also entitle the claimant to be awarded damages for breach. I would hold, therefore,

[31] *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd* (1995) 76 BLR 65 at 70 per Judge Lloyd.
[32] *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd* (1995) 76 BLR 65 at 88 per Judge Lloyd.

that, in ascertaining loss or expense, an arbitrator may, and indeed should, exercise judgment where the facts are not sufficiently clear, and that there is no warrant for saying that his approach should differ from that which may properly be followed when assessing damages for breach of contract.

Thus in cases such as the present, the arbitrator must decide *inter alia* whether the costs built into the tender rates were realistic on the footing that the contract proceeded without delay or disruption. That decision inevitably involves an element of judgment, just as the tendering process itself involves an element of judgment. There is no place for pure speculation in the ascertainment of loss or expense, any more than there is in the assessment of damages. Moreover, I think that an arbitrator should not readily use typical or hypothetical figures, but it would be wrong to say that they can never be used.'[33]

It should be noted that, in *Ellis-Don Ltd v Parking Authority of Toronto*,[34] the court held that the overheads and profit would have been capable of being earned elsewhere had it not been for the delay caused by the employer. It also held that on this project, without taking into account the results of this law suit, Ellis-Don made 4 per cent of the contract price to be applied against overhead and as profit, the contractor having claimed that 3.87 per cent of the contract price had been included for these items.[35] The Hudson formula was applied without any great consideration of its merits.

It is essential to remember that formulae assume a healthy construction industry and that the contractor has finite resources so that, if delayed on a project, it will be unable to take on other work. In a period of recession, if workload for a particular contractor is not heavy, or if, as in the *AMEC* case noted above, the contractor is of significant size, it will have difficulty in showing that a delay caused it to lose the opportunity to carry out other work. Indeed, as noted earlier, there may be other reasons why being delayed on one project would not prevent the contractor undertaking another. When the construction industry is buoyant or booming at the material time, a formula approach may be acceptable.[36] It has been held that a formula such as Emden is sustainable in the following circumstances:

- 'the loss in question must be proved to have occurred.
- the delay in question must be shown to have caused the contractor to decline to take on other work which was available and which would have contributed to its overhead recovery. Alternatively, it must have caused a reduction in the overhead recovery in the relevant financial year or years which would have been earned but for that delay.
- the delay must not have had associated with it a commensurate increase in turnover and recovery towards overheads.
- the overheads must not have been ones which would have been incurred in any event without the contractor achieving turnover to pay for them.
- there must have been no change in the market affecting the possibility of earning profit elsewhere and an alternative market must have been available. Furthermore,

[33] *How Engineering Services Ltd v Lindner Ceilings Partitions plc* [1999] 2 All ER (Comm) 374 at 383 per Dyson J.
[34] (1978) 28 BLR 98.
[35] See also *Shore & Horwitz Construction Co Ltd v Franki of Canada Ltd* [1964] SCR 589.
[36] *St Modwen Developments Ltd v Bowmer and Kirkland Ltd* (1996) 14 CLD-02-04.

there must have been no means for the contractor to deploy its resources elsewhere despite the delay. In other words, there must not have been a constraint in recovery of overheads elsewhere.'[37]

Before a decision is made to use a formula, it is essential to ensure that it does not overstate the actual loss to the contractor, and the formula should be backed up by supporting evidence such as the tender build-up or the audited accounts, showing actual overheads. Although it has generally been thought that formulae should be treated with suspicion, they are still accepted by the courts if other criteria can be satisfied:

'The claim is based on the conventional application of Emden's formula for a ten-week period. The sum is agreed, subject to proof that the loss was incurred. The loss is the loss of recovery of profit and head office overheads arising from the inability to earn these recoveries from other work in the relevant period because Cowlin's resources were still employed on non-profitable, non-financial recovering work for DHE.

Mr Spiller gave evidence to the effect that the effects of the repudiation were that he and Mr Brown were much more heavily involved in the project than they should have been. This precluded them chasing other work, being involved in negotiations and tendering and otherwise generating financially rewarding new work.

I readily accept that the heavy additional involvement that these two senior members of Cowlin's management team reasonably became involved in at Tidworth precluded significant additional earnings elsewhere. It follows that the conventional basis for assessing this loss, recourse to the Emden formula for a ten-week period, is appropriate.'[38]

The case concerned a contract on a design and build basis for the construction of houses for services families. Cowlin was the contractor and CFW was the architect which was engaged by Cowlin. CFW claimed against Cowlin for the return of a substantial sum which it said had been wrongly paid following a wrong adjudication decision. Cowlin put forward a substantial counterclaim. The claim was made by Cowlin for head-office overheads and profit in respect of a period of delay caused by its own sub contractor and was akin to a claim made under a building contract and the principle is precisely the same.

Care must be taken to avoid double-recovery in respect of directly engaged administrative staff if some kind of formula is used to deal with the element of general overhead costs. If some or all of the prolongation period is caused by additional work, the contractor will have recovered an appropriate proportion of overheads. Even if it has not actually been so recovered, the amount is reimbursable under the valuation of variation clause and, therefore, under JCT contracts cannot be recovered through the loss and/or expense clause which covers only loss and/or expense for which the contractor would not be reimbursed by a payment under any of the other provisions

[37] *Norwest Holst Construction Ltd v Co-operative Wholesale Society Ltd (No.2)* [1998] EWHC Technology 339 at paragraph 350 per Judge Thornton.
[38] *CFW Architects (a firm) v Cowlin Construction Ltd* (2006) 105 Con LR 116 at 169 per Judge Thornton.

in the contract. Note that the point is not whether the contractor has actually obtained the reimbursement, but whether it was entitled to it.

There is a use for formulae in certain situations, usually as a last resort where it is clear there has been a loss but where there is a complete lack of proper evidence to support the claim. However, the uncritical use of formulae without regard to available facts and without supporting evidence is to be avoided. It appears that there are two distinct situations so far as a claim for overheads is concerned:

- a disruption situation, where there is no prolongation of the contract period, in which the management time and overhead element are recoverable on the basis of proof of time spent as set out in the *Tate and Lyle* case.
- a prolongation situation, in which there is a delay to the contract period, in which case a formula approach may sometimes be used to calculate the amount provided that the entitlement to recovery in principle has already been established.

Whatever the situation, it is unlikely that any formula is suitable for general application and each formula must be carefully scrutinised in relation to its relevance.

Formulae in common use

(a) The Hudson formula

This used to be the best-known formula for calculating head-office overheads and profit although that is probably no longer the case. The formula is set out at page 1076 of *Hudson's Building and Engineering Contracts*.[39] The principle of the formula is to take the allowance which the contractor has made in respect of head-office overheads and profit in its original tender, then to divide this figure by the length of original contract period. The result is multiplied by the period of prolongation of the contract to produce the claimed overheads and profit. Loss of profit is dealt with as a separate head of claim (see Section 7.3.4). The formula is:

$$\frac{\text{HO/Profit percentage}}{100} \times \frac{\text{Contract Sum}}{\text{Contract period}} \times \text{Period of delay (in weeks)}$$

The formula combines head-office overheads and profit together on the reasonable basis that contractors normally add a single percentage to their prices to cover both. However, Duncan Wallace says of this calculation that 'in the case of a *delayed* contract, where the concern is to ascertain the "profit" which the delayed contract organisation might have expected to earn *elsewhere in the market on other contracts*, it is this necessary combined operating margin of profit and fixed overhead which, in appropriate market conditions, the contractor's enterprise will have lost as a consequence of the period of owner caused delay . . . '. This is not necessarily correct. If a contract has overrun, the contractor has not actually lost overheads or, indeed, profits. What it has lost is the opportunity to earn these two elements on other work during the overrun period.

[39] I N Duncan Wallace, *Hudson's Building and Civil Engineering Contracts* (1995) 11th edition, London, Sweet & Maxwell, where the strengths and some weaknesses of this and the Eichleay formula are discussed.

