PROLONGATION AND DISRUPTION – PROBLEMS OF CAUSATION IN BUILDING CONTRACTS. IS ARBITRATION THE ANSWER?

by Jeffrey C. Brown, LLB, ACIArb, Partner, Neil J. Jones & Co., Solicitors, Birmingham, England

This lecture was published in the May 1995 issue of Arbitration, *The Official Journal of the Chartered Institute of Arbitrators, London, and is published with kind permission of that Institute.*

INTRODUCTION

A number of recent well publicised authorities have highlighted the difficulties in proving claims for extensions of time to contract periods for the completion of building projects and also for direct loss and/or expense due to either prolongation or disruption. Where appropriate, reference will be made to the relevant portions of clauses 25 and 26 of JCT 80 together with an analysis of the difficulties presently confronting parties in the evaluation of either extensions of time and/or alternatively direct loss and/or expense. Complex situations often arise when building contracts are performed. The issue of disentangling cause and effect is not always performed with any degree of precision. It was stated by Lloyd L.J. in *McAlpine Humberoak v. McDermott International* [1992] 38 B.L.R. I that:

> 'It seems to be the practice in the construction industry to employ consultants to prepare a claim almost as soon as the ink on the contract is dry.'

However, as will be seen, consultants have more onerous and difficult tasks to perform.

It is hoped that this article will provide useful guidelines as to how this process is to be performed, and the current difficulties that exist in the wording of the JCT 80 Contract.

ROLLED-UP CLAIMS

Claims for direct loss and/or expense are usually prepared by quantity surveyors, who are the first to be called upon by contractors who perceive that they have a legitimate grievance. In the past they have tended to avoid complicated arguments of causation by pleading that the claims for reimbursement arose by adopting the overall period of delay together with all of the constituent causes of that delay relied upon with no attempt to demonstrate either the periods or durations of each individual delay caused by each. Thus, fundamentally, a rolled-up claim alleged that all of the factors of the delay caused the totality of the delay. This obviated the need for any precise investigation and analysis in any exhaustive detail

which in due course gave rise to cost savings for the contractor. However, any such allegation was an inherently dangerous proposition to adopt for those reasons as discussed hereafter.

It was considered at the time that the ability to plead loss on a rolled-up basis had been given judicial support due to the misinterpretation of those statements made in *J Crosby & Sons Ltd v. Portland Urban District Council* [1967] 5 B.L.R. 121 (a decision of Donaldson J. as he then was) and of *London Borough of Merton v. Stanley Hugh Leach Ltd* 32 B.L.R. 51. In *Merton*, at page 102, the following passage of the judgment of Vinelott J., in particular, was relied upon:

> 'If application is made for reimbursement of direct loss or expense attributable to more than one head of claim and at the time when the loss or expense comes to be ascertained it is impracticable to disentangle or disintegrate the part directly attributable to each head of claim, then, provided of course that the contractor has not unreasonably delayed in making the claim and so has himself created the difficulty the architect must ascertain the global loss directly attributable to the two causes, disregarding, as in Crosby, 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 taken in isolation. To this extent the law supplements the contractual machinery which no longer works in the way in which it was intended to work so as to ensure that the contractor is not unfairly deprived of the benefit which the parties clearly intend he should have.'

It is submitted however that the reliance upon *Merton* as giving judicial support to the rolled-up claim was incorrect. The passage of Vinelott J.'s judgment makes reference to the ascertainment of the quantum by way of a global loss. The passage cannot be relied upon as authority for not performing the analysis of showing cause and effect. The danger to the contractor of advancing his claim on this basis was that he had to prove his loss on the balance of probabilities and furthermore, by his own admission, he could not disentangle or separate the separate causes. Thus, for example, if the contractor's opponent were able to demonstrate that a majority of the causes of delay previously relied upon did not provide ground for claiming then, the claimant stood the risk that the totality of his claim would fail since he could not by his own admission sever the good parts from the bad. The significance of his high risk strategy becomes even more real when you consider that global claims are advanced in order to avoid the increased costs to contractors. Without examining evidence in some detail it will not be possible to offer any assessments of those sound elements of the contractor's claims as contrasted with those of more doubtful merit. Thus, by the time that the dispute approaches a trial, it will have become apparent that many of the claims which had previously been considered sound ean no longer be sustained. Furthermore, it should be noted that any claim advanced on a global or 'rolled-up' basis must state that it is not possible or practicable to disentangle cause and effect. Before it is possible to state this there should be a genuine attempt to analyze the claim to disentangle cause and effect.

