

**ASSESSING LOSS AND EXPENSES CLAIM BY
PROLONGATION COST**

RAIHA AZENE BINTI RAMLI

UNIVERSITI TEKNOLOGI MALAYSIA

ASSESSING LOSS AND EXPENSES CLAIM BY PROLONGATION COST

RAIHA AZENE RAMLI

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To my beloved husband, parents, sisters and brothers

Thank you for your support and confidence in me.

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ABSTRACT

Contractor's claims for loss and expenses have long been a contentious issue on many building contract. Claims are usually resolved during the final account process, but where negotiations fail, they frequently become disputes, with the parties adopting legal route to resolve their differences. Claims to recover prolongation cost arise in a number of contexts and it is importance for the claimant to understand the principles upon which such claims might be evaluated. In valuing the loss and expenses claim by prolongation cost, it is fundamental to prove delay and actual related cost losses arise in an action of damages and failure to prove will not entitle to a claim for damages. The objective of this study is to determine loss and expense claims that is related to prolongation cost by head of loss claims. The head of loss claims include site overheads, head office overhead, loss of profits, interest and financing charges, loss of productivity and cost of preparing the claim. The loss should be measured at the point in time in which the delay event arose, rather than costs incurred at the end of contract. In valuing prolongation costs, the decision in *Costain v Haswell* therefore provides a useful reminder of the importance of distinguishing costs generated by time and by volume. This study was carried out mainly through documentary analysis of law journals. The study also helps in adding to the knowledge base of the literature on prolongation costs and construction contracts.

ABSTRAK

Tuntutan kontraktor untuk kerugian dan perbelanjaan telah lama menjadi isu pertikaian di dalam kontrak secara amnya. Tuntutan biasanya diselesaikan semasa proses akaun muktamad, tetapi jika rundingan gagal, mereka sering menjadi pertikaian, maka penyelesaian secara undang-undang digunapakai bagi percanggahan yang berlaku. Tuntutan untuk mendapatkan kembali kos pemanjangan timbul dalam beberapa konteks dan ia adalah penting bagi pihak yang menuntut untuk memahami prinsip-prinsip di mana tuntutan itu mungkin dinilai. Dalam menilai kerugian dan perbelanjaan tuntutan dengan kos pemanjangan, ia adalah asas untuk membuktikan kelewatan dan kos kerugian sebenar yang berkaitan timbul dalam sesuatu tindakan kerosakan dan kegagalan untuk membuktikan tidak memberi hak kepada tuntutan ganti rugi. Objektif kajian ini adalah untuk menentukan kerugian dan perbelanjaan tuntutan berkaitan dengan kos pemanjangan berdasarkan kepada 'head of claims'. Tuntutan kepada *head of loss claims* termasuklah *site overheads*, *head office overhead*, *loss of profits*, *interest and financing charges*, *loss of productivity* dan *cost of preparing the claim*. Kerugian dan perbelanjaan haruslah diukur berdasarkan kepada masa di mana kelewatan itu timbul daripada kos yang ditanggung oleh pihak Kontraktor pada akhir kontrak. Dalam menilai kos pemanjangan, keputusan di dalam kes *Costain v Haswell* itu memberi satu peringatan penting dimana perlu membezakan kos samaada melalui *time* dan melalui *volume*. Kajian ini telah dijalankan terutamanya melalui analisis dokumentari jurnal undang-undang. Kajian ini juga membantu dalam menambah ilmu pengetahuan terhadap kos pemanjangan dan kontrak pembinaan.

TABLE OF CONTENTS

CHAPTER	TITLE	PAGE
	DECLARATION	ii
	DEDICATION	iii
	ACKNOWLEDGEMENTS	iv
	ABSTRACT	v
	ABSTRAK	vi
	TABLE OF CONTENTS	vii
	LIST OF TABLE	xi
	LIST OF FIGURE	xii
	LIST OF CASES	xiii
1	INTRODUCTION	
	1.1 Background of Study	1
	1.2 Problem Statement	3
	1.3 Objective of Research	5
	1.4 Scope of the Study	5
	1.5 Significance of the Study	5
	1.6 Organization of Chapters	6
	1.6.1 Chapter 1: Introduction	6
	1.6.2 Chapter 2: Loss and Expenses	6
	1.6.3 Chapter 3: Prolongation Cost	7
	1.6.4 Chapter 4: Research Methodology	7
	1.6.5 Chapter 5: Assessment Loss and Expenses Claim by Prolongation Cost	8
	1.6.6 Chapter 6: Conclusion and Recommendation	8

