

## Evaluating Contract Claims

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Wiley Blackwell (2nd ed, 2008)

ISBN-10: 1-4051-5920-0

ISBN-13: 978-1-4051-5920-3

Price £65.00

The book takes an interesting approach to the issue of claims in the construction industry. It concentrates on the quantification of claims after liability has been established, rather than the issue of liability itself. The book commences with a brief introduction to the principles of liability of loss and the authors set out some general principles regarding the burden and standard of proof. They fail, however, to note that there are exceptions to many of these general principles. The authors also make comments without referring to any authority to support some statements. They assert, for example, that the standard of proof may in certain circumstances be lessened where the costs of proof would not be proportionate.

In relation to mitigation of loss the authors discuss the High Court case of *Maersk Oil UK Ltd v Dresser-Rand (UK) Ltd* in which the claimant instructed a third party to rectify defects in a compression facility without requesting the defendant to attempt to resolve the problems. The claimant recovered its costs on the facts of the case. However, construction contracts often include clauses that permit the contractor to come back and remedy defects. These clauses may have the effect of limiting the amount that is recoverable, and important authorities are missed by the authors such as the Court of Appeal case of *Pearce and High v Baxter and Baxter*.

There is a substantial section on global claims; however, the authors' consideration of the law stops in 2002 and they fail to mention *Great Eastern Hotels v John Laing (2005)*; *London Underground v Citylink Telecommunications (2007)* and *Petromec Inc v Petroleo Brasileiro SA (2007)*. They also only cite the first instance decision on *John Doyle Construction Ltd v Laing Management (Scotland) Ltd*. There are, therefore, important cases missed and the story told by the authors is incomplete.

Chapter 3 looks at establishing a base for the claim. If it is a delay claim then the base will be the original programme for the works and if it is a money claim it will be the costs of undertaking the variation or the cost of the delay. The authors deal with this in some detail and make the point, often overlooked by contractors when claims are submitted, that the

tender may not be a suitable base from which to assess a claim. Sometimes the tender may be inaccurate and therefore to measure loss against it is to compound the inaccuracy. The authors then introduce various delay analysis methodologies. The authors look at provisional sums and whether these sums are defined or undefined. They then consider who owns the float to the programme. Acceleration and constructive acceleration are also considered, as is the issue of concurrent delay. All major issues are addressed; however, the book does not go into the depth of other text books on the subject, such as Pickavance.

An issue that is often debated is: when should time-related costs of prolongation be measured? The authors state that it is the 'time at which the costs that form the claim for additional payment were incurred'. They then conclude that it will be 'rare for the additional costs to be incurred wholly, or even at all, during the extended period of the contract'. While it must be right that the assessment of costs must be in the period when the costs were incurred, it does not follow that this will be rarely in the extended period. Often the effects of a prolongation event can only be measured in the extended period. So, for example, the costs of a rented site hut that is required for an additional year ought to be assessed in the extended period and not at the time of delay, otherwise the innocent party will be penalised with any price increases which occurred between the date when the delaying event occurred and the extended period.

Overall the book is clear and easy to read but when it attempts to deal with legal issues it is often incomplete. Neither of the authors are lawyers, and this perhaps explains why the weakness of this book is in its legal analysis. However, this does not excuse the authors who have elected to write a book on contract claims. The first edition was an excellent book but greater care ought to have been taken when writing this second edition.

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