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## Keep it Global

**Quantity Surveyors regularly face Global Claims. Richard Walmsley discusses how they might be approached.**

Disruption routinely occurs on construction contracts, yet it remains the most difficult head of claim for a contractor to prove. It is therefore no coincidence that contractors submit disruption claims on a global basis. A global claim represents a total sum claimed as a measure of loss for two or more events, where no breakdown is provided for each individual event. The reasoning behind such an approach is that due to the complex nature of the project, it is impossible to disentangle each and every individual disruptive event.

*A global claim can be linked to an absence of records.*

What this means in most cases is there are incomplete records to prepare a particularised claim and the global approach is the only realistic alternative.

Contractors will be aware that global claims represent high risk strategy, even allowing for the potential relaxations in *John Doyle v Laing Management*. How then should a contractor prepare a disruption claim?

Global claims carry risk and should be avoided. Instead it is suggested a contractor should:-

- Break the claim down into sensible smaller parts
- Attempt to particularise those smaller parts, supported wherever possible by contemporaneous records

Attempt to show causation, which is the application of fact and common sense

- Make a reduction, as appropriate, for the contractors own culpability
- If there is a balance of the claim remaining, a mini global claim, attempt to establish a dominant cause where the employer is culpable.

The claim will have a better prospect of success where a genuine attempt has been made to particularise, including a realistic acknowledgement of the contractors own culpabilities.

If the contractor chooses to submit a global disruption claim, what approach should the quantity surveyor adopt?

It is inappropriate in my view to dismiss the claim solely due to an absence of a cause and effect analysis. This approach is unrealistic in that it seeks to avoid the issue. It may also place the employer in some difficulty were the dispute to subsequently proceed to adjudication, arbitration or litigation. What then is the alternative?

On the assumption that the contractor was disrupted arising from the actions/inactions of the employer, I would suggest that the quantity surveyor attempts to estimate the contractor's entitlement.

In preparing such an estimate the quantity surveyor, with the participation and project knowledge of the appropriate design and management team members, should attempt to identify the disruptive events, including acts of prevention.

This will inevitably involve a review of the key contemporaneous documents.

*Causation is the application of facts and common sense.*

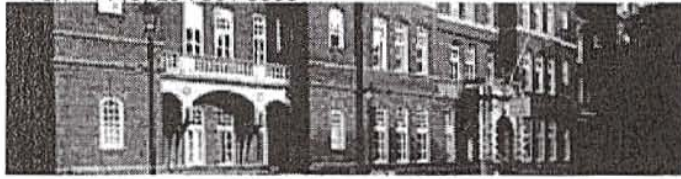
The information could be incorporated into a schedule that summarises these events and attempts to estimate a loss or productivity. This may mean 'bunching' events rather than the stringent analysis of each event in isolation.

The estimate will inevitably involve assumptions regarding gang sizes, the actual cost of those resources and a comparison, if possible, with work carried out during non-disrupted working. The difficulty with many construction contracts is that data to compare disrupted with normal working is often unavailable, unlike linear construction projects such as roads and pipelines where such a comparison may be easier. Nonetheless an attempt should be made.

It may be argued that the approach being suggested is inappropriate since it represents the quantity surveyor preparing the contractor's claim. I would disagree. It is the execution of the quantity surveyor's obligation to act independently to value the work carried out by the contractor, of which disruption may be a part.

I do not consider that a quantity surveyor can be criticised if, in the absence of information from the contractor, a genuine attempt is made to estimate the contractor's entitlement with the collaboration of the design and management team.

This makes it all the more important for a contractor, who should have the information, to prepare a claim in as much detail as possible. This should avoid the global approach wherever possible.



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## Being an Expert Witness

**Article written by Iain Wishart, Managing Director of G T Fairway, outlining the attributes required in an expert witness.**

One definition of an Expert Witness is someone who, through their qualifications or experience is recognised as proficient in their field and who agrees to act in a dispute between two or more parties. As the title might imply, the expert may eventually appear in a trial or hearing and give evidence relating to the matter in dispute. A slightly more whimsical definition of an expert witness might be a masochist who volunteers to subject themselves to cross-examination.

