

# Insight

*Insight* provides practical information on topical issues affecting the building, engineering and energy sectors.

## Inside this issue

Disrupted? Prove it!



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Disruption (too often confused or intermingled with a delay claim) is notoriously difficult to establish.<sup>1</sup> It can be crystal clear to everyone on the site that the works are not progressing efficiently but proving that a disruptive event (or events) has caused a loss and quantifying that loss can be challenging.

In this *Insight* we examine the key aspects of bringing a successful disruption claim and look at what records can be used to establish whether the events complained of have actually resulted in a loss.

### What is disruption?

Disruption is defined by the second edition of the Society of Construction Law's Protocol (the "SCL Protocol") as:

*"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 activities. Because of the disruption, these work activities are not able to be carried out as efficiently as reasonably planned (or as possible)."*<sup>2</sup>

At the core of a disruption claim are the additional costs incurred, over and above the planned resources, as a result of not being able to work efficiently as planned.

Disruption and delay are distinct from each other. Disruption may cause critical delay but, all too frequently, it causes sub-critical delay or inefficiencies which are not picked up by a critical delay analysis. As a result, winning your extension of time claim does not result in the recovery of the losses associated with the disruption on site.

As Hudson's Building and Engineering Construction Contracts states:

*"The distinction between delay and disruption is important, but rarely articulated, and is to an extent a matter of definition. Delay is usually used to mean a delay to the completion date, which presupposes that the activity which was delayed was on the critical path. Disruption to progress may or may not cause a delay to overall completion, depending on whether the activity delayed is on the critical path as explained above, but will result in additional cost where labour or plant is under-utilised as a consequence of the event."*<sup>3</sup> [Emphasis added]

It is not uncommon for disruption to fall lower down the list of priorities in claims than the extension of time claim. However, all too often it is disruption rather than critical delay which has caused much of the losses suffered.

### What do I need to establish?

Perhaps the most helpful guidance from the courts on disruption (in the context of global or total cost claims which disruption claims are often associated with), is from Mr Justice Akenhead in the *Walter Lilly* case.<sup>4</sup> Whilst to lawyers this guidance should be "common sense", it is amazing how often the basics get forgotten, buried beneath

superficially impressive expert evidence.

Mr Justice Akenhead emphasised three elements, all of which have to be proved **on the balance of possibilities**. These are as follows:

- 1 Events occurred **which entitle it** to loss and expense;
- 2 That those events caused disruption (and/or delay);
- 3 That the disruption caused loss and/or expense (or damage) to be incurred.<sup>5</sup>

We will examine these in turn. However, before doing that, the question that all too often has the answer no lawyer wants to hear is "*Did you comply with the notification provisions in the contract*"?

### Have the relevant notification provisions been complied with?

Whilst a seemingly obvious point, failure to comply with the notice provisions can result in a failure of the disruption claim in its entirety, especially where there are clearly worded time-bar provisions.

The *Van Oord* case is a notorious example of this.<sup>6</sup> The Claimants made a number of disruption and prolongation claims arising out of the onshore laying of a thirty-inch gas export pipeline in the Shetland Islands in Scotland. Their claim failed at the first hurdle. They had failed to give proper notice.

It can be difficult to comply with notification provisions, especially when the disruption suffered is particularly severe. Too many notifications can feel like a war of attrition and, certainly in an international context, we often come against cultural issues meaning that some feel inherently uncomfortable issuing notices. Contractors (or subcontractors) can also be reluctant, especially during the early stages of a project, to sour a new relationship by notifying disruption events.

However, it is precisely where disruption is severe that it is particularly important to comply with the notification provisions wherever possible. Systems and pro formas should be put in place and notification sent as a matter of course. It doesn't take long to notify when events are fresh in everyone's mind. Not only does notifying systematically prevent you being time barred (if applicable), it also provides strong prima facie evidence that an event has occurred. There may be a dispute about what the consequences are of that but you have a contemporaneous record of the event in question.