Thus, the global claim should be seen as the 'last resort rather than the first. The comments made in *Merton* and *Crosby* were the subject of further comment by the Privy Council in *Wharf Properties Ltd and Another v. Eric Cumine Associates and Others (No 2)* [1991] 52 B.L.R. 1. Lord Oliver stated (at page 20):

> 'Those cases establish no more than this, that in cases where the full extent of extra cost incurred through delay depend upon a complex interaction between the consequences of various events, so that it may be difficult to make an accurate apportionment of the total extra costs, it may be proper for an arbitrator to make individual financial awards in respect of claims which can conveniently be dealt with in isolation in a supplementary award in respect of the financial consequences of the remainder as a composite whole. This has, however, no bearing upon the obligation of a plaintiff to plead his case with such particularity as is sufficient to alert the opposite party to the case which is going to be made against him at the trial. ECA are concerned at this stage not so much with quantification of the financial consequences – the point with which the two cases referred to were concerned but with the specification of the factual consequences of the breaches pleaded in terms of periods of delay. The failure even to attempt to specify any discernible nexus between the wrong alleged and the consequent delay provides, to use (counsel's) phrase 'no agenda' for the trial.'

Subsequent to the *Wharf* decision, in two reported eases attempts were made to strike out claims which had been pleaded on a rolled-up basis. In *Mid Glamorgan County Council v. J. Devonald Williams & Partners* [1992] 8 Const. L.J. 61, Mr. Recorder John Tackaberry Q.C. refused to strike out a claim pleaded on a rolled-up basis. Furthermore, in *ICI Plc v. Bovis Construction and Others* [1992] 8 const. L.J. 293, His Honor Judge James Fox-Andres Q.C. rejected an application to have a statement of claim struck out and, instead, ordered the delivery in a number of instances of further and better particulars. Thus, at the present time, there is no judicial precedent for stating that if a claim is pleaded on a rolled-up basis, it does not disclose a valid cause of action so as to lend itself to an application to strike out any portion of the pleading or alternatively, the pleading in its entirety. However, there is sufficient authority to indicate that claims pleaded on a rolled-up basis must be part of a high risk strategy on the basis of the 'all or nothing' approach and, furthermore, are suspect if no attempt can be made to show cause and effect.

CRITICALITY AND CONCURRENCY

Extensions of time

It is often considered that forms of building contract which allow for the conferring of extensions of time to the contractor as a consequence of any delays to his works are thereby protecting the contractor's interests as opposed to the employer. This is not so. The purpose of a mechanism in any building contract which allows to the contractor an extension of time is to ensure that the employer's entitlement to claim liquidated and ascertained damages is retained. Without the mechanism for the granting of an extension, if the employer were responsible for a delay then the

courts would not allow the employer to, on the one hand, retain the benefit of the liquidated and ascertained damages when the employer would have had to have admitted that it had contributed itself to this delay albeit perhaps in part only.

In *Peak v. McKinney* [1970] I B.L.R. 111 it was stated by Salmon L.J. (at page 121) that:

> 'The liquidated damages and extension of time clauses in printed forms of contract must be construed strictly contra proferentem If the employer wishes to recover liquidated damages for failure by the contractors to complete in time in spite of the fact that some of the delay is due to the employer's own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer...'