The formula is not convincing, because the percentages are based upon the contractor's annual accounts prior to and during the contract 'or other available information'[40] and may never have been achievable on a particular project. In addition, there is a serious inaccuracy, because it allows the overheads and profit to be based on a figure including the amount of overheads and profit already included in the contract sum. If it is proposed to use the formula, the amount of overheads and profit already included should be excluded from the contract sum. Other criticisms have been levelled at the Hudson formula:

- It requires the total delay period to be reduced if appropriate to take account of various factors for which financial recovery is not permitted under most standard form contracts e.g. the contractor's own inefficiency or extensions of time on grounds which do not also permit recovery of loss and/or expense.
- It ignores the contractor's obligation to prove that it had to turn down the opportunity to earn a contribution to overheads and profits during any period of delay.
- It ignores the fact that the contractor should make realistic efforts to deploy its resources elsewhere during a period of delay.[41]
- The value of the final account may exceed the contract sum and any proper valuation for variations is likely to have included an element of reimbursement for overheads and profit while fluctuations may have the effect of reducing the percentage of overhead recovery on actual cost.
- The formula can also produce under-recovery for the contractor where inflation during the period of delay increases the overhead costs envisaged at the time of tender.

Some of these criticisms can be easily addressed if the period of delay in the formula is entered, not as the total delay to the project (which might include some contractor's culpable delay), but as the prolongation period which the architect has accepted as caused by the relevant grounds for recovery of loss and/or expense set out in the contract.

It is sometimes alleged that this formula has received judicial approval. That is incorrect. Invariably, the Emden formula has been used even though, as in *J. F. Finnegan Ltd v Sheffield City Council*[42] the judge referred to the Hudson formula with approval. Notwithstanding what he said, he proceeded to apply the Emden formula without taking any submissions about its validity. The court also mistakenly referred to the Hudson formula in *Whittal Builders Co Ltd v Chester-le Street District Council*.[43]

(b) The Emden formula

This is a formula which was published in a respected legal textbook, *Emden's Building Contracts and Practice*,[44] which considers the contractor's annual turnover as the basis for the percentage of overheads and profit. The formula is as follows:

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[40] I N Duncan Wallace, *Hudson's Building and Engineering Contracts* (1995) 11th edition, London, Sweet & Maxwell, paragraph 8.179.
[42] (1988) 43 BLR 124.
[41] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114.
[43] (1985) 11 Con LR 40.
[44] *Emden's Building Contracts and Practice*, 8th edition, [1980] vol 2, at page N/46.

$$\frac{h}{100} \times \frac{c}{cp} \times pd$$

'*h*' = the head-office percentage arrived at by dividing the total overhead cost and profit of the contractor's organisation by the total turnover.
'*c*' = the contract sum.
'*cp*' = the contract period.
'*pd*' = the period of delay.
'*cp*' and '*pd*' must be calculated using the same units, e.g. weeks.

This approach is open to some of the same criticisms as the Hudson formula. However, it is more useful than Hudson's formula if the actual costs of head-office personnel who were directly engaged in dealing with an individual contract are not obtainable. Sometimes the formula is changed slightly to substitute, for *h*, the proportion of the contractor's overall overhead costs which can be shown from its accounts to be spent on staff who are directly engaged on contracts. This gives an approximation of the cost of staff engaged on the particular contract during the period of delay. However, clearly this approach does not make an allowance for the cost of greater numbers of staff involved during the original contract period due to disruption.

This formula has been accepted in *J F Finnegan Ltd v Sheffield City Council*[45] and *Beechwood Development Company (Scotland) Ltd v Stuart Mitchell (t/a Discovery Land Surveys)*[46] where there was no practicable means of otherwise calculating the amount. In both instances, the court incorrectly referred to the formula as 'Hudson's'. More recently, the Emden formula has been accepted without adverse comment in *CFW Architects (a firm) v Cowlin Construction Ltd* where the judge referred to the 'conventional application of Emden's formula'.[47]

(c) The Eichleay formula

This formula originates in the USA. It is a calculation in three stages and differs from the other formulae in that it applies daily rates. It is as follows:

(1) $\dfrac{\text{Contract Billings}}{\text{Total contractor billings for contract period}} \times \text{Total HO overheads for contract period} = \text{Allocable overhead}$

(2) $\dfrac{\text{Allocable overhead}}{\text{Days of performance}} = \text{Daily contract HO overhead}$

(3) Daily contract HO overhead × Days of compensable delay = Amount of recovery

All such formulae are subject to criticisms and this formula is no exception. Among the possible drawbacks to this one are:

[45] (1988) 43 BLR 124.
[46] [2001] ScotCS 30.
[47] (2006) 105 Con LR 116 at 169 per Judge Thornton.

- The formula gives only a rough approximation of the sum due.
- It does not require proof from the contractor of its actual increased overhead costs resulting from the delay.
- Double-recovery is possible. To deal with this possibility, it is necessary to deduct any head-office overhead recovery which can be achieved in the valuation of variations.

The Eichleay formula is widely used in USA Federal Government Contracts and has been adopted in some other non-government cases, but it has been subject to criticism in the courts and is not universally accepted[48]. However, criticism of the formula is not criticism of the proposition that in a period of reduced activity on site a contractor will incur off-site overheads for which payment is not being recovered from revenue generated at site. It is simply that unintelligent use of the formula will demonstrate its inherent weakness.[49]

7.3.4 Loss of profit

Loss of profit, which the contractor would otherwise have earned had it not been for some delay or disruption, is an allowable head of claim under the financial claims clauses of most standard form contracts. Loss of profit is also recoverable in principle as a head of damage for breach of contract at common law under the first part of the rule in *Hadley v Baxendale.*[50] The contractor is entitled to recover only the profit normally expected to be earned. If, a delay prevented the contractor from earning an extremely high profit on another contract, the extremely high profit element would not be recoverable unless, in accordance with the normal rules, the employer was aware of the exceptional profit at the time the delayed or disrupted contract has been executed.

This is the second part of the rule which governs special damages and has been referred to earlier.[51] *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*[52] is a case in point (although not in the construction industry) where Victoria Laundry (who unsurprisingly were launderers) agreed to buy a boiler from Newman. Newman knew that the boiler was wanted in order to be put to immediate use, but delivery of the boiler did not occur until five months after the date stated in the contract and it was said that Victoria Laundry lost some extremely profitable contracts as a consequence. The Court of Appeal held that the plaintiffs were entitled to recover the profit which might reasonably have been expected to result if the boiler had been available during the five months delay, but that no allowance could be made for the extremely profitable nature of some of the lost contracts, because it was not in the contemplation of the parties at the time the contract was entered into.

The foundation of a claim for loss of profit is similar to a claim for recovery of overheads based on lost opportunity. Whether the contractor is prevented from

[48] See the comments of the USA Court in *E Berley Industries v City of New York* (1978) 385 NE (2d) 281.
[49] 28 BLR at 103.
[50] (1854) 9 Ex 341.
[51] See Chapter 5, Section 5.2.
[52] [1949] 1 All ER 997.

earning a profit on the contract on which it is engaged or whether it is prevented from earning a profit on another contract, it is the loss of opportunity to earn a profit which is important. It does not automatically follow that a contractor can recover a percentage in respect of profit every time it can prove delay or disruption. Such a claim is permissible only in situations where the contractor can show that, as a direct result of the disruption or prolongation, it has been prevented from earning a profit elsewhere in the normal course of its business. The position is similar to that discussed above in Section 7.3.3 regarding overheads. Indeed, for convenience, claims for loss of profit are often grouped together with loss of overheads. However, there is a distinct difference in the two claims.

The success of a claim for loss of profit will usually depend on the general financial situation in the country as a whole, because the contractor is put to proof that it could have earned a profit. In some instances, the reality may be that the contractor could earn no profit at all. Indeed, it may be that a contractor is operating at no profit or even a small loss. This will particularly be the case where the economic climate is such that many contractors are 'buying' work. A claim for overheads may not be unaffected, because it may be difficult for a contractor to show when there is a shortage of work that any actual loss of this kind has been suffered and other work may not be obtainable. But it will also depend on the extent to which the prolongation is the result of additional work, the value of which contains an appropriate proportion of profit.

There is a possible argument to the effect that loss of the overhead and profit-earning capacity of additional resources devoted to a contract because of delay or disruption is to be assumed without necessity of proof. For the reasons stated earlier, this kind of argument is no longer acceptable.