The courts will be sympathetic where they can be. In

*Obrascon Huarte SA v Her Majesty’s Attorney General for Gibraltar*<sup>7</sup> Mr Justice Akenhead stated that:

*“[I can] see no reason why this clause should be construed strictly against the Contractor and can see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer.”<sup>8</sup>*

However, there is no getting away from the fact that notices should be served, if they are required, when they are required.

**Do the events complained of entitle you to bring a claim?**

If you are going to bring a disruption claim you must have a legal entitlement to do so either under the contract or by way of a claim for breach of contract in respect of the events complained of. This basic requirement must not be forgotten!

**Establishing the events have occurred**

In severely disrupted projects proving that an event, or a multitude of events, occurred in retrospect (sometimes more than a year after the events) can be difficult. This is even more the case where notifications have not been served contemporaneously. Subcontractors may also refuse to provide the records they have to assist if a dispute with them is ongoing.

Whilst witnesses can give you an initial high level view of the type of events that have occurred, pinning down when exactly they happened and how often is often time-consuming.

In *Van Oord and another v Allseas UK Ltd*<sup>9</sup> Coulson noted that:

*“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.”* [Emphasis added]

The type of documents that can evidence disruption are wide ranging and some will require more analysis than others. They include emails and letters written contemporaneously, minutes of meetings, progress reports, site diaries, personal notebooks, allocation sheets and site photos.

A distinct lack of concern or reporting of the events is clearly going to be unhelpful. In *Van Oord*, Coulson noted that:

*“there is little indication in the contemporaneous documents, that, at any time, OSR put any great emphasis on these matters, or were claiming they were likely to lead to a doubling of the Contract price. To the extent that the contents of the contemporaneous documents comprise a credibility test to be applied to the OSR claims, then I consider that . . . they comprehensively fail the test.”*

The moral is clear – don’t suffer in silence! It won’t help you

later on. Equally, a claim crafted in retrospect to plug a hole is unlikely to succeed.

Either way, before you proceed with a disruption claim the facts must be established and tested. Does everything stack up (i.e. does it pass the sniff test)?

**Causation and quantification**

The next step is to prove that the events in question caused disruption and a loss of productivity. The best claim you can produce will describe each individual event, and what the result of it was, in as much detail as possible. Whether the records allow this, and whether it is cost-effective or proportionate, will depend on the quality of the records, the number of events and the quantum of the loss the party is seeking to recover.

So if a detailed and worked-up claim for each individual event is impossible or disproportionate, what else can you do?

The SCL Protocol provides a table of possible methods, dividing them into two loose categories of productivity-based methods and cost-based methods:<sup>10</sup>

Productivity-based methods	Cost-based methods
1. Project specific studies:	1. Estimated v incurred labour
a) Measured mile analysis	2. Estimated v used cost
b) Earned value analysis	
c) Programme analysis	
d) Work or trade sampling	
e) System dynamics modelling	
2. Project comparison studies	
3. Industry studies	

As explained in the SCL Protocol, productivity-based methods seek to measure the loss of productivity in the utilised resources and then price that loss. Cost-based studies seek to ascertain the difference between the actual cost and planned cost without first measuring productivity losses in the utilised resources.<sup>11</sup>

Generally speaking the easier the method for proving disruption the least likely it is to succeed, e.g. industry studies (which roughly speaking compare the productivity levels on site with those found in industry studies for similar works) or doing a pure total cost claim. A pure total cost claim which makes no effort at all to prove causation is, in essence, no more than a mud-flinging exercise. For example: *“I meant to spend x, I spent Y and here are 10 reasons which are your responsibility under the contract and I claim the difference between X and Y from you.”*

Perhaps the most well-known method for measuring disruption is the *“measured mile”*. A measured mile analysis looks at productivity levels for an activity or period of time where there was no disruption. The *“measured mile”* then becomes the baseline against which to measure the im-

pact of the disruption. The difference expended in the resources (labour, plant, materials etc) can then be quantified.

