ARTICLE

Practical Considerations When Making Disruption Claims

Disruption claims are generally considered to be difficult to prove and claims quite often get rebuked by the receiving party due a lack of particularisation. The main criticisms tend to be that there is an insufficient link between the disrupted event(s) complained of and the resultant loss being claimed. The contractor's own poor management and inefficient working often gets introduced as being a contributing factor to the loss being claimed. This article highlights the key ingredients to compiling a successful disruption claim along with some practical points that need to be considered.

What is disruption?

The Society of Construction Law ["SCL"] Delay and Disruption Protocol[1] defines disruption as:

"Disruption (as distinct from delay) is 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 work activities. The loss and expense resulting from that loss of productivity may be compensable where it was caused by disruption events for which the other party is contractually responsible."

'Keating on Construction Contracts'[2] defines disruption as follows:

"Disruption occurs where there is disturbance of the contractor's regular and economical progress and/or delay to a non-critical activity even though, on occasion, there is no or only a small ultimate delay in completion."

At the heart of any disruption claim lies a loss of production, that is, where work is being undertaken less efficiently than was anticipated and allowed for at the time the contract was executed. Examples of disruption include work being undertaken in a piecemeal manner, manpower/plant being retained over a longer period to execute the same amount of work and idling time resulting from rescheduled/out of sequence working.

Assessing disruption

When compiling a disruption claim a contractor will need to demonstrate, on a balance of probabilities, that event(s) occurred that give rise to an entitlement to claim, that the event(s) identified have caused disruption and the disruption has resulted in the additional costs being claimed. Whilst there is no set way for contractors to prove their claim, the SCL Delay and Disruption Protocol states:

[1] Society of Construction Law Delay and Disruption Protocol, 2nd Edition February 2017

[2] Keating on Construction Contracts, 9th Edition

"Disruption is demonstrated by applying analytical methods and techniques to establish the loss of productivity arising out of the disruption events and the resulting financial loss."

There are different methods commonly used to measure and quantify disruption. Perhaps the most common is the 'measured mile' approach. This methodology seeks to establish that planned production could have been achieved in areas of the site/activities where there was no disruption and that disruptive events were causative of reduced production to other areas/activities with a resultant increase in costs. This method works well on linear projects such as roads, rail, pipework, cable laying and/or where there is a significant amount of repetitive work, such as earthworks.

Establishing that planned production could be achieved is essential to counter a potential argument concerning tender insufficiency. However, if production levels in the measured mile indicate that planned/tender allowances could not be achieved, then the measured mile production level should substitute the planned/tender allowance as the base from which to measure the lost production to demonstrate that any tender insufficiency has been accounted for in the disruption calculation.

As noted in the SCL Delay and Disruption Protocol, when undertaking a measured mile analysis, "Care must be exercised to compare like with like". For example, it would be futile to compare bulk excavation work in regular spoil to trench excavation where large quantities of rock are present. It seems an obvious point, but it is surprising in practice how often insufficient thought is given to choosing appropriate measured mile(s) prior to commencement of the detailed calculations/analysis.

The SCL Delay and Disruption Protocol identifies other methods of analysis that can be used where the measured mile is not appropriate. These are broadly categorised into productivity-based and cost-based methods. Cost-based methods seek to provide a comparison between estimated and incurred costs.

Cost-based methods are considered to provide the least robust support for a disruption claim and are often applied when lost productivity cannot be reliably calculated using productivity-based approach. Some examples of productivity-based methods are earned value analysis, system dynamics modelling, project comparison and industry studies.

Importance of records

Whatever method is used to measure disruption, the most important requirement is to have contemporaneous records that support the disruption calculations to the required level of proof. The better the records, the greater chance of a successful outcome.

Unlike prolongation, disruption claims are quite often considered as an afterthought at the end of the project, using the existing day to day records in the best manner possible. Unfortunately, at this stage the opportunity to put systems in place to measure disruption and collect sufficient contemporaneous records may have been lost.

As mentioned, some types of project (linear/repetitive work) are more suited to identifying and measuring disruption. With these projects, especially those of larger value, it may well be cost effective for contractors to employ resources (project planning/quantity surveyors) solely for the purposes of putting systems in place to ensure appropriate contemporaneous records are kept to support the disruption claim.

The importance of contemporaneous documents was emphasised by Coulson J in Van Oord UK Ltd v Allseas UK Ltd[3], where he stated:

"In my view, these contemporaneous documents are a useful starting point when trying to work out what was happening on site at any given time, and what the relevant individuals thought were the important events on site during the works… That the reports and other contemporaneous documents in this case make so few references to standing time or disruption, and the fact that detailed claims were not made in the large amounts now advanced until months, even years, after the period in question, are plainly factors undermining the credibility of OSR's claims in these proceedings."

Valuing the disruption

Once it has been established that an event (or events) occurred that caused disruption, then the next step will be to value the disruption.

Disruption can be caused by a variety of events such as late information/approvals, delayed access, variations, inclement weather, suspension of the works etc. The starting point, as ever, will be to review the Conditions of Contract to determine the remedy, if any, for the particular

[3]Van Oord UK Ltd & Anor v Allseas UK Ltd [2015] EWHC 3074 (TCC)

disruptive event. Typically, disruption will be assessed as loss and/or expense (damages) or valued as a variation, where the valuation of variation rules will apply.

Where a measured mile approach has been used to measure the disruption caused by a variation, the valuation approach adopted will likely be a re-rate with the planned allowances or measured mile production levels replaced by actual production levels demonstrated by records. This will require the affected contract rate(s) to be broken down into its constituent components (labour, plant, materials and overheads and profit etc). Care must be taken to ensure that only the affected elements of the rate are adjusted. For instance, original plant mobilisation and demobilisation allowances should not be factored into the calculation.

Where disruption is to be valued on a loss and/expense basis it will be necessary for the contractor to provide documentation to prove the costs it has incurred. In such circumstances the contractor will, where possible, be responsible for mitigating the ongoing losses caused by the disruption, for example by relocating idling resources to other areas of the project unaffected by the disruptive events.

In circumstances where a contractor lacks sufficient records/documents to link the costs being claimed to specific events then a disruption claim is sometimes advanced on a 'total cost' basis. In Walter Lilly v Mackay & DMW Developments[4] it was stated that there was nothing in principle wrong with a 'total' or 'global' cost claim.

However, there are added evidential difficulties in most cases.

In order for a total cost claim to succeed a contractor must generally demonstrate:

- The impracticability of directly proving the losses incurred;
- The reasonableness of its accepted tender;
- The reasonableness of its actual costs being claimed; and that
- The contractor is not responsible for any of the additional costs being claimed and has adequately identified and removed any costs for which it could be considered responsible.

Given these added evidential requirements, reliance on the total cost approach should be seen as a last resort when there is no other option available.

Final thoughts

Disruption claims require thought, detailed investigation and most of all records in order support the disruption analysis/calculations. Unfortunately, far too often disruption claims are considered as an afterthought at the end of a project when the losses have been incurred and the opportunity to collate adequate records and prove the claim to the required standard has gone. Taking the time to put systems in place at project commencement and proactively collecting contemporaneous records throughout the duration of the project will greatly improve the chances of a successful outcome.

[4]SWalter Lilly & Co Ltd v (1) Giles Patrick Cyril Mackay (2) DMW Developments Ltd [2012] EWHC 1773 (TCC)

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