



Disruption claims: Are your project records up to date?

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Disruption can be hard to pinpoint. It is one of those features that you know when you see it and most parties have likely felt it on a construction project. However, being able to make a claim for the effects of disruption and prove that claim to enable financial recovery can be another matter altogether.

What is disruption?

Disruption is, essentially, the loss of productivity felt by a contractor caused by unanticipated interruptions to the progress of the works. It is defined in the SCL Delay and Disruption Protocol (2nd Edition February 2017 at [43]) as:

A disturbance, hindrance or interruption to a Contractor's normal working methods, resulting in lower efficiency. Disruption claims relate to a 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).

At its heart, a disruption claim is a claim made by a contractor for the additional costs arising from the loss of efficiency or productivity (being lost work efficiency (labour and utilisation of plant) and an increase in direct

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time spent on those same tasks) – when compared with what had initially been planned.

Disruption claims involve a forensic programming and quantity surveying examination and are claims that are made after the fact once the productivity impact has occurred.

Disruption and delay are separate

A claim for disruption does not depend on delay to the critical path (although, that may also be the case). These are two separate concepts, despite the common reference to claims being for 'delay and disruption'. It is very much a separate analysis, and distinct from delay.

A delay impacts completion of the works as a whole (if it is a critical delay) leading to a claim for an extension of time and potentially prolongation costs, whilst disruption is the loss of productivity to a specific work activity. Disruption may cause delay, but it can also arise because of sub-critical delay or from events that do not cause delay at all. It is therefore conceptually different to a prolongation claim. Indeed, disruption can, for example, occur and be a symptom of acceleration.

The effect of disruption may not be visible or immediately felt when compared with a traditional delaying event that would give rise to an extension of time. Sometimes it will be obvious that efficiency has dropped off. However, depending on the nature of the project, it may not be until weekly or even monthly

progress or financial reports are prepared that any loss of productivity will be observed. Given this, to repeat an adage, it is critical that project records are kept up to date.

How do you establish relief?

There are four steps to establish a disruption claim:

1. Identify the relevant event(s) or cause(s) of the disruption;
2. Ascertain whether the contract gives the contractor an entitlement to recovery for disruption either under a specific clause or by way of damages for breach of contract;
3. Prove that the event(s) caused disruption; and
4. Quantify the cost of the disruption.

Identify the event(s)

The first step is to identify that there was a disruption of activities and what caused that disruption. This may seem obvious, but it is necessary to set out the disruption event(s) as a foundation step, to then be able to identify what consequences flow from each event.

Does the contract allow recovery?

Second, disruption must be recoverable under the contract.

Most standard form contracts (eg NZS3910:2013) do not expressly address recovery for disruption. Instead, they may give an entitlement to claim some of the events that could lead to recovery in the form of loss and expense or damages. Unless dealt with separately in special conditions, disruption

claims generally proceed as claims seeking damages for breach of contract. In considering entitlement, care should be taken to check the special conditions as to whether there is:

- Any specific notification requirement(s);
- A loss and expense clause which may bar recovery of costs associated with disruption;
- Any entitlement under the variations clause (including as part of valuation of variations) which could prevent or reduce the recovery of disruption costs as a separate claim; and
- Any compensation right(s) as a result of an acceleration instruction, as a claim for disruption may not be available where it has been caused by acceleration measures.

Prove causation

The next element is causation. Ideally, the claim will describe each individual event, and what the result of it was, in as much detail as possible. This involves:

- Identification and analysis of each of the exact operations (labour and plant) claimed to have been disrupted (rather than just a bare statement that the works have been disrupted); and
- Using the above to establish a narrative link showing how the disruptive event caused disruption to certain activities.

The list of matters that may cause disruption can be open ended, but examples could include the combined or cumulative effect of multiple variations, late instructions and/or the unavailability of

work faces. Usually, it will be a combination or accumulation of causes that leads to disruption.

Just as a principal may cause the contractor to be disrupted, there are a range of factors in which a contractor themselves can impede productivity or efficiency (or which a principal can say are the responsibility of a subcontractor), which need to be considered in a disruption claim. Allowance should be made for matters that are within the contractor's responsibility such as a lack of skilled labour, lack of QA processes followed or inadequate site supervision.

Quantify the claim

This may involve assessment by expert programmers and quantity surveyors to ascertain the extent and impact of the disruption event and the costs recoverable. Evidence will be required to demonstrate:

- The cause (events) of the disruption;

- The impacted activity and progress of work that was disrupted;
- The impacted period of work; and
- The additional labour and equipment expended on the disrupted activity.

Project records are key

The most important consideration, underpinning both causation and quantification, is the evidence (documents) that is required to establish relief in a disruption claim. It can be clear to everyone on site that the works are not progressing efficiently, but proving that a loss has been caused, and quantifying that loss is a separate matter, which can be challenging.

The importance of having evidentiary documentation was discussed in the leading case, *Walter Lilly v MacKay & Anor* ([2012] EWHC 1773 (TCC) at [486(c)]). The Court said that there is no set way to prove the elements and that it is open to

contractors to prove them with whatever evidence will satisfy the tribunal to the requisite standard of proof. Therefore, the closer the evidence is to the coal face, the more convincing it is likely to be.

In *Van Oord & Anor v Allseas UK Ltd* ([2015] EWHC 3074 (TCC)) the Court 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. *Van Oord* emphasises that a lack of contemporaneous documents can be detrimental to a claim.

Record keeping is key to proving a disruption claim. It is important to keep project documentation to support what happened on site, including, for example, emails, letters, minutes of meetings, progress reports, site diaries, personal notebooks, allocation sheets, site photos, day work sheets / time records and time lapse recordings.

Parties should try to take the time to ensure that their project records are comprehensive and up to date, in the event that a disruption claim arises. The worst position for a claiming party to end up in, is being unable to prove its case on the balance of probabilities.

If you have any questions about possible disruption claims, or you have any questions regarding matters of construction law, please get in touch with our [Construction Team](#), or your usual contact at Hesketh Henry.



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Glen also co-leads Hesketh Henry's Insolvency and Restructuring practice which provides an invaluable complementary skill-set given the financial pressures that have hit the construction sector in recent times.



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Ariana is a Senior Associate in Hesketh Henry's Construction team and a specialist construction lawyer, experienced in both front-end and back-end construction matters. She advises a diverse array of clients across the industry, both at local and international level, and has acted on a wide variety of projects from residential developments to significant infrastructure.

Ariana advises clients on how to ensure projects are successful and has a focus on resolving disputes. That said, she also regularly acts on contentious construction matters (including in adjudication, arbitration, mediation and large multi-party litigation), and for clients across the full spectrum of affected parties. She has particular expertise in performance bonds, and in assisting body corporates when defects arise on apartment blocks.



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Abbi is an Associate in Hesketh Henry's Construction team. She is experienced in general civil and commercial litigation work, with a particular focus on the construction sector. She acts for a range of clients across the industry and in a variety of disputes including those concerning major infrastructure projects and commercial developments. Her practice is complemented by her work in debt recovery.