This important and fundamental principle has to be considered when a contractor's application for an extension of time is considered where, as usually will be the case, there will be other causes of delay with a significant and substantial degree of concurrency. Where there are concurrent delays, one due to the employer and the other due to the contractor, then the contractor must be accorded an extension of time for the employer-related delay. The clause in the building contract should afford an extension of time failing which, if it may be shown that the employer has caused delay, albeit concurrent with delay by the contractor, for which there can be no extension of time, then the mechanism for claiming liquidated and ascertained damages must fail. Authority for this proposition may be found in the judgment of Vaughan Williams L.J. in *Wells v . Army & Navy Co-op* 11902] 86 L.T. 764 when he stated:

> 'In law, I wholly deny the proposition Mr Berr put forward which was this really in effect:
>
> 'Never mind how much delay there may be caused by the conduct of the building owner, the builder will not be relieved from penalties if he to has been guilty of delay in the execution of the works.'
>
> I do not accept that proposition in law.'

Furthermore, in *Walter Lawrence & Son Ltd v. Commercial Union Properties (UK) Ltd* [1984] 4 Con. L.R. 37 the facts were that the contractor was already in delay through his own fault when exceptionally inclement weather caused substantial further delay. The architect took the view that if the contractor had not already been in delay then the inclement weather would have had less effect than it did in fact have. The court stated that the architect's view was erroneous. The contractor was entitled to an extension of time in respect of the inclement weather when it occurred irrespective of whether or not the contractor was at that time in delay through his own fault. However, it is not all delays which merit an extension of time. It is only those delays which affect the progress of the project so as to have a knock-on effect on subsequent activities which delay the overall date for completion of the project. Such delays are stated to be

critical.

In *H Fairweather & Co Ltd v. London Borough of Wandsworth* [1987] 39 B.L.R. 106 His Honor Judge Fox-Andrews QC dealt with an appeal from an arbitrator's award which included assessing whether or not the arbitrator's method of allocating extensions of time under clause 23 of the JCT Local Authorities Edition with Quantities 1963 Edition (July 1975) was correct. The arbitrator had decided that the appropriate test was to ascertain what was the dominant cause of the delay. Judge Fox-Andrews disagreed. He stated that clause 23 was to be contrasted with clause 24 of the Contract which conferred on the contractor a right to claim for direct loss and or expense. The granting of an extension of time should not be considered a condition precedent for claiming the latter, albeit that there was obviously a relationship between both. Thus, whilst the architect would have to allocate the causes of the extension(s) of time granted by him, it would be wrong of him to apply the 'dominant cause' test in doing this.

It is clear from the decision of Megaw J. in *Wraight Ltd v. PH & T (Holdings) Ltd* 13 B.L.R. 26 that the rules for the quantification of loss and expense may be regarded as being analogous with those rules for quantifying losses by way of damages which of course depend upon and are consequent to breaches of contract. Thus, it must follow that the same principles which apply to identity causation in breach of contract cases should also apply to those instances where direct less and/or expense needs to he identified. Argument was raised in *Wraight* that the words 'direct loss and/or damage' being the precise wording as comprised in clause 24 of the RIBA Standard Form of Building Contract (1963) Edition should be interpreted as giving rise to entitlement to claim only those 'direct' losses and thus any losses which should be regarded as indirect or consequential should be ignored. In his judgment Megaw J stated:

> '... 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 obligations.'

Difficulties relating to causation more often arise in the tort of negligence rather than in contract. Thus, one has to ascertain that the breach of the duty of care in the tort of negligence was the cause of the loss that the loss may be considered reasonably foreseeable and not too remote. The leading case in the tort of negligence dealing with issues of causation and foreseeability is *Overseas Tankship (UK) v. Morts Dock: & Engineering Co. ('The Wagon Mound')* which related to damage to a ship's wharf and to some equipment thereon due to a discharge of furnace oil on to the surface of the water in a bay which spread and was subsequently ignited by the use of oxy-acetylene equipment. The plaintiff's claim in this instance failed on the ground that the damage had to be considered as being too remote. Whilst of general interest, cases involving allegations of breaches of duty in the tort of negligence cannot be considered as providing direct authority

and guidance when attempting to analyze causation in cases of direct loss and expense and breaches of contract.