The expert provides a technical expertise that the judge or arbitrator normally will not have. If the expert does his or her job properly, they will often be able to identify for the judge or arbitrator the important technical issues that needs to be considered and provides their view as to how the judge or arbitrator should decide the issue.

The first attribute required of an expert witness is that the person should be proficient in their field. Like the World's favourite airline, most experts are self-styled, but accepted as expert through their training or professional skills and experience. There are however a number of recognised courses that provide training in the skills required.

One or the other attributes required is the ability to be objective. Without that sense of objectivity, an expert ceases to become independent and simply becomes a hired gun on behalf of their client. If that happens, if the matter goes to a hearing the expert's testimony will be tried, probably found wanting and discounted if not entirely disregarded.

It almost goes without saying that an expert must tell the truth. If an expert does not and he lies under oath, then not only will his evidence be tainted, but they may face criminal prosecution.

The ability to communicate in simple language is essential. Some months ago, I was listening to the Today programme on the radio. The feature was on the subject of enriched uranium. "What is enriched uranium?" asked the interviewer. The reply was "Basically, its uranium that's been enriched." In the case of an expert witness, if he or she can't get their message across, then they will have failed in their task. Although, lawyers, judges and arbitrators are in the main highly intelligent human beings, they do not have the technical expertise of the expert and it is up to the expert to communicate in a language that other people can understand.

Linked to the last point, is the ability to write in plain English. It is normal practice for an expert to submit a report that provides the judge or arbitrator with their view. It should ideally provide the salient facts relating to the expert's investigations, the facts that they have uncovered and the conclusions drawn from the facts that have been investigated. The opposing side's lawyers will read and the witness will probably be called upon to give evidence and offer themselves up for cross-examination.

What can the expert expect when finally they are called upon to give evidence? If he or she is to be cross-examined, they can expect to be interrogated fairly thoroughly. Counsel for the opposing side will attempt to extract answers from the expert that will discredit or undermine something said in the expert's report and damage his or her clients case. The expert should not attempt to second guess the opposing sides Counsel but should answer all questions truthfully and objectively even if the answer may give the appearance of damaging their own client's case. Any attempt at evasion or obfuscation will merely postpone the point at which Counsel for the opposing side will extract the response that he or she is looking to get. If Counsel for the expert's client believes that a response given during cross-examination was unsatisfactory or perhaps left the wrong impression, they will deal with the matter in re-examination.

Recent legislation that resulted from a report by Lord Woolf recommended the appointment of a single expert answerable to the court. It was felt that this would be an important step in reducing unnecessary expense and as the court appointed the expert, it would ensure impartiality. Most of the people who practice as experts welcome the Woolf proposals and consider that the work of the expert will become even more important in years to come.

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## Criteria For Success Using Court Appointed Expert

**Article written by Fred Frater in which he discusses the circumstances which gave rise to a successful appointment as a court appointed expert.**

Lord Woolf has called for increased use of Court Appointed Experts - preferably one

**Fairway's experience of attempting to agree positions with other experts' is not encouraging and although some measure of agreement has usually been reached, complete agreement is normally not possible. That two experts could agree on all details in this case was surprising and thus worthy of considering what factors made it possible.**

Lord Woolf in his report "Access to Justice" has made several proposals with regard to the appointment and role of expert witnesses. Amongst these are the proposals that:-

- The calling of expert evidence should be under the complete control of the Court
- The Court would have the power to appoint the expert
- When possible, single experts should be used
- Opposing experts should co-operate and produce a single report indicating areas of disagreement
- The expert has overriding responsibility to the Court
- The expert addresses the Expert Report to the Court

Recent experience by Fairway Consultancy Services indicates that a valuable contribution to the resolution of a dispute through arbitration can be made through a court appointed expert.

