

Practical tips for putting claims together



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Today's Agenda

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- Essential elements of a claim;
- Causation;
- Records;
- Productivity;
- Duty to Mitigate;
- Questions.

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Essential elements of a claim

- Cause:

The event that has given rise to the claim and is usually based on fact;

- Effect:

Can you demonstrate that the effect on which the claimed compensation is based was caused by the event? Can you link cause with effect?

- Entitlement:

Entitlement will flow from a remedy contained in the contract, a breach of contract giving rise to damages;

- Substantiation:

Prove that statements made and points relied on are actually true.

Linking cause with effect

- Para 194:

“In this regard, I think that one of the logical flaws in Shahady’s approach is that it assumes causation rather than identifies actual evidence of it.”

Para 197:

“The Court is concerned with common law notions of causation. The only appropriate method is to determine the matter by paying close attention to the facts, and assessing whether White has proved, on the probabilities, that delay in the underboring solution delayed the project as a whole and, if so, by how much.”

White Constructions Pty Ltd v PBS Holdings Pty Ltd
[2019] NSWSC 1166

Causation

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- Claimant bears burden of proving claim (delay & loss) on balance of probabilities;
- **Contemporaneous** records are the best form of evidence;
- Reports of delay & quantum experts are only as good as the evidence you provide them.

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Causation

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- Claimant alleged delay to development caused by sewage designer's failure to prepare satisfactory design;
- Judge dismissed claim but considered delay analysis & quantum in detail;
- Parties' delay experts disagreed on method of analysis and causes of delay;
- Judge appointed his own delay expert & concluded neither delay method appropriate!

White Constructions Pty Ltd v PBS Holdings Pty Ltd [2019]
NSWSC 1166

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Causation

- Close examination of **actual evidence** of what was happening **on the ground** will reveal if delay in approving the sewerage design actually delayed the project;
- Court should apply **common law, common sense** approach to causation;
- Rejected generalized statement from site foreman;
- Judge preferred primary, contemporaneous source of evidence: **site diary**.

White Constructions Pty Ltd v PBS Holdings Pty Ltd [2019]
NSWSC 1166

Causation

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*“It is important to emphasise that delay analysis and the expert programming evidence associated with it is merely one tool to assist the fact finding tribunal. Delay analysis **should be based so far as possible on contemporaneous evidence of what actually happened on site** during the progress of the works and is ultimately only as reliable or accurate as the data upon which it is based. It should be emphasised that such analysis, of course, **can never be a substitute for relevant and convincing factual evidence.**”*

Keating on Construction Contracts

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Causation: lessons to learn from *White v PBS*

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- Establish & maintain detailed site diary or record:
 - Who is on site, what are they doing & where;
 - What is holding up progress;
 - What instructions were issued;
- Keep worksheets, timesheets, records of progress broken down by workstream;
- Keep emails & diaries from those on site.

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Causation: impact of COVID-19

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- 1 Causing project delay (critical or noncritical);
- 2 Effects on the subcontractors and supply chain;
- 3 Effects on the labour and material supply;
- 4 Constraints upon country border movement and access to site;
- 5 Constraints upon undertaking the work itself; and
- 6 Additional direct costs (e.g. protective equipment).

Causation: impact of COVID-19

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Develop a strategy/plan:

- Maintain as a live document;
- Constraints upon undertaking the work itself;
- Identifying the specific events;
- Routes for recovery through the contract; and
- Consideration of what the effects are that flow from each of those events.

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Causation: impact of COVID-19

Some restrictions imposed as a result of C-19 may not actually cause delay/disruption or additional costs.



- Hand-washing;
- Social distancing (operations that require more than one operative in close proximity);
- Impacts from supplier/designers – could lead to a delay in fabrication; and
- Entire crew vacating the site when one of its crew members had tested positive and felt the effects of the virus.

Each cause can lead to primary and secondary effects. Need to show traceability between the claimed cause and the claimed effects and the cost arising from the effects.

Records, records, records.....

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The number one cause of construction disputes in 2020 is poorly drafted or incomplete and unsubstantiated claims.

Arcadis,

Global Construction Disputes Report 2020

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SCL Delay and Disruption Protocol

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Core Principle 1:

“Programme and records

Contracting parties should reach a clear agreement on the type of records to be kept and allocate the necessary resources to meet that agreement.”