In *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*,[53] work was suspended on a contract for 58 weeks. The contract used was not a standard form, but the comments apply to most standard form building contracts. The Court of Appeal also helpfully indicated what kind of substantiation was required to found the claim:

> 'The way in which the claim for loss of profit was dealt with below has caused me some anxiety. The basis upon which the claim was put in the pleadings was that for 58 weeks no work had been done on this site. Accordingly, a large part of the plaintiffs' head office staff, and what was described as their site organisation, was either idle or employed on non-productive work during this period, and the plaintiffs accordingly suffered considerable loss of gross profit . . . When the matter came before the court below the matter was put rather differently. The case was put on the basis that in the time during 1966 and 1967 when they were engaged in completing the construction of the East Lancashire Road project they were unable to take on any other work, which they would have been free to do had the East Lancashire Road project been completed on time, and they lost the profit which they would have made on this other work. When the case was argued in this court it seemed to me that the plaintiffs were a little uncertain about which basis they were opting for.

[53] (1970) 1 BLR 114.

> In the end however I think they came down in favour of the second basis: that is, the one that was argued before the court below . . .
>
> Possibly 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 could be of help. Moreover, it is possible, I suppose, that a judge might think it useful to have an analysis of the yearly turnover from, say, 1962 right up to, say, 1969, so that if the case is put before him on the basis that work was lost during 1966 and 1967 by reason of the plaintiffs being engaged upon completing this block and, therefore, not being free to take on any other work, he would be helped in forming an assessment of any loss of profit sustained by the plaintiffs.'[54]

Later in the same case it was said:

> 'Under this head (i.e., loss of profit) the plaintiffs were awarded the sum of £11,619. The defendants submit that this sum should be wholly disallowed, no loss of profit having been established. This outright denial is, in my judgment, probably untenable, it being a seemingly inescapable conclusion from such facts as are not challenged that the plaintiffs suffered some loss of profit. The sum awarded was arrived at on the basis of a gross profit calculated at nine per cent of the main contract figure of £232,000. Whether this was a satisfactory method of approach need not be decided now, though I have substantial doubts on the matter.'[55]

In *Wraight Ltd v P H & T (Holdings) Ltd*,[56] a successful claim for loss of profit was made on a somewhat different basis. In that case, the contractors terminated their employment under clause 26 of JCT 63 and claimed, as part of the direct loss and/or damage, the profit they would have earned had they been able to complete the contract work. The judge had little hesitation in finding it to be a valid claim. He said:

> 'In my judgment, the position is this: *prima facie*, the claimants are entitled to recover, as being direct loss and/or damage, those sums of money which they would have made if the contract had been performed, less the money which has been saved to them because of the disappearance of their contractual obligation.'[57]

In referring to the sums of money which the contractors would have made, the judge went to the nub of the matter. What is recoverable is the actual profit on that contract. The profit which might usually be obtained in such circumstances is not relevant. This situation is different from a situation noted earlier where the contractor is prevented from earning a profit on another contract.[58] The difficulty here is in determining the level of profit the contractor would have made if it had been allowed to do the work. It is probably not enough for the contractor simply to demonstrate the profit it put into its tender, because such profit may not have been realisable. The

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[54] (1970) 1 BLR 114 at 122 per Salmon LJ.
[55] (1970) 1 BLR 114 at 126 per Edmund Davies LJ.
[56] (1968) 13 BLR 27.
[57] (1968) 13 BLR 27 at 36 per Megaw J.
[58] See *Parsons (Livestock) Ltd v Utley Ingham & Co Ltd* [1978] 1 All ER 525.

Wraight case must also be distinguished from normal claims for direct loss and/or expense arising from delay or disruption, because the profit lost in this instance was that which would have been earned on work that the contractor was not permitted to carry out[59] rather than work which was delayed or carried out under different conditions than those originally anticipated.

7.3.5 Uneconomic working

Delay and disruption can lead to loss of productivity in two different ways. It may be necessary to employ additional labour and plant or the existing labour and plant may stand idle or be under-employed. The latter situation is often referred to as 'loss of productivity'. Although this is a permissible head of claim, it can be difficult if not impossible to establish the amount of the actual additional expenditure involved. Contractors commonly attempt to overcome this problem by presenting the claim on a total cost basis. In other words, they maintain an entitlement to be remunerated for all the work they have done and for all the resources they have expended. This type of claim has been roundly condemned.[60] It could only be sustained if the contractor could show that the labour forecast in the tender was strictly accurate, that it was absolutely blameless and that none of the resource time was occupied other than by carrying out the work. The problem is that contractors attempt to demonstrate loss of productivity by reference to original tender figures to establish the anticipated percentage productivity, then actual labour figures are used to show the fall in productivity. Usually a new percentage is calculated to form the basis of calculation of the claim. A contractor should be able to establish the actual costs incurred, but it will clearly be impossible to prove as a matter of fact what the costs would have been had the delay or disruption not occurred.

The tender breakdown is irrelevant. The contractor's intended use of labour and plant by reference to the original programme of work is unlikely to be an accurate forecast. The problem is that the intended use may be inadequate. Some of the additional labour and plant time may be the difference between the contractor's wrongly estimated proposed resources and what it would have had to use even if the contract had proceeded without delay or disruption. In appropriate cases it is possible to demonstrate the true loss by ignoring the tender breakdown showing intention and simply comparing a period of normal working with a period when disruption is present. Assuming that the building work is of a fairly repetitive nature, this method produces a fairly convincing ratio for application throughout the project.[61]

A further difficulty is that of relating particular items of additional expenditure under these or indeed other heads to particular events. Contractors seldom keep cost records in such a detailed form as to enable this to be done, particularly where there may be several concurrent causes of delay and disruption, some but not all of which may entitle the contractor to make a financial claim.[62] Provided that the contractor

[59] See Chapter 4, Section 4.4: 'Omission of work to give it to others'.
[60] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 112 per Vinelot J.
[61] The method was approved by Mr Recorder Percival in the 1985 *Whittal Builders v Chester-le-Street District Council* (the 1985 case) (1996) 12 Const LJ 356. There were two cases by this name (one in 1987).
[62] Concurrency and the inherent difficulties are discussed in Chapter 2, Section 2.4.

submits whatever evidence there is, it is a matter for the architect and quantity surveyor to determine the amount due. It is reasonable to assume that some loss will have been suffered as a result of uneconomic working wherever delay or disruption has occurred. Although the contractor will be unable to prove in every detail the loss it has suffered the architect and the quantity surveyor cannot refuse to ascertain for that reason. Effectively, this is a type of global claim which is discussed in Chapter 9.

In *London Borough of Merton v Stanley Hugh Leach Ltd*[63] the court had to decide whether the contractor was entitled to recover direct loss and/or expense under the terms of a JCT 63 contract when it was impossible for it to attribute the amount of loss and/or expense to specific events. The court followed *J Crosby & Son Ltd v Portland UDC*[64] in answering the question affirmatively. The court held that, provided the contractor has not unreasonably delayed making the claim, if there is more than one head of claim to which the global amount is attributable, the architect or quantity surveyor must ascertain the global amount which is directly attributable to the various causes. However any loss or expense which would have been recoverable if the claim had been made under one head in isolation and which would not have been recoverable under the other head, also considered in isolation, must be disregarded. In other words, it must be clear that all the causes contribute to the loss. However, it is clear that the court was mindful that, before embarking on such an ascertainment exercise, all the criteria for a valid claim had to be satisfied and the loss and/or expense attributable to particular causes could not be separated.

7.3.6 Winter working

One other factor that can lead to a claim which is effectively one for loss of productivity is the carrying out of work in less favourable circumstances, e.g. excavation work carried out in winter rather than in summer. In such circumstances, there is potentially a claim in respect of the additional costs caused by working in winter when, but for the delay, the work would have been completed during the summer period. The principle behind this type of claim is discussed in Chapter 7, Section 7.2. Clearly there will be no, or at least little, chance of a claim on this basis where work scheduled to be carried out in winter is pushed into spring or summer.

7.3.7 Site supervision costs

Site supervision can take many forms: from the site agent or manager with several staff at one extreme to the site operative who also carries out supervisory duties at the other, with most instances falling somewhere in between. Site supervision has already been mentioned as part of on-site establishment costs. However, the position of supervisory staff is worth further consideration. If the contractor is to have any chance of claiming the cost of supervisory staff on site, it must be demonstrated that

[63] (1985) 32 BLR 51.
[64] (1967) 5 BLR 121.

such staff would not have been required on site at the time in question had it not been for the occurrence which the particular contract specified as a ground for loss and/or expense.