In an arbitration concerning an Owner and Contractor in dispute over a petrochemical project, I was appointed as *one* of the Court Experts.

for the purpose of making a report consisting of written answers to the Court's questions and give verbal testimony in examination on his report.

This Court had spent some time seeking candidates for the appointment but had been unable to find a candidate acceptable to both sides.

It is perhaps not surprising that, for disputes arising in any specialised field of technology or management, such difficulties might arise. After all, a court cannot be expected to be familiar with the many technologies of all the cases presented to it and be able to judge which experts have the experience relevant to the issues in dispute.

This particular court solved the problem by asking the parties to nominate candidates themselves from which a choice might be made. Understandably, this too founded as the parties could not agree on a single one.

The final solution was for each party to select an expert and agree upon the two names to be put forward to the court for appointment as "the joint experts".

The Court made the appointments not knowing or being concerned as to which candidate was nominated by which party.

During this process of appointment, which occurred after the pleading had been submitted, the parties were meticulous not to brief the potential experts on any aspects of the case with the result that when we started work we did so with no view of either side's case or it's merits. As neither of us had contributed any of the pleadings we were in a position that was not pre-conditioned by any experience in the case to that point of time.

In a preliminary hearing, the Court quickly made it clear to the experts that they were appointed by the Court and their role was to answer the questions that the Court would provide for the benefit of the Tribunal.

The Court also made it clear that the experts were expected to provide a single agreed report which was to be confined to answering the questions.

The Court's questions consisted of two sets of some 25 questions which had been drafted by the respective parties. Each party had the right to object to the other's questions.

Following appointment the experts were provided with all the pleadings and exhibits that had been exchanged so far.

Generous powers and access were given to the experts in that we were required to answer to questions on the basis of all the documentation in the possession of both parties who made available working areas adjacent to their filing storage and retrieval systems in their respective offices. Computer files containing project data were also made available and the parties co-operated to ensure that the experts had the most complete and reliable data.

In addition, the parties responded to the experts needs for clarification of the questions by providing selected extracts from their pleadings and their exhibits together with additional notes as the pertinence to their arguments. These documents were compiled by the parties who made presentations to the experts in

In this matter, as in the choice of documents we wished to examine, we were entirely self determining and the parties facilitated every request. As for the presentations, each party invited the other to witness the experts interviews of the project staff.

Following our initial study of the questions and our interviews of the party's staff, we studied the project and, after analysis and discussion, answered the questions as fully as possible and with complete agreement.

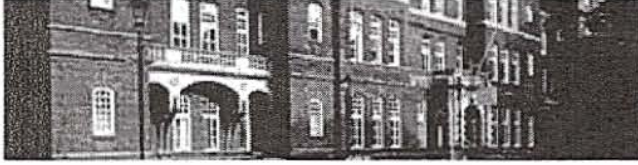
The following were the unusual features of this case which may have contributed to the success of the approach.

1. The "expert" was appointed by the Court and acted for the Court but were, in fact, the respective nominees of the parties.
2. The parties did not appoint their own experts in addition.
3. The experts were highly experienced and successful practitioners in the management and administration of projects identical in nature to the project in dispute.
4. The experts had not been engaged by either party for the purpose of advising during the preparation of the pleadings.
5. Once appointed, the court required the experts to prepare estimates of their fees and expenses and the court assumed responsibility for all payments to the experts.
6. Other than for the purposes of analysing data, the experts never met, corresponded with or interviewed one party without the other expert being in attendance and both Lawyers of both the parties in attendance.
7. Both parties co-operated with the experts and with each other in providing all the information the experts requested.
8. An joint report answering only the party's questions was required and was agreed with no dissension.

From the standpoint of the Court, having a set of agreed answers to each party's questions was a clear advantage leaving no scope for argument on such issues.

It may be noted that the parties reached a settlement before the hearing of verbal testimony was completed.