Secretariat: 10 April 2020

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“Contractors and subcontractors will likely need to develop and shape bespoke record keeping systems, as it is unlikely that the traditional project controls systems will capture the relevant information.”

What might the C-19 restrictions include?

- Increased focus on hygiene (e.g. hand-wash breaks);
- Social distancing (1-2m) (e.g. smaller gang sizes/double handling, reduced production etc);
- Canteens on remote sites shut down (e.g. delivery costs or site closure); and
- Availability of masks for dusty trades and changes to confined space working.

Need the right records, recording the right events.

Proportionality: how far do you have to go?

- One doesn't have to prove every detail of cost beyond doubt – but “on the probabilities”;
- But there must be **sufficient relevant records** to show that the claimed effect/cost was likely to have arisen from the claimed cause;
- Example – handwashing/sanitising breaks – exhaustive records for all personnel?; and
- Adoption of unique cost-coding or referencing systems could enable the appropriate valuation data to be better captured.

Sampling

For repetitive impacts/tasks a sample approach may be appropriate:

- Analysing a range of staff and operatives to determine the effective of downtime and compare with pre-Covid-19;
- But the sample must be shown to be representative; and
- Be of a type of impact that will recur such that the result can be extrapolated.

CD-19 impacts are evolving - such assessments will need updating.

Loss of productivity

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SCL Delay and Disruption Protocol defines disruption as:

“a disturbance, hindrance or interruption to a Contractor’s normal working methods, resulting in lower efficiency. Disruption claims relate to loss of productivity in the execution of particular activities. Because of the disruption, these work activities are not able to be carried out as efficiently as reasonably planned (or as possible).”

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Loss of productivity

- The actual impact on productivity rates (daily output of a given gang-size on a particular activity) will depend on the facts;
- The baseline one measures from is all important: must show what level of down-time should have been allowed for based on what was known and incorporated into the Contract;
- For example:
 - Down-time in hot/tropical countries;
 - Chernobyl - requirements known at the time the Contract was entered into.

Loss of productivity

- Social distancing could result in certain operations being hindered. Would need to monitor such tasks to assess actual production in comparison to pre-CD19;
- Reduced rate of supply of materials from suppliers; or reduced availability of resources including subcontractors:
 - Maintain records of material deliveries;
 - Show connection of this supply rate to the affected operations is required.
- Impact to programme: forecast the reduced production rate into schedules to reflect anticipated delay:
 - Consider how far into the future and for what trades would the increased durations apply?

Loss of productivity

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- AVOID a global approach which just assesses the production and cost of a group of operations and compares with tender or other norms and claims the difference:
 - such an approach could be shown to be flawed if there are any other issues impacting production.
- INSTEAD – isolate the discrete CD-19 impacts on specific operations.

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Duty to mitigate?

- FIDIC 1999 and 2017, the Contractor and Employer are both at all times obliged to use: *“all reasonable endeavours to minimise any delay in the performance of the Contract”*;
- NEC has an early warning system whereby both the Contractor and the Project Manager have an obligation to give an early warning, as soon as either becomes aware of any matter, which could: *“increase the total of the Prices, delay Completion, delay meeting a Key Date or impair the performance of the works in use”*.

Duty to mitigate?

- Often express duty to mitigate in standard form contracts;
- Check any specific duties to mitigate in bespoke amendments;
- Overarching common law duty to mitigate loss;
- What does it mean in practical terms?
 - Produce updated programme;
 - Keep reporting on progress;
 - Keep completing site diary!
 - Consider proposing acceleration programme.

Duty to mitigate?

- Consider the contract and take legal advice (consider country/jurisdiction);
- Generally, mitigation steps should be reasonable under the circumstances;
- Important to advise the other party, what options have been considered, which option was chosen to be implemented and why;
- Some mitigation steps could be implemented at minimal cost e.g. resequencing the works may not result in significant cost;
- But if there are increased work-fronts, there could be additional supervision/‘preliminaries thickening’.

Golden rule should be that the total cost of the mitigation measure should result in an overall net saving – otherwise it’s not mitigation!



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Questions?

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Webinar

Watch | Listen | Discuss

Next week:

Differences in payment provisions & practices between Middle East Civil Codes & English common law

Thursday, June 18 2020

12pm (30mins + 10mins Q&A)



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