If the supervisor would have been on site in any event, there can be no claim. Moreover, the contractor must also show that there was a purpose in the supervisor's presence on site at the relevant time. It is not unknown for a contractor to put additional supervision on site on the pretext that the problems on site make it necessary, when actually the reason is that the contractor has no other project suitable for the supervisor at that particular time.

On the other hand, it sometimes happens that some disrupting event for which the employer is responsible does not result in any prolongation of the contract period, but it does require additional supervision for the particular activity. It is essential that both contractor and architect are at pains to establish, in every instance, that the attendance on site of a supervisor or an additional supervisor is a necessary result of the disrupting event.

Where small projects are concerned, it is common for the supervision to be in the hands of a working person-in-charge. Care must be taken that additional supervisory costs are not claimed unless strictly necessary.

It is important to establish the number and quality of supervisors the contractor envisaged at the time the contract was executed and, most important, whether the contractor's assumptions in this regard were well founded and reasonable at the time they were made.

7.3.8 Plant

There are certain important factors which must be taken into account when considering costs related to prolongation. It is necessary to identify plant which the contractor has hired and separate it in the reckoning from its own plant.

Plant hired in

If the plant is hired from an external source there is no great problem. In that situation, the amount which the contractor is entitled to claim is the loss which it has actually incurred. That will be the actual sum which the contractor has paid to the owner of the plant under terms of the hire contract.

If the contractor is claiming for a period in excess of the period for which the plant was in use on the basis that there is a minimum period of hire, it is for the contractor to prove that there is such a minimum period by reference to the terms of hire. Obviously if it is clear that the disruption will be prolonged, rather than allowing the plant to stand idle, the contractor has a duty to mitigate its loss by either trying to use the plant elsewhere or by terminating the plant hire contract and returning the plant to its owner in accordance with the terms of the hire. If the contractor is thereby in breach of the plant hire terms, that is entirely a matter for the contractor unless perhaps it can be shown that the damages for the breach are less than the contractor would claim for leaving the plant idle on site. In such circumstances, the

contractor probably has a claim for the amount of damages it has had to pay on the grounds that it amounts to mitigation of loss.

Questions often arise if the contractor is part of a group and one of the companies in the group hires out plant and equipment to the others. Once it is established that there is a claim in principle, the question to be answered refers to the amount actually lost or expended by the contractor in hiring the plant. Does the plant hire sister company hire out plant to the contractor at the same rates as it would apply to other contractors? It is likely that there would be a discount. It is for the contractor to prove that it actually has to pay the hire charge. If the contractor is a separate limited company, in other words a separate legal entity, whatever charge has been paid will be claimable unless there is some arrangement between the companies which allows the contractor to recover the outlay in another way. If the contractor and the hirer are actually separate divisions of the same company (i.e. not separate legal entities) it will be difficult for the contractor to show a loss.

Sometimes a contractor will argue that it is entitled to claim hire charges even though it is its own plant, because it operates a plant hire business, hiring out spare plant to other contractors. In such circumstances, the contractor would have to show that, if the particular plant was not being used by the contractor, it would have been able to hire it out. The contractor must prove that it had an opportunity to do so.

Contractor's own plant

If the contractor is using its own plant, it will often attempt to claim based on a notional hiring charge. That is not a valid claim for the simple reason that the money claimed is not money actually expended. Arriving at the true cost of its plant standing idle is more difficult. *B Sunley & Co Ltd v Cunard White Star Ltd*[65] is relevant. There, an excavating machine had to be transported to Guernsey to be used on a building contract, but it was delayed by one week at port. During the delay it worked for one day and earned £16. The contractor claimed £577 for loss of profit, but no evidence was produced. The cost of the machine was £4,500 and its life was said to be three years. The Court of Appeal held that the measure of damage was:

- depreciation
- interest on money invested
- cost of maintenance
- value of wages thrown away.

£30 was awarded less the £16 earned while in port. In arriving at that figure, the Court took account of the fact that the machine would not depreciate as much while standing idle as it would when working. At first instance[66] the court held that the proper measure of damages was the amount the contractor would have made by the use of the machine during the period it was idle, but the Court of Appeal took the view that, without proof of special damages, the contractor could only recover nominal damages based mainly upon a calculation of the rate of depreciation of the

[65] [1940] 2 All ER 97. See also the Canadian case *Shore & Horwitz Construction Co Ltd v Franki of Canada Ltd* [1964] SCR 589 which followed the same principles.
[66] [1939] 3 All ER 641.

machine: There is 'no authority for the proposition that if the owner of a profit-earning chattel does not prove the loss he has sustained the judge may make a fortuitous guess and award him some arbitrary sum.'[67]

In a more recent case (under JCT 80, but the principle is applicable to other contracts), the position was largely upheld where the court has held that ascertainment should take into account the substantiated cost of capital and depreciation, but not the elements normally included in hire rates on the basis that plant will only be profitable for some of the time:

> '. . . in ascertaining direct loss or expense under clause 26 of the JCT conditions in respect of plant owned by the contractor the actual loss or expense incurred by the contractor must be ascertained and not any hypothetical loss or expense that might have been incurred whether by way of assumed or typical hire charges or otherwise.'[68]

A contractor may be able to show that its own plant, kept idle on site by factors which would normally entitle the contractor to recover loss and/or expense, would have been able to be used to earn profit elsewhere. The contractor would have to show that there was other work it could have done with the plant. To that extent, such a claim is one of lost opportunity, rather like a contractor's claim for overheads and profit. It appears that if a contractor can prove its actual loss by submitting detailed calculations based on cost records, it is entitled to recover the proven amount of loss in the normal way.

However, if a contractor cannot prove or evidence actual damage, it is entitled to recover only an amount which is normally limited to depreciation. The absence of real evidence in *Sunley* led the Court of Appeal to take the view that the depreciation for the claim period would be £29 for the week. However, because it had been said that the working life of the machine was only three years, the Court said that it would not depreciate as much when idle as it did when working and they thought that £20 for the week was all that should be allowed for depreciation. As noted earlier, there are intermediate positions between the two extremes of hired in and contractor's own plant. Each of these positions must be examined carefully, it being remembered that the key point is that a contractor can only recover, as direct loss and/or expense, what it has actually lost or spent.

7.3.9 Increased costs

Additional expenditure on labour, materials or plant due to increases in cost is an allowable head of claim provided that the increase was an inevitable result of a delay for which the contractor has an entitlement in principle to loss and/or expense. Increases in the cost of labour, materials or plant which may take place over the contract period unconnected to any entitlement to loss and/or expense may or may not be claimable depending on the terms of the contract. For example, a fluctuations clause may be applicable. A claim may be sustainable in situations where disruption

[67] [1940] 2 All ER 97 at 101 per Clauson LJ.
[68] *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd* (1995) 76 BLR 65 at 93 per Judge Lloyd.

has resulted in labour-intensive work being delayed and carried out during a period after an increased wage award. It should be noted that, where a claim of this kind is being made in respect of a delay in completion, it is not only the work carried out during the period of delay that should be considered. The correct measure would be the difference between what the contractor would have spent on labour, materials and plant and what it has actually had to spend over the whole period of the work as a direct result of the delay and disruption concerned. However, detailed proof is necessary and, in making this calculation, proper allowance must be made for any recovery of increased costs under any applicable fluctuations clauses in the contract. Moreover, it is what the contractor *should* have spent excluding expenditure due to its own defaults, which must be considered.

Contractors may often seek to make such calculations easier by using some kind of formula or notional percentage to produce a result. That approach is not acceptable. The contractor must show that the increases in costs have been the inevitable consequence of the cited occurrence. This can be quite complicated in the case of materials, because the contractor must demonstrate that it could not reasonably have placed its order earlier to avoid the increases. Above all, it must not be assumed that all work and all materials after the period of delay or during a prolongation period after the contract completion date, will automatically suffer a price increase. In order to have any chance of success, this kind of claim must be made on an item-by-item basis and each step must be properly evidenced. This head of claim, whether for increases in labour, goods or materials costs, is itself very laborious to prepare; which is probably why the use of formulae or notional figures is so attractive albeit wrong.

