8 Response to Claims: Counter-Claims

8.1 General policy

No one likes to be on the receiving end of a claim. From the employer's point of view it will mean additional cost by way of loss of revenue and/or additional payments to be made to the contractor. From the point of view of the professional advisers to the employers, it may reflect on the firm's competence in preparing contract documents and on their skills in contracts administration. They may also be faced with additional costs of administration which cannot be recovered from the employer. When contractors receive claims from subcontractors, they will be mindful of the fact that the claim may arise out of their poor organisational skills, in which case they will not be able to obtain reimbursement from the employer or other subcontractors.

Nevertheless, valid claims are a fact of life in modern construction projects. They are an essential feature of small and large contracts and the machinery to deal with them should be regarded as an important element of control. Prompt submission of notices and particulars, followed by a considered response from the recipient as soon as possible, will usually facilitate early remedial action and settlement.

The employer's professional advisers will normally be required to act as independent valuer or certifier under the contract and/or advise the employer on the contractor's rights and entitlements. In *Pacific Associates Inc and Another* v. *Baxter and Others* (see Chapter 1), it was held that the contractor had no recourse against the engineer if he should fail to certify properly and act fairly. The contractor would, however, be able to recover from the employer. Consultants should therefore be aware that they are likely to be the target for negligence claims from the employer if the contractor's claims arise out of their failure to value or certify in accordance with the conditions of contract. Employers should also be aware that their interference with the impartial certifying function of their consultants will be self-defeating (*Morrison-Knudsen* v. *B.C. Hydro & Power* and *Nash Dredging Ltd* v. *Kestrell Marine Ltd*, see Chapter 1).

Consultants who fend off claims to avoid criticism of their own performance may only be compounding the problem and laying themselves, and the employer, open to greater claims from contractors. Delay in recognising a claim and responding to it may cause any hope of effective remedial action to be lost. Poor advice given by consultants to the employer upon which the employer relies to embark upon the road to litigation or arbitration which could otherwise have been avoided may lay the consultants open to claims from the employer.

If claims are to be dealt with effectively, employers and their professional team should decide on policy at the outset. There should be a system of referral to experienced staff who are not responsible for the day-to-day administration of the project. Advice from an independent consultant may be appropriate from time to time. A policy statement should include the following:

- consultation as soon as the first notice from the contractor is received (or as soon

- consultation to determine the validity, merits and substance of the claim;
- consultation to analyse the causes and effects of the matters which are the subject of the claim;
- recommendations on the quantum of the claim;
- content of written response and necessary certificates to be issued.

Whatever policy is adopted, the timing and content of the first response to a claim situation may be critical to its successful conclusion with the minimum exposure to delay and additional cost. It is important that the response should reflect the opinion of the certifier (which may take into account the various matters discussed during consultations with other members of the professional team and the opinions of persons to whom the claim may have been referred).

The content should be sufficiently detailed to show that the matter has been properly considered and the door should be left open to allow the contractor to submit further arguments or facts in support of the claim.

8.2 Extensions of time

Prompt response to any situation which may jeopardise progress and completion of the works by the due date is necessary for practical and contractual reasons. From a practical point of view, it is essential to have a valid programme which is consistent with progress and the latest extended completion date. Without continual review which takes account of actual delay and entitlement to extensions of time, there is no means to plan future issuance of details and instructions and there is no yardstick by which to measure future delays. Extensions of time granted several months after the event (or even several months after completion of the project) are of no practical use and any opportunity which may have existed to reduce the delay may have been lost.

From a contractual point of view, time to exercise the powers to grant an extension may be critical to the employer's rights to levy liquidated damages (*Miller* v. *London County Council*, see Chapter 1, Section 1.4). Some doubt has been expressed on the validity of the argument that if extensions of time are not granted within the time contemplated by the contract, the employer's rights to liquidated damages are extinguished. In *Temloc Ltd* v. *Erril Properties Ltd* (see Chapter 1, Section 1.4), the *employer* argued that since the architect had failed to grant an extension of time within the 12-week period provided in clause 25.3.3 of the JCT80 standard form contract, the employer could not recover liquidated damages but he could recover general damages in lieu of liquidated damages (which in this case had been £nil in the appendix to the contract). The judge took the view that the 12-week period was *directory only* and not mandatory. The JCT Standard Building Contract 2011 includes similar provisions (clause 2.28.5). This view has been highly criticised by distinguished authors on construction contracts. However, since it was the *employer* who was seeking to rely on this provision in order to recover damages which it could not otherwise claim under the liquidated damages provision in the contract, it is not surprising that the judge did not see fit to allow the employer to benefit from his own architect's failure to grant an extension within the time limits laid down in the contract. If this practice was condoned by the courts, nothing would prevent

the contract. It is submitted that the contractor would still be able to succeed in arguing that the employer could not rely on the liquidated damages provisions in the contract, if the architect did not grant an extension of time within the 12-week period, notwithstanding the judge's view in *Temloc* v. *Erril Properties*.