LOSS AND EXPENSE AND DAMAGES

Difficulties of causation and concurrency are a more usual occurrence in breach of contract cases. The principles of concurrency and causation have long since bedevilled the courts when dealing with causes of loss. Numerous insurance cases can be relied upon as guidance. See for example the following cases:

(a) In *Coxe v. Employer Liability Insurance* 1916 2 K.B. 629 the court had to decide whether or not the death of a military officer who was run over by a train when visiting guards and sentries posted at various points along the line was 'directly or indirectly caused by, arising from or traceable to... war'. If this was so, then the deceased's estate could not recover any proceeds from his policy of insurance which did not cover against death caused by such circumstances. The court concluded that the death was indeed indirectly caused by war.

(b) *Leyland Shipping v. Norwich Union Fire Insurance Society* 1918 A.C. 350. In this instance the court had to decide whether or not the cause of the total loss of a ship was due to storm damage or alternatively, was due to enemy action.

The evidence before the court was that following the ship being struck by the enemy torpedo she was moored at Le Havre. She remained there for two days taking to ground at each ebb tide, but floating again with the flood and finally her bulkheads gave way and she sank and became a total loss. It was held that the cause which was proximate in its efficiency was the torpedoing by the enemy German submarine. This cause had been preserved though other causes in the meantime had sprung up which had not yet destroyed it or truly impaired it and thus, the result was that the enemy action remained the real efficient cause to which the loss could be ascribed. Thus, underwriters were protected by the warranty against all consequences of hostility.

(c) Similarly, in *Yorkshire Dale Steamship Co Ltd and The Minister of War Transport* [1942] A.C. 691 the Privy Council of the House of Lords had to decide whether or not the cause of damage to a ship was being involved in a warlike activity, being a deviation of course under naval orders to avoid apprehended submarine attack. The court emphasised that the choice of the real or efficient cause from out of the hole complex of the facts had to be made by applying commonsense standards. The court emphasised that the interpretation to be applied did not involve any metaphysical or scientific view of causation. Viscount Simon L.C. stated at 698 that one had to ask oneself what was the effective and predominant cause of the accident that happened whatever the nature of the accident may be. Furthermore, he drew the

analogy (again page 698) with a doctor certifying the 'cause of death' in which case, the doctor looked for the thing which had predominantly operated to bring death about. The House of Lords concluded that the cause of the damage to the ship was a marine risk and not a war risk. A marine risk did not become a war risk merely because the conditions of war made it more probable that the marine risk would operate.

In *Leyland Shipping* Lord Shaw of Dunfermline (at pages 368 and 369) gave a very lucid account of causation. He stated thus:

> 'In my opinion, my Lords, too much is made of refinements upon this subject. The doctrine of cause has been, since the time of Aristotle and the famous category of material, formal, efficient and final causes, one involving the subtlest of distinctions. The doctrine applied in these to existences rather than to occurrences. But the idea of the cause of an occurrence or the production of an event or the bringing about of a result is an idea perfectly familiar to the mind and to the law, and it is in connection with that that the notice of *proxima cause* is introduced. Of this, my Lords, I will venture to remark that one must be careful not to lay the accent upon the word 'proximate' in such a sense as to lose sight of or destroy altogether the idea of cause itself. The true and the overruling principle is to look at a contract as a whole and to ascertain what the parties to it really meant. What was it which brought about the loss, the event, the calamity, the accident? And this is not an artificial sense, but in that real sense which parties to a contract must have had in their minds when they spoke of cause at all.
>
> 'To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but – if this metaphysical topic has to be referred to – it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.'

Furthermore, he added:

> 'My Lords, we have had a large citation of authority in this case, and much discussion on what is the true meaning of causa proxima. Yet I think the case turns on a pure question of fact to be determined by commonsense principles. What was the cause of the loss of the ship? I do not think that the ordinary man would have any difficulty in answering she was lost because she was torpedoed.'