7.3.10 Financing charges and interest

(a) Financing charges

This is a topic which tends to be skated over, because it is sometimes difficult to understand, particularly the difference between finance charges and interest. In practice there is little or no difference because they are two sides of the same coin. Finance charges are the financial burden borne by a contractor, because it has received payment later than it should have been received under the terms of the contract. It is the charge or notional charge by a bank to enable the contractor to borrow the amount of money which it has wrongfully not received. Whereas interest is the sum payable by the employer to compensate the contractor from being kept out of its money. Looked at slightly differently, it is the loss of interest that the contractor could have had the opportunity of earning on the money wrongfully unpaid. In other words, it amounts to compensation (damages) for the loss of use of money. That is the position quite irrespective of the entitlement or otherwise of a contractor to interest at common law on outstanding debts and claims. The point was decided by the decision of the Court of Appeal in *F G Minter Ltd v Welsh Health Technical Services Organisation*,[69] which recognised the problems associated with financing

[69] (1980) 13 BLR 7.

construction operations and produced a businesslike and sensible interpretation to the claims provisions in JCT 63:

> '[In] the building and construction industry the cash flow is vital to the contractor and delay in paying him for the work he does naturally results in the ordinary course of things in his being short of working capital, having to borrow capital to pay wages and hire charges and locking up in plant, labour and materials capital which he would have invested elsewhere. The loss of the interest which he has to pay on the capital he is forced to borrow and on the capital which he is not free to invest would be recoverable for the employer's breach of contract within the first rule in *Hadley v Baxendale*[70] without resorting to the second, and would accordingly be a direct loss, if an authorised variation of the works, or the regular progress of the works having been materially affected by an event specified . . . has involved the contractor in that loss.'[71]

It is worth examining the circumstances of that case in greater detail in order to understand the reasoning of the Court. The plaintiff was a contractor which was engaged to construct a hospital in Wales. The contract was in JCT form. Substantial variations were instructed during the progress of the Works. Regular progress of the contractor and a nominated sub-contractor was materially affected because certain instructions were delayed. The contractor submitted claims under the provisions of JCT 63 under the equivalent clauses (11(6) and 24(1)) to SBC 4.23. The contractor challenged the amounts paid because they had not been certified until a considerable time after the loss and expense had been incurred. It claimed, as part of its direct loss and/or expense, the finance charges which it had incurred on borrowed capital and the interest it could have earned if it had been paid at the right time, because it had been kept out of its money. However, the employer contended that such charges were not direct loss and/or expense; they were simply a claim for interest. The Court disagreed with the employer's argument and held that the contractor's claim for finance charges was indeed a claim for loss and/or expense. The Court's decision is an unambiguous statement of the law.

The Court first looked at the words 'direct loss and/or expense' and decided that there were no grounds for giving these words any other meaning than they have in a case of breach of contract in a legal context.[72] It said that they must be interpreted as covering those losses and expenses which flowed naturally and in the usual course of things from a breach of contract.[73] The Court decided that it should apply the distinction between direct and indirect, commonly referred to as 'consequential' losses. It had to be recognised that, in the construction industry, loss of profit and expenses lost on wages and stores may be recoverable as direct loss and/or expense. A contractor which has to finance construction operations has to spend money. A contractor may either borrow the money from a bank and pay the borrowing charges or use its own money. In the latter instance, the contractor will be unable to invest the money and gain interest. The court concluded that financing charges are

[70] (1854) 9 Ex 341.
[71] (1980) 13 BLR 7 at 15 per Stephenson LJ.
[72] *Wraight Ltd v P H & T (Holdings) Ltd* (1968) 13 BLR 27.
[73] *Saintline Ltd v Richardsons, Westgarth & Co Ltd* [1940] 2 KB 99.

implicitly part of the recoverable direct loss and/or expense or what was being claimed 'is not interest on a debt, but a debt which has as one of its constituent parts interest charges which have been incurred.'[74]

Interpreting clauses 11(6) and 24(1) of JCT 63, the Court agreed that the architect could only ascertain and certify the amount of interest charges lost or spent at the date of the contractor's application. That amounts to the period between the direct loss and/or expense being incurred and date of the written application for reimbursement. Further losses and charges would only be recoverable, if at all, by means of further applications. Therefore, under JCT 63, if the contractor subsequently incurred charges, they were recoverable only by making further applications. That was because JCT 63 did not permit claims for continuing or future losses. It referred only to direct loss and/or expense which have already been incurred.

There is no such limitation under SBC, IC or ICD, where only one application from the contractor is required to cover loss and/or expense that has been incurred or is likely to be incurred. Indeed, if the provisions of SBC, IC and ICD are properly observed, there should be few finance charges payable by the employer although no doubt the same can be said about all building contracts. The court considered circumstances in which finance charges were not payable:

> 'The architect under all forms of this contract has to investigate and compute values and expenditure from time to time and to adjust the contract price by adding certified amounts as a consequence of action taken or not taken by himself and or his employer. It is only if the duties which these two clauses on their true construction put upon him are so unreasonable, if they cover investigating and ascertaining and certifying interest charges of this kind, as to have gone beyond the contemplation of the parties to this contract that a court would be driven to hold that they are no part of the claimants' direct loss or expense.'

It is unlikely that the duties imposed on the architect and the quantity surveyor under any of the JCT 2005 suite of contracts or most other standards forms would be beyond the contemplation of the parties. The question of interest as part of direct loss and/or expense was examined still further by the Court of Appeal in *Rees & Kirby Ltd v Swansea City Council*[75] where the Court considered and extended the *Minter* principles. The Court decided that finance charges should be calculated on a compound interest basis.

> 'There remains to be considered the question whether [they] are entitled to recover their financing charges only on the basis of simple interest, or whether they are entitled to assess their claim on the basis of compound interest, calculated at quarterly rests, as they have done. Now here, it seems to me, we must adopt a realistic approach. We must bear in mind, moreover that what we are considering is a debt due under a contract; this is not a claim for interest as such . . . but a claim in respect of loss or expense in which a contractor has been involved by reason of certain specified events. [The contractor] like (I imagine) most building contractors, operated over the relevant period on the basis of a substantial over-

[74] (1980) 13 BLR 7 at 23 per Ackner LJ.
[75] (1985) 5 Con LR 34.

> draft at their bank, and their claim in respect of financing charges consists of a claim in respect of interest paid by them to the bank on the relevant amount during that period. It is notorious that banks do themselves, when calculating interest on overdrafts, operate on the basis of periodic rests: on the basis of the principle stated by the Court of Appeal in *Minter's* case, which we here have to apply, I for my part can see no reason why that fact should not be taken into account when calculating the [contractor's] claim for loss or expense . . . '.[76]

Again, the detail of this case is worth examination. In 1972 the contractor was engaged to construct a housing estate for Swansea Corporation. The contract was on JCT 63 terms for a fixed-price contract. The date for completion of the Works was 6 July 1973. Instructions were given for a large quantity of variations under clause 11 and there were delays in the issue of instructions and information. The Works were not in fact practically completed until 4 July 1974. The contractor gave notice to the Council of the causes of delay, giving further particulars and applied for reimbursement of loss and/or expense under clause 24.

However, during 1972 there was a severe increase in wage rates in the construction industry and it soon became clear that the contractor would lose substantial amounts of money. Relationships were good at this point. Moreover, in October 1973, the Minister for Housing and Construction issued a statement that local authorities could in appropriate cases consider making *ex gratia* payments to contractors working on fixed-price contracts who suffered losses. With that in mind, the parties left the contractor's claims aside and they tried to negotiate an *ex gratia* payment or alternatively that the contract be varied into a fluctuating price contract. It took until the end of 1976 for the contractor to conclude that no settlement on either of these bases was going to take place. Accordingly, the contractor wrote to the Council pointing out that its losses were being aggravated by interest charges on monies outstanding in respect of its contractual claim.

