ARTICLE

It's all on you!

The burden of proof and records

Maintaining records to meet the burden of proof and demonstrate causation in your construction claim or defence is essential. It's all on you!

"The burden of proof is usually on the claimant, who must prove their case on a balance of probabilities – that something has more likely to have happened than not…"

50%-51%

"The effort between meeting this standard could be the difference between 50% proof and 51% proof."

Burden of proof

The burden of proof to be satisfied in construction matters is in line with civil procedures, namely 'on the balance of probabilities'. This standard is thought to be vague compared to the higher standard of proof in criminal cases 'beyond reasonable doubt'. However, who has the burden of proof may depend on the circumstances under which a claim arises and the burden can shift from one party to the other in defence of an assertion.[1]

What does this mean in practice?

No matter who is responsible for deciding your claim, whether that be an Architect, Adjudicator or Arbitrator, you will have to prove your claim on the balance of probabilities. For example, if you respond to a claim saying "no, we did not cause delay due to…you were already very late with…" it will require you to prove that is the case.

The effort between meeting this standard "could be the difference between 50% proof and 51% proof…"[2] – a thin line by anyone's standards. The practicalities of achieving the burden of proof is appreciating the importance of records and how to maintain them, which was discussed in our previous article titled 'Construction claims: no records, more disputes?'

1 Building contract claims and disputes, Turner, 2nd Edn. (1999), page 424.
2 Burnetts, Carey, 'On the "balance of probabilities"' (2019).

Case law

In 2012, the decision of Walter Lilly v Giles Mackay and DMW provided some guidance on the burden of proof relating to loss and/or expense that was specified in that contract, to allow the Architect to ascertain the Contractor's entitlement. Mr Justice Akenhead said that this project was a 'disaster waiting to happen' with the parties pleadings including expert bundles reaching some 43,000 pages.

As part of his decision, Mr Justice Akenhead considered the exercise of the ascertainment of loss and expense:

"Clause 26.1 talks of the exercise of ascertainment of loss and expense incurred or to be incurred. The word "ascertain" means to determine or discover definitely… with certainty. It is argued…that the Architect or the Quantity Surveyor can not ascertain unless a massive amount of detail and supporting documentation is provided. This is almost akin to saying that the Contractor must produce all conceivable material evidence…to prove its claim beyond reasonable doubt. In my judgement, it is necessary to construe the words in a sensible and commercial way that would resonate with commercial parties in the real world. The Architect or the Quantity Surveyor must be put in the position in which they can be satisfied that all or some of the loss and expense claimed is likely to be or has been incurred. They do not have to be "certain"… bearing in mind that one of the exercises which the Architect or Quantity Surveyor may do is allow loss and expense, which has not yet been incurred but which is merely "likely to be incurred."

> *"Poorly substantiated claims as a result of poor and/or insufficient records are the seeds to global claims. "*

Mr Justice Aikenhead said that the reviewer of the claim should not have been overly precise by requesting massive amounts of detail and supporting documentation to be certain that loss and/or expense was incurred.

It is about being reasonably satisfied that all or some of the loss and expense claimed is likely to be incurred. It is also about looking to the contract to decide what type and level of documentation is required while using common sense to decide if that documentation is enough to meet the burden of proof.

If you are faced with similar issues as the Walter Lilly case, it is beneficial to know that Adjudicators (or Judges) have the power to review (and change)[3] an Architect's decision on a claim and it is these senior decision makers who must decide which party has the burden of proof relating to that Architect's decision.[4]

JCT 2016 Design & Build Contract

Under the JCT Design & Build 2016 contract the obligations relating to loss and expense claims are set out under clause(s) 4.19 to 4.22. The ascertainment of loss and/or expense starts with a Contractor notice under cl. 4.20.1 and requires the Contractor to notify that as a consequence of a relevant matter, they are likely to incur direct loss and/or expense. Thereafter under cl. 4.20.2 the Contractor submits their initial assessment with information that is *"reasonably necessary"* to enable the reviewer (such as the Architect, Contract Administrator or Quantity Surveyor) to ascertain the loss and/or expense incurred. If the impact of the relevant matter continues, the Contractor has an obligation (cl. 4.20.3) to regularly provide updated information to allow the ongoing ascertainment of loss and/or expense by the reviewer.

The reviewer of the Contractor's assessment(s) provides its determination (cl. 4.20.4) *"…by reference to the information supplied by the Contractor…"* and therefore, the Contractor's success in achieving their correct entitlement from the reviewer's ascertainment is greatly influenced by the quality of the Contractor's information (for example, detailed and accurate records).

The above obligations create a requirement on both parties being proactive with respect to the management of loss and/or expense claims. This is because under cl.4.20.4 the reviewer must make their initial assessment within 4 weeks, followed up by fortnightly updates, with such assessments being directly referenced to the cost evidence provided by the Contractor.

In practice, this assessment process should prevent late submissions by the Contractor and more importantly not submitting their supporting information late, and in turn, prevent the reviewer waiting until the last moment to provide its determination. Therefore, should both

3 Unless a contract specifies that a decision by the Architect is final until it is heard by formal dispute resolution.

4 Corbett, Tweeddale and Tweeddale, 'Shifting the burden of proof: revisiting adjudication decisions' (2015).

parties correctly apply the provisions of cl.4.20, cost certainty should be achieved utilising contemporaneous information as the works progress, and avoid surprises and disputes later down the line.