Occasionally, it is not possible to decide which cause is the active, dominant or efficient cause and thus it may be stated that the causes of the loss are of equal efficacy. In such a situation, it appears that, following the dictum of Devlin J. in *Heskell v. Continental Express Ltd* [1950] 1 ALL E.R. 1033 that the breach of contract is one of two causes, both co-operating and both of equal efficiency, it is sufficient to carry judgment for damages. Devlin distinguished cases of causation in contract and in tort. He stated that it was clearly settled that in tort the wrongdoer could not excuse himself by pointing to another cause. It was enough that the tort should be a cause and it was unnecessary to evaluate competing causes and

ascertain which of them was dominant. The decision of Devlin in *Heskell* was approved by Steyn J. in *Banque Keyser Ullmann SA v. Scandia (UK) Insurance Co Ltd and Others* [1987] 2 W.L.R. 1300.

It is clear that where more than one party has caused or contributed to the same 'damage' an apportionment of liability between them can arise as a consequence of the application of the Law Reform (Civil Liability) Act 1978. This would apply particularly where there are two causes of the loss each of equal effect. However, the wording of Section 1(1) of the 1978 Act provides that 'any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage.' It is important to note that the damage must be suffered by another person. Thus, in a situation where there are competing causes one being contractor-related and the other being employer-related the Law Reform (Civil Liability) Act 1978 cannot, it is submitted, have any specific application since it relates to 'damage' caused to a third party. To this extent the principle of law in *Heskell* is not affected by the 1978 Act.

While it is difficult to disagree with the lucid judicial statements made by Lord Shaw in *Leyland*, lawyers and lay persons often have difficulty of deciding issues of dominance. The principles of law may be the same but construction projects have the ability to create factual matrices infinitely more complex than the straightforward choices which confronted the court for example in the *Leyland, Coze* or *Yorkshire Dale* decisions. For example, in *ICI v. Bovis* the claim advanced by the plaintiff against the defendants exceeded £31m and comprised within this total was a large number of heads of claim. Whilst it was accepted in that decision that those particulars hitherto given were inadequate, the Scott Schedules were of not inconsiderable length. In the three quoted insurance cases factual questions which confronted the courts were easily defined and clear cut such as what was the cause of the loss of the ship or why was the soldier killed? In a building case, however, the delay to the project or the disruption is ongoing with a number of active competing causes taking effect at various times. It is submitted that there is a two-fold exercise to be performed in each claim situation. The first is the painstaking reconstruction of the contract with the analytical identification of the causes and identifying where relevant the extent of any concurrency. Whilst this exercise is often undertaken with the aid of computer software, it cannot hide the necessity for the understanding of the detailed history of the project. This exercise ought to be performed by interviewing the key witnesses of fact since it is most unlikely that the whole history will be obtained by reference to the written records alone.

It is only when this first task has been performed that it will then be possible to ask questions based on what was the 'dominant' or active or efficient cause of the delay or disruption. This will be a crucial exercise where it may be shown that during the currency of the project there were

also contractor-related or 'neutral' causes of delay as well as those of the employer's making. This exercise may not be necessary where there is not a positive counter-allegation by the employer that he was not responsible for some or all of the delay.

What distinguished building cases from other cases involving questions of causation, such as the three aforementioned insurance cases, is that there invariably is not the necessity to perform the first analytical exercise as discussed above. There is no necessity to perform the detailed historical investigation since the facts are far less complex. The cause and effect analysis both in respect of extensions but more particularly in respect of direct loss and/or expense can be exhaustive. It is pertinent to consider whether this is what was the intention of those parties responsible for the drafting of the JCT 80 Standard Form of Building Contract. Experts, usually quantity surveyors, have to analyse the effects of often hundreds of causes of delay and disruption, ascertain concurrency and eventually state what the financial consequences are.