The contractor submitted a detailed formal claim with full particulars in June 1978. There followed a succession of letters from the contractor, but the architect did not respond until February 1979. The architect gave an extension of time for the full period claimed (52 weeks) and also certified sums of money in February, April and August, but said that the interest claim was not a matter for the architect's decision and none of the certificates included any element of interest. The contractor expressly reserved its right to claim interest as part of its loss and/or expense and the final certificate was issued without prejudice to the contractor's right to press that outstanding claim. In its subsequent action through the courts, the contractor was claiming interest for various periods but, importantly, also for compound interest until the date of judgment. The ruling of the Court of Appeal was important and worth consideration in some detail. The following points can be derived from it:

(1) The contractor's application for loss and/or expense need not be in any particular form, but it must make clear that the claim includes direct loss and/or expense resulting from the contractor being deprived of its money. Lord Justice Robert Goff said that, under JCT 63:

[76] (1985) 5 Con LR 34 at 51 per Robert Goff LJ.

> '. . . we must, I consider, proceed on the basis that some reference is necessary. Even so I do not consider that more than the most general reference is required, sufficient to give notice that the contractor's application does include loss or expense incurred by him by reason of his being out of pocket in respect of the relevant variation or delayed instruction, or whatever may be the relevant event giving rise to a claim under the clause.'[77]

The position is, it seems, different under SBC, IC and ICD, because of the revised wording. However, it is always prudent for a contractor to include clear reference to its claim for finance and interest charges as part of its claim for direct loss and/or expense.

(2) Under JCT 63 and indeed under SBC, IC and ICD the contractor's application must be made within a reasonable time of the loss or expense having been incurred as the clause makes plain. The Council argued that the contractor had failed to do so and pointed to the long period between practical completion in 1974 and the formal claim in 1978. However, on the facts of this case the Council could not rely on the delay between practical completion and the formal application of June 1978 as showing that the application had not been made within a reasonable time, because they were prevented from enforcing their strict legal rights under the principle of promissory estoppel.[78] This is an important point, but if negotiations for a settlement are taking place, it is sensible practice for the contractor expressly to reserve its legal rights, both as to interest or otherwise.

(3) There is no cut-off point for interest at the date of practical completion:

> 'As I read the clauses, given that (on the clauses in the form which they take in the contract now before us) successive applications are made at reasonable intervals, I can see no reason why the financing charges should not continue to constitute direct loss or expense in which the contractor is involved by reason of, for example a variation, until the date of the last application made before the issue of the certificate issued in respect of the primary loss or expense incurred by reason of the relevant variation. At the date of the issue of the certificate, the right to receive payment in respect of the primary loss or expense merges in the right to receive payment under the certificate within the time specified in the contract, so that from the date of the certificate, the contractor is out of his money by reason either (1) that the contract permits time to elapse between the issue of the certificate and its payment, or (2) that the certificate has not been honoured on the due date, but I can for my part see no good reason for holding that the contractor should cease to be involved in loss or expense in the form of financing charges simply because the date of practical completion has passed.'[79]

Under modern contracts, the need for successful applications is not necessary to secure interest payments.

(4) A delay in payment occurred while the parties attempted to negotiate an *ex gratia* payment. This delay extended from the date of practical completion in July 1974

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[77] (1985) 5 Con LR 34 at 48 per Robert Goff LJ.
[78] As stated by Lord Cairns LC in *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439.
[79] (1985) 5 Con LR 34 at 49 per Robert Goff LJ.

to 11 February 1977 when it became clear to both parties that the contractor would have to claim strictly in accordance with the terms of the contract. It was a delay which, in the view of the court, was attributable to an independent cause, the negotiation, not to the ordering of variations or the giving of late instructions. The financing charges incurred by the contractor during this period were not direct loss and/or expense for the purposes of the contract. This part of the reasoning of the Court of Appeal is beset with difficulties and it has been the subject of some comment. It raises potential legal and practical difficulties when scrutinised carefully.[80]

It is always prudent for the contractor to reserve its rights to finance charges if negotiations are taking place with a view to settlement or, alternatively, to give notice of arbitration. While negotiations are in progress, it is good policy for both parties to continue to act as though there were no such negotiations, so that where, as in this case, the negotiations fail one party is not left at a disadvantage. 'Hope for the best, but prepare for the worst' is a good adage. The best that can be said in this instance is that the particular facts of *Rees & Kirby Ltd* were unique.

(5) The period within which the contractor was entitled to recover finance charges extended from 11 February 1977, when the architect notified it that the claim had to be dealt with strictly in accordance with the terms of the contract, until 10 August 1979 when the contractor signed the draft final account.

(6) The contractor had a substantial overdraft at its bank and, therefore, the finance charges should be calculated on a compound interest basis with quarterly rests.

It has now become settled law that under the direct loss and/or expense provisions of JCT contracts and probably under similar provisions in other forms, finance charges are allowable as a head of claim. It is crucially important to understand that when a contractor is claiming in this situation, it is not claiming interest on a debt but rather claiming what is a constituent part of the loss and/or expense.

A connected, but rather different, question concerns the date at which finance charges start to run. Is it the date on which the contractor makes application and the architect has the first intimation that there is a matter to consider under the terms of the contract? Is it rather the date by which the architect has sufficient information to consider the point? Consider, for example, the situation where the contractor makes the briefest of applications and, despite a detailed and precise request from the architect, the contractor is very slow in providing the information reasonably necessary to enable the architect to ascertain the amount of loss and/or expense. Who is to bear the financing charges for the intervening period?

One view is that, whatever may be the reason for the architect's inability to ascertain, if the claim is found ultimately to be valid, the contractor is bearing the financing charges, while the money remains in the employer's pocket and, therefore, the contractor is entitled to reimbursement. Another approach is to say that the period commences when the architect has received all the information reasonably required; before that the contractor is the author of its own misfortune. On balance, it is thought that the latter is the better view and receives some support from the

[80] See the commentary on this case in 30 BLR 5.

reasoning in *Rees & Kirby Ltd*. In any particular case it will be a matter of fact to be taken into account how much of the delay between making application and providing full information is the responsibility of the contractor. In *Rees & Kirkby Ltd* although the period of negotiation was omitted from the reckoning, it was not the fault of any party.

It appears that the principles enunciated in *F G Minter Ltd v Welsh Health Technical Services Organisation* and *Rees & Kirby Ltd v Swansea Corporation* are to be followed as a general rule and that the resulting additional financing charges must be considered to result directly from the delay and disruption concerned, and consequently are recoverable. Before moving on, mention must be made that this approach as well as the *Minter* decision seems to be in conflict with an old decision of the House of Lords in a case known as *The Edison*.[81]

> '. . . the appellants' actual loss, in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents' acts, and, in my opinion, was outside the legal purview of the consequences of these acts.'[82]

This particularly harsh view has been overtaken by the realities of high inflation in subsequent years. Dr Parris has observed 'this decision of the House of Lords has in fact long been ignored by the courts, if it has ever indeed been followed'[83] and cites in support *Dodd Properties (Kent) Ltd v The City of Canterbury*.[84] It, therefore, appears that *The Edison* has no application to the type of situation envisaged above[85] and most authorities have ceased to consider it to be good law, certainly on the relevance of impecuniosity. It used to be thought that, in assessing damages, the fact that the injured party was put to greater expense due to its impecuniosity was something which could not be taken into account. It was considered to be too remote. The possibility and consequences of impecuniosity is now considered to be within the contemplation of the parties at the time they execute the contract. For example, in certain circumstances an impecunious party may be unable to take immediate action to mitigate its losses. In an interesting development, it has been held that interest is recoverable as damages since it was within the parties contemplation at the time the contract was entered into that such charges might be incurred.[86]

The *Rees & Kirby Ltd* case has concluded the debate about financing charges as a proper head of claim under contracts in JCT terms. There is no doubt that such charges are claimable as part of the direct loss and/or expense which a contractor is entitled to claim. The principle established by *Minter* and *Rees & Kirby Ltd* are applicable to other forms of construction contract such as GC/Works/1(1998). The principle was re-affirmed in the Scots Court of Session following legal argument

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[81] (1933) AC 449.
[82] (1933) AC 449 at 460 per Lord Wright.
[83] John Parris, *The Standard Form of Building Contract*, 2nd edition 1985, Blackwell Science, Section 10.05 Interest as 'direct loss and expense'.
[84] (1979) 13 BLR 45.
[85] (1979) 13 BLR 45 a t 54 per Megaw LJ and at 61 per Donaldson LJ.
[86] *Amec Process and Energy Ltd v Stork Engineers & Contractors BV (No 3)* [2002] EWHC B1 (TCC).