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## Avoiding financial disaster

***Projects which hit financial disaster are predictable, avoidable, and mainly caused by human error, says Iain Wishart of trouble shooting company G T Fairway.***

Most of the projects that Fairway is involved in today are financial disasters of one sort or another. Advisors are not normally involved until the disaster has happened, their job often being to help salvage something from the wreck.

Disastrous projects happen for many reasons. Many of them are avoidable, most are predictable and almost all of them are caused by human error and lack of foresight.

One near financial disaster occurred on a multi billion dollar infrastructure development, which was to be constructed in a number of sequential construction projects. The first construction contract to be let was a substantial dredging contract. Previous to that, a soils investigation and testing organisation had been commissioned to undertake a sub surface survey to determine the availability, type and quantity of suitable sand and other fill material which was required for later construction projects.

It was the dredging contractor's job to dredge suitable fill material and to reclaim land, which was an essential element for the remainder of the projects. If this stage was late, the remainder of the project would be affected.

The testing organisation carried out its instructions properly and undertook a series of trial examinations and boreholes. It subsequently produced locations, plans and quantity estimates of the suitable fill material it had located. Part of the testing organisation's report was included in the dredging contractors contract.

The contractor's price and equipment selection was based on the soils report in the contract. After contract award, it mobilised, carried out its initial surveys and began work. Almost immediately it experienced a very major problem.

When the testing organisation took its sea bed samples, they were aware of the presence of large boulders on the sea bed and in the upper sea bed layers. However, their task was to establish availability and suitability of fill material, not to provide complete details of sea bed and sub surface conditions. As a result, their report mentioned the presence of boulders in an oblique way but even that information was not given to the contractor.

As a result of the boulders on the sea bed it soon became apparent that the contractor's dredgers were underpowered and could not achieve the production rates the company planned and needed to achieve to adhere to the programme and to remain profitable. The initial protest to the engineer was rejected out of hand. The contractor then faced the dilemma of either struggling on and being subjected to increased and prolonged operating costs and liquidated damages for its inability to meet programme, or to bring in more powerful and more expensive dredgers, thereby meeting the programme dates but at a substantial cost. The engineer's immediate and thoughtless rejection of discussions didn't help. When Iain Wishart of Fairway Construction Consultants was brought in, the contractor was still pondering its options and struggling with its existing equipment.

"When the problem was explained, I checked the contract and the test and boreholes logs and advised the dredging contractor to take a substantial number of samples from the as yet undisturbed sea bed areas," explains Wishart. "This time, however, we didn't ignore the boulders: we brought them in and included them in our sampling reports. We had invited the engineer's representative to attend the sampling and testing process, but he declined.

"With our own samples, we re-presented the claim showing clearly the differences between the information provided to the contractor in the contract and the actual results taken by our sampling process. The contract was explicit in that if there was an error in the information given by the owner, the contractor was entitled to the cost and time consequences resulting from that error."

In this case, the end result was a happy one for the contractor. Within a few weeks of the resubmitted claim, the engineer was forced to acknowledge the error, the contract price was re-negotiated, the contractor brought in larger equipment, the project was finished on time and the contractor made a profit. The owner ended up with the first part of the project on time, but at a cost which was 60% higher than he had anticipated. The entire situation was due to an error of miscommunication and a lack of thought when the contract documents were drafted.

As in the majority of cases, this incident was avoidable and foreseeable. Part of the problem facing contract drafters in a series of sequential contracts is that, unless thought is given early on to ensure that the contracts compliment one another and that investigation, design and construction contracts all properly fit together, gaps can and do occur. The same situation has happened on other contracts, where boulders were removed and discarded rather than transporting them to a laboratory to be included in the soils report.

It is easy to see how a simple error could have resulted in a major conflict. It is so easy to see how the whole problem could have been avoided with a little bit of thought, and foresight. Undoubtedly the contractor's original tender would have been higher than they were, but certainly not the 60% extra that the owner ended up paying.