OPERATION OF CLAUSES 25 AND 26 OF JCT 80

Difficulties apply in assessing whether or not a cause of delay ultimately may be termed critical which means that it has the effect of delaying or contributing to the delay of the project as a whole. This is especially so if the event occurs during the early stages of the contract. The circumstances, accurate records and data must be considered necessary before it may be proved that the cause of the delay and the delay itself was ultimately responsible for the delay in the completion of the works as a whole. In such circumstances there are obvious grounds for legitimate differences of opinion. Furthermore, there is no strict requirement in JCT 80 for the architect or contract administrator to perform an exact apportionment to the various causes making up the overall extension of time that is granted. To the contrary, clause 25.3.1.3 provides only a requirement that he should state 'which of the Relevant Events he has taken into account...'.

Furthermore, under clause 25.3.1.4, there is a requirement that he should state the extent, if any, whereby he has taken into account any instruction under clause 13.2 requiring as a Variation the omission of any work issued since the fixing of any previous Completion Date.

The words used in the contract to decide the entitlement, if any, to any extension of time are 'fair and reasonable'. This is subject to varied interpretations in practice. This is not a precise formula and thus depends upon the discretion of the architect or contract administrator. The contract does not provide any legal guidelines in the event of concurrency notwithstanding that those legal principles appear not to be in serious judicial question.

Clause 26.3 of JCT 80 is a clause which merits special attention. It states as follows:

> 'If and to the extent that it is necessary for ascertainment under clause 26.1 of loss and/or expense the Architect/ Contract Administrator shall state in writing to the Contractor what extension of time, if any, has been made under clause 25 in respect of the Relevant Event or Events referred to in clause 25.4.5.1 (so far as that clause refers to clauses 2.3, 13.2, 13.3 and 23.2) and in clauses 25.4.5.2, 25.4.6, 25.4.8 and 25.4.12.

On the basis that under clause 25 there is no requirement to apportion the prolongation period to the various cause or causes this clause is considered to be necessary to create the necessary apportionment for direct loss and/or expense. It however appears that this is based on flawed logic.

The clear inference must be that if there is a certificate by the architect or contract administrator giving rise to an extension of time due to employer related delays this will, furthermore, give rise to an entitlement on the part of the contractor to claim for direct loss and/or expense and the contractor will thus be entitled to claim its costs of prolongation. It would appear from the authorities that this, as a proposition of law, is incorrect. Whereas it may be seen that it is sufficient to show that any cause of the delay which is wholly concurrent with others, and which is due to the employer's default, will create entitlement to an extension of time, the same rule cannot be relied upon for grounds for claiming direct loss and/or expense. It will have been seen from the authorities quoted herein that it has been accepted that the rules for quantification of loss and expense are analogous to those rules for the assessment of quantum of damages. Clause 26.1 states:

> '... the Architect/Contract Administrator is of the opinion that the direct loss and/or expense has been incurred or is likely to be incurred... then the Architect/Contract Administrator from time to time thereafter shall ascertain, or shall instruct the Quantity Surveyor to ascertain the amount of such loss and/or expense which has been or is being incurred by the Contractor;...'

Thus, the Contract envisages that the architect or contract administrator is to form his opinion whether or not loss and/or expense has been incurred or is likely to be incurred in the future and gives him the option of instructing the quantity surveyor to quantify what this loss is.

It is true to state that the clause imposes upon the contractor a responsibility to provide 'upon request such information as should reasonably enable the Architect/Contract Administrator to form an opinion' or 'upon request such details of such loss and/or expense as are reasonably necessary for such ascertainment.' However the Contract cannot intend the degree of information and detail which the contractor has to provide as including an exhaustive and comprehensive analysis of cause and effect. The contractor's resources simply do not afford him the facility of doing this. The architect must be assumed to have some knowledge of the history of the project. This is implicit on the basis that the information or detail which the contractor is to provide is only following receipt of a request to produce it. Furthermore, the references