which essentially proceeded from first principles.[87] In an interesting passage the Court said:

> 'There may have been a tendency in the past to treat such claims as claims for impecuniosity and I think practitioners may have, when possible, preferred to plead a claim for such items in terms of the second branch of the rule in *Hadley v Baxendale.* That is understandable. But that is not to say that such claims must be pleaded under that branch, or fail. . . . what at one point in time may be considered to be an extravagant proposition . . . is not necessarily to be considered so for all time. These things are not cast in tablets of stone. . . . it seems to me to be perfectly compatible with sound financial strategy in the construction industry that the pursuers should incur these financing charges. . . . Financing strategy is not to be confused with impecuniosity. . . . Even if I am wrong in my view that the word "directly" is to be equiparated with "naturally" in the sense used in the first branch of the rule in *Hadley v Baxendale*, I am of the opinion that the pursuer's claim for financing charges could still come within the phrase "direct loss and/or expense".'[88]

(b) Rate of interest

Although the principle of charging interest is established, there remains the question of the rate of interest which is recoverable. It may appear simple. For example, many contractors in this situation will simply rely upon published rates of interest in order to claim. Where a contractor is, in fact, operating on the basis of borrowed money, it should be straightforward to obtain from the contractor's bankers the necessary supporting evidence about the amount and rate of finance charges incurred. If the contractor's claim is for loss of opportunity to invest capital, it will be necessary for the contractor to show the way in which it normally invests its money and the interest that it usually earns.[89] The rate at which an ordinary commercial borrower can borrow or invest money is probably the safest approach.

The reality of the situation introduces several problems. The position is that the contractor is only entitled to the rate of interest or finance charges which was in the contemplation of the employer as a foreseeable consequence of the matter in regard to which the contractor is claiming. In other words, the contractor has to demonstrate that the rate at which it had to borrow money was the kind of rate which the employer would have known would be applicable in the given circumstances. It would have to demonstrate that the interest which it would have expected to receive was again something which the employer would have expected.

Different problems will arise where a contractor alternates between a credit and a debit situation during the contract period. It may become very difficult to establish at any particular point in time whether what it is entitled to claim is interest on borrowed money or loss of investment opportunity. In practice, it is likely that the percentages will differ very little from each other. If all parties agree, it may be sensible

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[87] *Ogilvie Builders Ltd v The City of Glasgow District Council* (1994) 68 BLR 122.
[88] *Ogilvie Builders Ltd v The City of Glasgow District Council* (1994) 68 BLR 122 at 139 per Lord Abernathy.
[89] *Tate & Lyle Food and Distribution Co Ltd v Greater London Council* [1982] 1 WLR 149.

simply to calculate the average percentage to be applied. Often in these cases, the time and cost needed to establish precise figures is not justified by the difference between precise figures and averages. The financial pages of the good quality daily newspapers and, of course, the internet will be a useful source of reference and, in practice, it may well be acceptable to average-out rates of interest over a period rather than to go through the tedious mathematical exercise of detailed calculation on the basis of rates from day to day.

Overdraft rates will fluctuate throughout a contract. Moreover, different contractors will be able to achieve different rates. The particular circumstances of a contractor may dictate that a bank will only lend money on what might be described as a penal rate of interest. In such circumstances, if an exceptional rate of interest is being charged to the particular contractor, its recovery as part of direct loss and/or expense will be limited to a rate which the employer had in contemplation when executing the contract. The same thing may apply to the loss of opportunity to invest. Some contractors may have an exceptionally rewarding chance to invest, but if that cannot be said to have been in the employer's contemplation at the time the contract was executed, it will be disallowed. Therefore, that any interest or finance charges should be assessed at a rate equivalent to the usual cost of borrowing (or usual investment return), disregarding any special position of the contractor. There is authority for this view. One looks

> ' . . . at the cost to the plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for example, the fact that a particular plaintiff could only borrow money at a very high rate or, on the other hand, was able to borrow money at specially favourable rates. The correct thing to do is to take the rate at which plaintiffs in general could borrow money. This does not, however . . . mean that you exclude entirely all the attributes of the plaintiff other than that he is a plaintiff . . . [It] would always be right to look at the rate at which plaintiffs with the general attributes of the actual plaintiff in the case (though not, of course, with any special or peculiar attribute) could borrow money as a guide to the appropriate interest rate . . . '.[90]

This seems to be the correct approach, certainly under JCT terms. However, although the contractor is not usually entitled to claim anything other than 'normal' interest and financing charges, the situation may be changed if it can be shown that the employer was perfectly well aware that a particular contractor could only obtain a loan at a rate which was notably higher than normal or that the contractor had access to especially good investment rates. The recovery would then fall under the second limb of *Hadley v Baxendale*; effectively special damages of which the employer had due notice.

The interest allowable on an overdraft is that actually payable by the contractor (subject to what has been said above) and would therefore be compounded at the normal intervals adopted by the contractor's bank, e.g. quarterly or half-yearly.

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[90] *Tate & Lyle Food and Distribution Co Ltd v Greater London Council* [1981] 3 All ER 716 at 722 per Forbes J.

(c) Interest

The law relating to interest payments is complex and it is still developing. It still retains some of the medieval abhorrence of usury which seems strange in today's commercial environment. There is a legal presumption that late payment of money does not ordinarily cause the recipient to suffer any loss for which interest is payable so that, *London, Chatham and Dover Railway Co v South-Eastern Railway Co* held that a person who pays late on an invoice discharges the obligation by paying the sum certified without interest.[91] The House of Lords has affirmed this rule[92] but at the same time they considered that the rule was not satisfactory, and their Lordships expressed the view that the position should be altered by statute, as had been recommended by the Law Commission in its report on Interest in 1978.[93]

The general position, when considering the position of a contractor who is trying to recover interest, is that the recovery may fall into one or more of five categories:

(i) If there is an express term of the contract providing for interest in specific circumstances

Where applicable, this category is generally unmistakable. The JCT standard forms and the ICE Conditions of Contract do have such provision under which the employer must pay interest on overdue payments, for example SBC clause 4.13.6.

(ii) If the contract can be construed as giving a contractual right to interest payment

Interest and financing charges as part of direct loss and/or expense fall into this category. These have been discussed earlier in this chapter.

(iii) If interest is awarded by the court on judgment for a debt

There has to be a debt – more than a mere assertion that money is due – before judgment will be given and interest will be awarded. The court is empowered to award interest provided the money was outstanding at the time proceedings were commenced although it may have been paid subsequently.[94] Arbitrators have a like power which provides:

> '(1) The parties are free to agree on the powers of the tribunal as regards the award of interest.
> (2) Unless otherwise agreed by the parties the following provisions apply.
> (3) The tribunal may award simple or compound interest from such dates and with such rests as it considers meets the justice of the case –

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[91] *London, Chatham and Dover Railway Co v South-Eastern Railway Co* [1893] AC 429.
[92] *President of India v La Pintada Cia Navegacion SA* [1984] 2 All ER 773.
[93] Cmnd 7229. Eventually, this was put into effect, at least in part, by the Late Payment of Commercial Debts (Interest) Act 1998, see point (v).
[94] See s. 15 of the Administration of Justice Act 1982 (amending s. 35A of the Supreme Court Act 1981).

(a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award;
(b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.

(4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including the award of interest under subsection (3) and any award as to costs).
(5) References in this section to an amount awarded by the tribunal include an amount payable in consequence of a declaratory award by the tribunal.
(6) The above provisions do not affect any other power of the tribunal to award interest.'[95]

The normal practice is that interest will be awarded from the date on which payment should have been made, but there may be reasons why a lesser period will be awarded for example, unreasonable delay on the part of the claimant.

Both judgment debts and sums directed to be paid by an arbitrator's award carry interest at the prescribed statutory rate as from the date of judgment or the award.