The SCL Protocol notes that this is one of the “most reliable and accurate project-specific studies” although, in fairness, only if “properly implemented”.<sup>12</sup>

It can be difficult to find a measured mile for a variety of reasons. For example, if the records haven’t been kept, then proving you could actually achieve the productivity rates in the tender will be difficult. Likewise if the disruption is particularly severe there may be no undisrupted measured mile to compare with. If the works are complex there may be no standard section of works or too many different “measured miles” to make a measured mile or multiple measured miles practicable.

Whatever method of analysis is used, it is important that it sits on a firm base of fact established by reference to the contemporaneous records and witness evidence. The results must also be sense checked. In particular, if the tender was light or there were variations within the measured mile that is available, then these need to be acknowledged and dealt with.

In *Amey LG Ltd v Cumbria County Council*,<sup>13</sup> his Honour Judge Stephen Davies noted that:

*“what is referred to as the ‘measured mile’ approach, . . . ought to have been verified by being able to demonstrate that the planned outputs had actually been achieved in some cases where the disrupting events did not occur . . . it ought to have been relatively easy, by reference to the contemporaneous records which were produced, to have conducted a cross check on a suitable sample basis. It seems to me that it would . . . have been a reasonably easy exercise to demonstrate this . . . to undertake an appropriate sampling exercise, which would have ensured that any risk of individual variations would have been picked up and catered for.”*

The key point is that the expert evidence is only the cherry on the top of the case for disruption. It is the factual evidence which sits alongside these types of analysis that is the key to success.

### Practical tips

The mantra “records, records, records” cannot be repeated often enough. It is worth thinking carefully about putting systems in place at the beginning of a project that will make it easy for disruption events to be notified and recorded at the time they occur. Ensure that these records are retained safely and centrally.

Delayed design, late design or defective design, for example, can cause huge disruption not just at the beginning of the project but throughout and is notoriously difficult to reconstruct retrospectively. Don’t hesitate to ask questions or record what has happened in an email to the other side right from the beginning of the project. Issue RFIs and put enough of a description in the document as to the problem that it can be easily understood in two or three years’ time.

Once you are on site, keep an eye on the type of records you are keeping and put a new system or records in place if you think they are required. If your workforce is constantly having to shift from one workforce to another, how can this be recorded easily and quickly? Asking someone to take two minutes to record an issue at the end of the day while memories are fresh, or draft a quick email noting the instructions on site, creates an invaluable contemporaneous record. Do the allocation sheets being used have sufficient detail?

Photographs (with the date and time recorded) are not only an indisputable record (you would hope) of the as-built status at that time but can also show how congested a site is and exactly how difficult the work is (for example if access is more difficult than planned). One client had Go Pro cameras strategically stationed around their site. They were not only an amazing resource for the delay claim but also showed when there were third parties physically in their way.

Whatever analysis you carry out, the key to disruption claims is contemporaneous factual evidence. The more you have, the easier it will be to win your claim.

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### Footnotes

1. With thanks to Laura Bowler for her assistance in preparing this article.
2. SCL Delay and Disruption Protocol, 2nd edn, page 43.
3. See Hudson’s Building and Engineering Contracts, 13th edn, chapter 6 - Time for Performance and the Consequences of Delay, section 6.15: The Contractor’s Progress-related Money Claims, section 6-066.
4. *Walter Lilly & Company Limited v (1) Giles Patrick Cyril Mackay (2) DMW Developments Limited* [2012] EWHC 1773 (TCC).
5. See paragraph 486 of *Walter Lilly*.
6. *Van Oord and another v Allseas UK Ltd* [2015] EWHC 2074 (TCC).
7. [2014] EWHC 1028.
8. See *Obrascon Huarte SA v Her Majesty’s Attorney General for Gibraltar* [2014] EWHC 1028, para 312.
9. [2015] EWHC 2074 (TCC).
10. See paragraphs 18.12 to 18.29 of the SCL Protocol for an overview.
11. See paragraph 18.12 of the SCL Protocol.
12. See paragraph 18.25 of the SCL Protocol.
13. [2016] EWHC 2865 (TCC).

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