It is noted that under cl.4.20.2 and 4.20.3 there is no obligation on the Contractor to provide either extensive or substantive information to support their claim. Rather, it is clear that the only information that is required to be provided is that which is *"…reasonably necessary…"*. This is consistent with the decision in Walter Lilly v Giles Mackay.

Establishing causation

The initial establishment of causation is the foundation of a successful construction claim. A claim that lacks clear causation will generally meet the first line of defence, such as in a delay claim that "your claim has failed to demonstrate that the cause(s) of delay claimed has caused a critical delay to the project… therefore your claim is rejected."

Demonstrating cause and effect in construction should not involve any metaphysical or scientific view or microscopic analysis;[5] demonstrating a clear causal link will depend on the facts of the claim.[6] If the link between cause and effect is not established, for example, by not having sufficient or clear documentation, the chances of the claim failing at the early stages will increase.

Types of causation

There are said to be two types of causation, which must be applied equally, with common sense[7]: legal causation and factual causation. Legal causation is the analysis of the duty that is breached. For example, most standard form contracts will set out what should happen in certain circumstances, where a clause sets out the reason(s) for awarding an extension of time subject to compliant notices and a valid basis of claim as listed. Legal causation would decide that test and determine whether compliance with the contract had occurred.

Factual causation is where the contract has not agreed a test for causation, and therefore, the facts relating to the issue(s) will be assessed to decide the real event that caused the damage. It is in this situation that the adequacy of a party's records will determine whether they can successfully establish a causal link between a breach and their losses that they are seeking reimbursement.

The power of records

Maintaining and compiling accurate and clear records is a skill for future need – and implementing good record keeping cannot be over emphasised.[8]

Poorly substantiated claims as a result of poor and/or insufficient records are the seeds to global claims – they are "usually presented because one of three things has happened; sensible records were not maintained, sensible records were not safely stored, sensible records were not referenced in the compilation of the claim."[9]

> *"...global claims are easy to identify, difficult to support and easy to attack"*

Several cases[10] have dealt with global claims, which in other words, describe a global claim as a total loss claim that fails to demonstrate the cause and effect of individual events and fails to specify loss to individual events. Importantly, global claims are easy to identify, difficult to support and easy to attack. Proper record keeping can go a long way to avoid the requirement to pursue global claims.

Regardless of the good intentions displayed by contracting parties at the start of a project, problems will arise and documents are the most reliable source of information that parties will rely on to prove their claims.

Adopting a commonly used Electronic Document Management Systems (EDMS) is a good start as these are useful for exchanging information between parties. This would mean a common source of key documentation is in place for all parties to use without the need for requesting massive amounts of information by claim reviewers.

Often a project team can lose control of the documentation and fall into a cycle where the project team are inundated with information, constantly attending meetings, producing information to deadlines with multiple revisions and the project fundamentals are lost.

5 Burr, Delay and Disruption in Construction Contracts, 5th Edn. (2016), para 14-003 and 14-004.

6 Society of Construction Law, Baatz, 'Factual and legal causation in construction and infrastructure law: a thorny subject (2015).

7 Ibid.

8 Lemon, Keating Chambers, Preparing the claim (2010).

9 Whitfield, Record levels in global claims (2013).

10 John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd (1996) 82 BLR 83 and John Doyle Construction Ltd v Laing Management (Scotland) LTD [2004] ScotCS 141.

However, there is certain documentation that should always be kept safe and in order. These are:

— **Tender:** invitation to tender, tender offer, clarifications, estimates and calculations relating to time and cost, internal emails and notes.

— **Contract:** general and particular conditions, drawings and specifications, employer requirements, subcontractor and supplier contracts.

— **Programmes:** tender, revised tender, post contract programme and all time and productivity calculations.

— **Correspondence:** letters, RFI's, instructions, emails, instant messaging, voice messaging.

— **Contractual reporting:** progress reports, minutes of meetings, site diaries, photographs, productivity reports and timesheets for labour and plant returns, material requisitions, drone recordings.

Site diaries and photographs are examples of the best records to be kept and can be invaluable when pursuing claims for an extension of time or disruption. If a system is adopted where the site team record daily, accurate site diaries, this would be viewed as primary evidence in a formal dispute.

Emerging technologies such as the use of drones and project 'fly throughs' can provide real time contemporaneous records with respect to progress and technical compliance at key stages throughout the construction process.

Each contract will use different terminology and specify different levels of documentation required to satisfy the burden of proof and identify causation. Some contracts may be clear and some extremely vague. The normal meaning of terminology will suffice unless there are defined terms in the contract to say otherwise. Notwithstanding, maintaining records to meet the burden of proof and demonstrate causation in your construction claim or defence is essential and it's all on you!

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CRAIG MCPHEATOR
Senior Consultant, Construction Solutions
+44(0) 1786 430800
craig.mcpheator@fticonsulting.com

JOHN FORSON
Senior Consultant, Construction Solutions
+44(0) 1786 430800
john.forson@fticonsulting.com

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