to 'reasonably' means that the contractor is not obliged to submit in exhaustive detail all information and every detail. Yet, the irony is that this is what the contractor must do if it is to have the certainty of securing its claims in arbitration. Whilst on the one hand the architect is not entitled to insist upon the submission of detail to support a claim which goes above and beyond that of reasonableness, it is inconsistent to offer criticism for such action if this is the task which the contractor will have to perform in the pursuit of its claims in arbitration. However, at the present time there is simply no incentive for the architect or contract administrator to certify entitlement for direct loss and/or expense. In failing to certify he will or should know that the law places a high onus of proof upon the contractor who will in all probability have omitted to retain the necessary documents to prove at least a significant portion of his claim, even if minded to pursue it in arbitration. Furthermore, in failing or refusing to certify loss and expense the architect or contract administrator does not breach any obligations toward the contractor such as would render him liable for damages in his own right. If an architect's or contract administrator's opinion as to the contractor's entitlement to loss and expense is subsequently shown in arbitration between the parties to be incorrect, other than the incurring of legal costs, no direct punitive consequences follow any such findings by an arbitrator.

An architect or contract administrator will need to be aware that in failing to consider or refusing to certify loss and expense he may render the employer to be in breach of contract. This takes place where an architect refuses to, or is prevented from, exercising his powers of discretion and forming an opinion. This was the situation which occurred in *Croudace v. The London Borough of Lambeth* [1986] 33 B.L.R. 25. This decision is based upon the contents of the Standard Form of Building Contract, Local Authorities Edition 1963, July 1977 Revision. The facts in *Croudace* were somewhat unusual in that the defendant's chief architect retired but there was no successor appointed. Whereas prior to retirement the plaintiff contractor had received the benefit of a 31 week and 3 day extension of time it was denied from pursuing its claims for financial reimbursement. The Court of Appeal concluded that the defendant's acts or omissions were sufficient to amount to a failure to take steps as were necessary to enable the plaintiff's claim for loss and expense to be ascertained. However, it is not a breach of contract for the architect or contract administrator to reach an incorrect conclusion. Thus, so long as no clear evidence emerges that the architect or contract administrator has pursued a deliberate policy of rejecting the contractor's claim, irrespective of whatever merits it may have, it will always be open to the architect to state that he had complied with the procedure as set down in the clause 26, albeit that it may be shown that the 'opinion' which the architect formed was incorrect. However, it should be noted that if the employer actively tries to prevent or inhibit the exercise of the powers of

certification by the architect or contract administrator, then this may give rise to an allegation that there has been breach of the torts of actual interference with or procurement of a breach of contract. This was the issue which confronted the court in *John Mowlem & Co PLC v. Eagle Star Insurance Co. Ltd and Others* [1992] 62 B.L.R. 126.

Arbitrators, especially those who have had experience of working for contracting organisations, will often be sympathetic to the contractor who has omitted to retain exhaustive documentary detail. Furthermore they know they have to decide issues only on the basis of the balance of probabilities. They cannot however ignore existing case law. They know, or should know, that it is incumbent upon a party seeking recovery of loss and expense to provide the best possible particulars of his loss and the causes thereof as he possibly can. It will not be sufficient for him to allege that he has provided reasonable detail or all information as may reasonably be required. Inevitably, the employer will request that this process is performed which will demand extensive and detailed analysis with the inherent costs implications.

CONCLUSION

If the intention of the draftsman of clause 26 of JCT 80 was to compensate the contractor for those losses which it had incurred in the performance of the Contract due to specific causes, all of which could be stated to be employer-related, with minimum formality and modest further expense, then this aim has not been realised. Thus, the conclusion must be that this clause and method whereby loss and expense claims are the subject of arbitration must be the subject of some amendment. An alternative method may be to amend clause 41 of JCT 80 which deals with arbitration and the JCT Arbitration Rules themselves which regulate the method of dispute resolution between the parties as a consequence of the operation of clause 41 of the Contract. whilst such a proposal may be considered radical, it would appear that the JCT Arbitration Rules which were themselves considered innovative, when first launched in 1988, do not go far enough. Employers will no doubt wish to resist any such a change.