CHAPTER	TITLE	PAGE
2	LOSS AND EXPENSES	
2.1	Introduction	9
2.2	The Concept of Loss and Expenses Cost	12
2.3	Ground for Contractual Claims	13
2.3.1	Loss and Expenses under Standard Form Provision	13
2.3.2	Notice requirements	17
2.3.3	Nature and form of notice/application	18
2.3.4	Conditions precedent and the failure to give notice/application where the terms of contract require it.	20
2.4	Quantification of Claims	23
2.5	Assessment of Loss and Expenses Claims	24
2.5.1	Additional Preliminaries	25
2.5.2	Labour Disruption	27
2.5.3	Material	29
2.5.4	Inflation	31
2.5.5	Head Office Overheads and Profit	31
2.5.6	Interest and Financing Charges	34
2.6	Conclusion	35
3	PROLONGATION COST	
3.1	Introduction	37
3.2	Evaluating Prolongation Costs	41
3.2.1	The difference between claims for an extension of time and prolongation cost	41

CHAPTER	TITLE	PAGE
	3.3.2 The difference between prolongation costs arising from critical and non-critical delays	43
3.3	Principle to Claim to Recover Prolongation Cost	46
3.4	Quantification of Prolongation Costs	48
	3.4.1 On-Site Overhead	50
	3.4.1.1 Actual cost	52
	3.4.1.2 Estimated Cost	53
	3.4.2 Off-Site Overheads	53
	3.4.3 Subcontractors' prolongation cost	55
	3.4.4 Financing Costs	56
	3.4.5 Cost related to claim preparation	56
	3.4.6 Loss of profit opportunity	58
3.5	Conclusion	59
4	RESEARCH METHODOLOGY	
	4.1 Introduction	61
	4.2 Methodology of Study	61
	4.3 Limitations of the study	65
	4.4 Conclusion	66
5	ASSESSMENT OF LOSS AND EXPENSES BY PROLONGATION CLAIM	
	5.1 Introduction	67
	5.2 Head of Loss Claim in Prolongation Cost	69
	5.2.1 On-Site Overhead	70

CHAPTER	TITLE	PAGE
	5.2.2 Off-site Overhead	75
	5.2.3 Loss of profits	78
	5.2.4 Interest and financing charges	81
	5.2.5 Cost of preparing the claim	85
5.3	Conclusion	89
6	CONCLUSIONS AND RECOMMENDATIONS	
6.1	Introduction	90
6.2	Summary of Research Findings	90
6.3	Problem Encountered During Research	95
6.4	Further studies	95
6.5	Conclusion	96
6.6	Recommendation	99

REFERENCES

LIST OF TABLE

TABLE NO.	TITLE	PAGE
2.1	Example of a Calculation of a Disruption Claim	29

LIST OF FIGURE

FIGURE NO.	TITLE	PAGE
4.1	Research Process ad Method of Approach	62

LIST OF CASES

NAME OF CASES	PAGE
<i>Ascon v McAlpine</i> (1999) 66 Con LR 119, (2000) 16 Const LJ 316 (TCC)	74,75,92
<i>Bremer Handelsgesellschaft mbh v Vanden Avenne Izegem</i> [1978] 2 LJoyds Rep 109	22
<i>City Inn Limited v. Shepherd Construction Limited</i> [2007] CSOH 190	44
<i>Costain Limited v. Charles Haswell & Partners Limited</i> [2009] EWHC 3140 (TCC)	42,70
<i>Ellis-Don Ltd v Parking Authority of Toronto</i> (1978) 28 BLR 98	33
<i>F.G.Minter Limited v Welsh Health Technical Services Organization</i> [1980] 13 BLR 1	14
<i>Hadley vs. Baxendale</i> (1854) 9 Ex 341	10,14,15, 35,69,82
<i>John Doyle Construction Limited v Laing Management (Scotland) Limited</i> [2004] BLR 295	45
<i>J Crosby & Sons Ltd v Portland UDC</i> (1967) 5 BLR 126	13
<i>James Longley & Co Ltd v South West Regional Health Authority</i> (1984) 25 BLR 56	57
<i>JF Finnegan Ltd v Sheffield CC</i> (1988) 43 BLR 124	33,76,93
<i>London Borough of Merton v Stanley Hugh Leach</i> [1985] 32 BLR 51	19,21

NAME OF CASES	PAGE
<i>Merton LBC v Stanley Hugh Leach Ltd</i> (1985) 32 BLR 51.	13
<i>Peak Construction Ltd v McKinney Foundations Ltd.</i> [1970] 1 BLR 111	32,79,93
<i>President of India v La Pintada Cia Navegacion SA</i> [1985] AC 104.	34
<i>Rees & Kirby Ltd v Swansea CC</i> (1985) 30 BLR 1	34.82,84.93
<i>Robinson v. Harman</i> 1 Exch. 850	15,89
<i>South Australia Asset Management Corporation v. York Montague Ltd</i> [1996] 3 All ER 365	16
<i>Sunley Ltd v. Cunard White Star Ltd</i> [1940] 1 KB 740	76,78
<i>Wraight Ltd v P H & T (Holdings) Ltd</i> (1968) 13 BLR 26	23,80
<i>Wood v Grand Valley Railway Co.,</i> (1913) 30 O.L.R. 44	28