(iv) If it can be shown that there are special circumstances

This is a promising category for interest seekers. Where it is established that a creditor has suffered special damage, for example by incurring debts of interest on overdrafts as a result of being out of funds as a result of the debtor's late payment of a debt, the creditor is entitled to claim that special damage, provided that the situation can be brought within the second part of the rule in *Hadley v Baxendale*.[96] This follows from the decision of the Court of Appeal in *Wadsworth v Lydall*,[97] which was approved by the House of Lords in *La Pintada*.[98]

In *Wadsworth v Lydall*, Wadworth entered into a contract to sell a piece of land to Lydall for £10,000 and, expecting to receive the purchase price from Lydall by the agreed date, entered into a contract to buy more land. Unfortunately, Lydall failed to pay the purchase price, but paid only £7200 to Wadsworth late. This resulted in Wadsworth being unable to pay his vendor and, therefore, having to pay interest on the unpaid purchase price of the other plot of land. In addition, Wadsworth also incurred the cost of raising a mortgage to meet the balance owing. In due course Wadsworth sued Lydall claiming, among other things, interest which he had to pay his vendor for late completion of the purchase and the costs of the mortgage.

In allowing these two items as special damage under the second limb of the rule in *Hadley v Baxendale,*the Court of Appeal said:

'The defendant knew or ought to have known that if the £10,000 was not paid to him the plaintiff would need to borrow an equivalent amount or would have to

[95] Section 49 of the Arbitration Act 1996.
[96] (1854) 9 Ex 341.
[97] [1981] 2 All ER 401.
[98] *President of India v La Pintada Cia Navegacion SA* [1984] 2 All ER 773.

> pay interest to his vendor or would need to secure financial accommodation in some other way. The plaintiff's loss in my opinion is such that it may reasonably be supposed that it would have been in the contemplation of the parties as a serious possibility, had their intention been directed to the consequences of a breach of Contract.'[99]

The *London Chatham and Dover Railway Co* case which was authority that interest was not recoverable on a debt paid late was distinguished as follows.

> 'In my view the Court is not constrained (i.e, in relation to interest) by the decision of the House of Lords. In *London Chatham and Dover Railway Co v South-Eastern Railway Co* the House of Lords was not concerned with a claim for special damages. The action was an action for an account. The House was concerned only with a claim for interest by way of general damages. If a plaintiff pleads and can prove that he has suffered special damage as a result of the defendant's failure to perform his obligation under a contract, and such damage is not too remote, on the principle of *Hadley v Baxendale*, I can see no logical reason why such special damage should be irrecoverable merely because the obligation on which the defendant defaulted was an obligation to pay money and not some other type of obligation . . . '.[100]

This case clears the way for parties to recover interest as 'special damage' in claims under building contracts. It has been held that where a civil engineering contract did not include provision for the payment of interest on late payment, a contractor may still be entitled to interest or financing charges if he is able to demonstrate that they are special damage.[101]

It is worth mentioning what appears to be an application of the principle of *Wadsworth v Lydall* in the Northern Ireland decision *Department of the Environment for Northern Ireland v Farrans (Construction) Ltd.*[102] The dispute arose under JCT 63 and seems to be a wrong view of the interest position. Under JCT 63 clause 22 (similar to SBC clause 2.32.1), once the architect has issued what would now amount to (and which will be referred to below as) a certificate of non-completion, the employer is entitled to deduct liquidated and ascertained damages at the stated rate from money due or to become due to the contractor. The question which arose was whether, if subsequently the architect grants an extension of time so that the employer must refund some of the liquidated damages, is the contractor entitled to interest or financing charges in respect of the repaid amounts? For the purposes of the case, the parties agreed that the architect had the power to issue more than one certificate. In the Ulster case, four such certificates had been issued following grants of extension of time.

The court decided that where several certificates were issued, with the result that sums previously deducted as liquidated damages had to be repaid, the contractor was

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[99] *Wadsworth v Lydall* [1981] 2 All ER 401 at 405 per Brightman LJ.
[100] *Wadsworth v Lydall* [1981] 2 All ER 401 at 405 per Brightman LJ.
[101] *Holbeach Plant Hire Ltd v Anglian Water Authority* (1988) 14 Con LR 101. The court was applying the proposition laid down in *President of India v Lips Maritime Corporation* [1987] 3 All ER 110 at 116 per Lord Brandon. The position under JCT Forms is dealt with under '(a) Financing charges' earlier in this Section.
[102] (1982) 19 BLR 1.

entitled to interest on the sums repaid. Clause 22 was to be construed as meaning that when the employer received a certificate of non-completion the employer was entitled to deduct liquidated damages. This was at the employer's own risk that a later certificate might vitiate the earlier certificate leaving the employer without any defence against a claim for breach of contract in failing to pay the amounts shown in the relevant interim certificates by the due dates. The employer ought to have been aware that there was a chance that further extensions of time would be issued which would result in the employer being in breach of contract. In those circumstances the contractor was entitled to the remedy appropriate for a common law claim for breach of contract. The court applied *Wadsworth v Lydall* and held that the arbitrator in the case had power to award damages, which could include interest incurred or lost as a foreseeable consequence of the employer's breach of contract. It is a mystery how the employer could be in breach by operating the express provisions of the contract and this is a decision of which all concerned with administering building contracts should be aware, but which it could be unwise to follow.

Whether that decision was right or wrong, and it has been criticised by the editors of *Building Law Reports*[103] and others, the wording of the SBC clause makes it plain, that the employer is not making good an earlier breach of contract. SBC clause 2.32.1 confers on the employer the right to deduct liquidated damages once the architect has issued a certificate under clause 2.31 and the employer has given written notice of intended deduction to the contractor. Once these two conditions are satisfied the employer has a contractual right to deduct liquidated damages – and clause 2.32.2 deals with what is to happen if the completion date is later altered in the contractor's favour. The employer cannot be in breach of contract by doing that which is expressly empowered by the contract.

(v) If it is a commercial debt

The Late Payment of Commercial Debts (Interest) Act 1998 has been fully in force since November 2002. As the name implies, it only deals with commercial debts; consumers are excluded. Broadly, if invoices are outstanding for longer than the prescribed period (usually about 30 days), the creditor is entitled to claim interest at 8% above the Bank of England Base rate current at the previous end of June or end of December as the case may be. In addition and depending upon the size of the debt, a modest lump sum is to be added to the amount of interest.[104]

7.4 Cost of a claim

Invariably, a contractor submitting a claim to the architect will have, among the heads of claim, an item for fees paid to a claims consultant. The contractor is not entitled to be reimbursed for any costs incurred in preparing the claim for the simple reason that none of the standard form building contracts requires the contractor to submit

[103] (1982) 19 BLR 1.
[104] The Late Payment of Commercial Debts Regulations 2002.

a claim. The contractor is simply required to make a written application to the architect, and to provide supporting evidence as required by architect and/or quantity surveyor in order to reasonably enable them to form an opinion and ascertain the amount due. Some confusion has been caused because it has been said that the case of *James Longley & Co Ltd v South West Regional Health Authority*[105] is authority that a claims consultant is entitled to be paid for work in preparing the claim. The case decided no such thing. The facts are that, following an arbitration which was settled during the hearing, taxation of costs were reviewed and the fees of a claims consultant were allowed in respect of work done in preparing the contractor's case for arbitration (the preparation of three schedules annexed to the Points of Claim). His fees for preparing the contractor's claim for presentation to the architect were not allowed. The fees which were allowed were fees of a potential expert witness in the arbitration.

The principle is that if the claim is prepared as part of arbitration or litigation, the costs can be recovered as part of the costs of the action. The employment of a claims consultant by a contractor is, at least in theory, unnecessary. In practice, of course, many contractors do need assistance in presenting their documents in the best possible way. Evidencing a claim is not something that every contractor knows how to do without such assistance. But whether a contractor employs a claims consultant or a solicitor to give advice, or even takes counsel's opinion on the matter, the fees involved are not recoverable unless incurred as part of arbitration or legal proceedings. It has been held that managerial time spent in dealing with a problem may be claimable as a claim for 'special damages' in an action at common law.[106] It may be that there can in principle be a claim for the cost of managerial time spent on preparing a claim, if not already included in a claim for head-office overheads. The contractor would be put to proof that it had to devote time and that such time would otherwise have been spent on productive work. It is arguable that a contractor could recover the cost of employing an outside expert if there was no one available in the contractor's firm to do the work.

[105] (1984) 25 BLR 56.
[106] *Tate & Lyle Food and Distribution Co Ltd v Greater London Council* [1982] 1 WLR 149.