CHAPTER 1

INTRODUCTION

1.1 Background of Study

A contractor is entitled to payment for works including variations and may also entitle to claim for additional time and money.¹ There is no legal significance of the term *prolongation claim*. It is not a type of claim described by the law and is often called a *delay claim*. Many times it is also known as *disruption claim*. Only the contractors and subcontractors can make this claim, not the Employer². This claim intends to allow the contractor to gain compensation in terms of money, if at all there is a compensable delay that actually stops or hinders the contractor from completing the work on time. The claim is made underlying the delay factors in which the contract was prolonged or the completion of the project was delayed, that is, the work took longer time by the contractor in completion than it was anticipated by the contractor at the time when the contract was made.

Most of the contracts are developed clearly underlining on the agreement that the contractor will finish the work within the given time-period. Furthermore, it

¹ Murdoch, J.R. and Hughes, W. (2008) *Construction Contracts: Law and Management*, 4th ed. Taylor and Francis, Oxford

² Davenport, P. (2006). *Construction Claims*. Federation Press. pp.126

implicitly emphasizes on the requirement that the client will ensure that he/she avoid in delaying the work of the contractor³.

However, delays do occur in a number of construction contracts, where there is an implicit and understood the requirement of compensating the party that has suffered the loss. Due to these delays, it becomes obvious that the contract will not be completed on time. As a result, the assessment of delays in contracts leads is necessary, which involves identification of the specific cause for each delay, followed by the assessment of the extent to which the delay has occurred and lastly, attributing the responsibility of the delay⁴. It is clearly stated that to assess the extra payment due to the delay as a consequence of Employers prolongation, the assessment of the claim must be related to the time when the act of delay occurred and should not in exceed time of the contract. A simple example as follow:

“If party A tends to suffer a loss due to a delay caused by party B, then party A is entitled to claim for the compensation of the damages in order to put party A back into the position in which he was before the act of delay”.

Therefore, prolongation costs would be the costs that are actually incurred from the time when delay occurred and started affecting the progress of the contract, instead of the time extended for completing the contract. What should be considered is the impact of delay on the progress, and it leads to have a clear assessment of the impact of the delay for determining the additional overhead expenses and costs that has been incurred⁵.

This claim could be charged on when, and if, the project is prolonged or extended beyond the anticipated completion time because of the delay in the progress

³ Ibid, pp.126

⁴ Ndekugri, I., Braimah, N., and Gameson, R. (2008). *Delay Analysis within Construction Contracting Organizations. J. Constr. Eng. Manage.*, 134(9), p.1279

⁵ Lo, T., Fung, I., and Tung, K. (2006). "Construction Delays in Hong Kong Civil Engineering Projects." *J. Constr. Eng. Manage.*, 132(6), p.636

of the work and activities and as a result the Contractor is required to employ extra resources over and above the actual allowed price of the contract. Nevertheless, there are some resources that could be extended with the span of original contractual period due to some variations. These extended resources must be reimbursed to the Contractor for further progress.

1.2 Problem Statement

In any construction projects, the contractor is legally obligated to complete the project within the date set for completion or by the date that is set in the contract. However, delays always tend to disrupt and disturb the performance of the work performed by the contractor. This delay might be caused either by the employer or by the contractor himself or due to the events for which none of the party is responsible.

As for delays or disruption caused to the Works, if these are caused through some act or omission of the Employer or his agent (perhaps the architect, engineer or the Superintending Officer) then contracts often allow the contractor to recover his costs arising from the delay or disruption, again in the form of loss and expenses.⁶

Any claim for loss and expenses must be calculated on the basis of the actual loss incurred. It is not unusual to see prolongation costs calculated on the basis of sums derived from contract preliminaries. This is clearly incorrect as the figures included in the contract are essentially estimates. Using the contract preliminaries is unlikely to represent the true loss suffered by a contractor in the event of delay.⁷

⁶ Michael Charlton *et al.*, *Seminar Paper: Additional Payment under Malaysian Forms of Contract*, 2001. p.1/34

⁷ *Ibid.* p.2/34

Having established the legal right to pursue a claim for loss and/or expense and satisfied all the relevant procedural requirements, it is obligatory for the claimant to identify with suitable precision the respective heads of loss claim entitlements that need to be quantified and substantiated. The principal common areas of such claim usually encountered in practice as follows:⁸

- a. Site Overheads;
- b. Head Office Overheads;
- c. Loss of Profits;
- d. Interest and Financing charges;
- e. Loss of Productivity;
- f. Inflationary Cost Increase of Materials and Labour; and
- g. Cost of Preparing the Claim.

A typical claim for loss and/or expenses depends on the nature of the delay or disruptive element. It may encompass either one, or all, or a number of the above-listed heads of entitlements. Much also depends upon the relative strength of the particular case in terms of the quality of proof (example: records and documents) available in justification of the particular entitlement or entitlements. Though some of the said entitlements appear relatively straight forward, these are nevertheless fraught with legal uncertainties where the ultimate decision is swayed more by subjective factors than objective considerations. Hence, the subsequent write-up expands upon the scope of some of the rather contentious areas of the claim for entitlements so as to shed some light for better understanding.

⁸ Ir Harban Singh KS. (2007). Demystifying direct loss and/or expense claims. *Malayan Law Journal* Articles/2007/Volume 4/DEMISTIFYING DIRECT LOSS AND/OR EXPENSE CLAIMS. 4 MLJ xxix. P.

1.3 Objective of Research

Following is the objective of the study:

1. To determine potential heads of loss claim under loss and expense claims due to prolongation cost.

1.4 Scope of the Study

This research will focused at relevant research papers, articles, books, journals and court cases on loss and expenses claim on prolongation cost in heads of loss claims in any jurisdiction. The court cases will not be restricted to Malaysian cases only; reference is also made to cases in other countries such as United Kingdom, United States, Canada and Hong Kong. The scope of the study is wide enough to incorporate different cases, demonstrating a broader view of the research topic.

1.5 Significance of the Study

Claims to recover prolongation costs arise in a number of contexts and it is some importance for parties to understand the principle upon which head of loss claims might be evaluated. The study helps in adding to the knowledge base of the literature on loss and expenses claims and prolongation costs under construction contracts. This study is to reduce the uncertainty and difficulties in the event of

claiming loss and expense that are deny under the reason upon the relative strength of the particular case in terms of the quality of proof available in justification of the particular entitlement or entitlements. Though some of the said entitlements appear relatively straight forward, these are nevertheless fraught with legal uncertainties where the ultimate decision is swayed more by subjective factors than objective considerations. Hence, construction industry stake holders will be more aware and clear understanding while dealing with heads of loss claims in contracts.

1.6 Organization of Chapters

1.6.1 Chapter 1: Introduction

The first chapter provides an overview of the research, including a brief background of the topic along with describing brief concept of prolongation costs, claims and delays, the problem that is focused in the research, the objectives that will be achieved through literature study analysis. In addition, the section includes scope of the study and the significance of the study.

1.6.2 Chapter 2: Loss and Expenses

In the second chapter, literature review on loss and expenses claim have been studied to identify the contractor entitlement to recover loss and expenses claim affected by specific events as set out in the relevant clauses and standard form of contract. The assessment for contractor claims for loss and expenses perhaps most argumentative issue in the post-contract financial management of building contract.

However, the recovery of loss and expense is a procedure under specific term of the contract. The recovery of certain heads of claim may be permitted under express contract terms which might not be recoverable as a claim for damage at common law. A careful study of contract condition and appreciation of their legal application and knowledge of the relevant case law has also been collected and reviewed in this chapter.

1.6.3 Chapter 3: Prolongation Cost

In the third chapter, literature review for the prolongation cost has been studied to substantiate the entitlement of the heads of loss claim. Contractually or legally the contractor must prove his claim in order to have sufficient merit to warrant certification of appropriate amount of entitle of the heads of loss claims. Commonly the entitlement of head of loss claim brought under the following heads:

- 1) On-site overheads
- 2) Head office overheads
- 3) Interest and Financing Costs
- 4) Loss of Profit
- 5) Cost related to claim preparation

1.6.4 Chapter 4: Research Methodology

In the fourth chapter, the methodologies of this study has been separated into few steps, namely identifying the research issue, literature review, data collection, research analysis, and conclusion and recommendation. This approach is to ensure

that the collection of the information and the data analyzing can be precisely implemented.

1.6.5 Chapter 5: Assessment Loss and Expenses Claim by Prolongation Cost

The fifth chapter provides analysis of different case studies by critically reviewing and clarifying all the facts of the case studies. Furthermore, this chapter will present, discuss and compare each issue identified from the case study in accordance to the objectives of the research.

1.6.6 Chapter 6: Conclusion

Lastly, the sixth chapter will provide a discussion of the overall research findings relating them with the objectives of the study. Moreover, this chapter will also provide recommendations for the future study and limitations of the study.

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