In an Australian case, it was held that the employer had the option to levy liquidated damages (if the architect issued the necessary non-completion certificate) or, if no certificate was issued, the employer may levy general damages which may exceed the amount stipulated for liquidated damages: *Baese Pty Ltd* v. *R.A. Bracken Building Pty Ltd* (1989) 52 BLR 130. The commentary to the case (at pp. 131 and 132) suggests that the judgment is of limited application and should not be regarded as creating a precedent giving rise to a general right to opt for liquidated damages or general damages.

The requirement to grant an extension of time within the periods contemplated by the contract does not mean that the architect's or engineer's opinion must be the right one. The architect, or engineer, need only consider the delay and grant, or refuse to grant, an extension of time within the requisite period. Provided that there was a genuine attempt to deal with the matter, and the contractor was notified of the extension, or reasons for refusing an extension, within the period, then the contractual provisions will be satisfied and the employer's rights to rely on the liquidated damages provisions will be preserved. A refusal, or insufficient extension, which is not based on a genuine attempt to assess the delay (but merely to preserve the liquidated damages provisions), may not be effective. No response, or protracted exchanges of correspondence with no conclusion, may not preserve the employer's rights to liquidated damages if it should be subsequently held that an extension of time ought to have been granted at the appropriate time.

The case of *Aoki Corp* v. *Lippoland (Singapore) Pte Ltd* [1995] 2 SLR is a Singapore decision which dealt with the peculiar wording of clause 23.2 of the SIA (Singapore Institute of Architects) form of contract in which the architect is required to give an initial intimation of his decision as to whether or not a delaying matter deserves an extension of time, in principle within one month of the contractor's notice of delay, without having to give his opinion on the amount of the extension in his initial intimation. The contractor argued that the architect's failure to give his initial decision in principle within one month had the effect of the architect losing his power to grant an extension, that time (for completion) was 'at large' and that the employer lost its rights to levy liquidated damages.

The judge found in favour of the employer. That is to say, the architect's initial intimation was not given too late in the circumstances of this particular case. Certainly, the wording of clause 23.2 of the SIA form does not make it a *condition precedent* to the architect's rights to grant an extension of time that the initial intimation should be given within one month. In *Bremer Handelsgesell-Schaft M.B.H.* v. *Vanden Avenne-Izegem P.V.B.A.* (see later), the judge stated that there must be express wording to bar an entitlement or right if notice was not given within the prescribed time. However, see also *Steria Limited* v. *Sigma Wireless Communications Limited* [2007] (see Chapter 6, Section 6.2).

However, the Singapore case did not deal with the issue as to when the extension of time itself should ultimately be granted. In the circumstances of this case, the judge took the view that the initial intimation (given three months after completion of the works) was not too late. However, it is evident that an initial intimation given two-and-a-half years after completion quoted in a reference to an earlier case of *Tropicon Contractors Pte Ltd* v. *Lojan Properties Pte Ltd* [1991] 2 MLJ 70 (CA); (1989) 2 MLJ 215 (dist) was given too late. Notwithstanding the *Aoki* v. *Lippoland* decision, an architect or engineer who delays any decision regarding an extension of time runs the risk of jeopardising the employer's rights to levy liquidated damages.

It would seem at least arguable that the case of *Aoki* v. *Lippoland* has not affected the existing ground rules for most other forms of contract, but it must be said that there may be a shift in policy on the application of extension of time provisions. Clause 2.28.3 of the JCT Standard Building Contract 2011 requires the Architect/Contract Administrator to state the relevant event which he has taken into account when making an extension of time and if there is more than one applicable relevant event, allocate periods of time against each relevant event. Clause 2.19.1 of the JCT Intermediate Building Contract 2011 does not require the Architect/Contract Administrator to allocate periods against each relevant event. Under the JCT Standard Building Contract 2011 the Architect's/Contract Administrator's response to any notice of delay is required within 12 weeks of receipt of the contractor's notice or particulars, or if the notice is given within 12 weeks of the completion date, using his best endeavours, before the completion date (clause 2.28.2). Under the JCT Intermediate Building Contract 2011 the Architect's/Contract Administrator's response is required as soon as he is able to assess the extension (clause 2.19). In both cases there is provision to review the extensions of time within 12 weeks of practical completion.

The 1987 fourth edition of FIDIC (clause 44) is almost non-committal as to when the engineer should respond to a claim for extensions of time. It requires the engineer to respond 'without undue delay' if he considers that an extension is due.

The 1999 FIDIC Red, Yellow and Silver Books require the engineer or employer (as the case may be) to respond within 42 days after receiving the contractor's notice and particulars (sub-clause 20.1). A response may be with approval or with disapproval and with detailed comments. Sub-clause 3.5 requires the engineer (within the 42 days) to consult with each party in an endeavour to reach agreement or, failing agreement, he must make a fair determination. Under the Silver Book, where the employer deals with such matters (as there is no engineer), the contractor must register his dissatisfaction with the employer's assessment of his claims within 14 days or he must give effect to it. The text of this clause could have been clearer and there is at least the possibility that the employer's determination could become final and binding if the contractor fails to register his dissatisfaction within 14 days. If the contractor registers dissatisfaction [within 14 days], the dispute may be referred to adjudication.

Under the 1999 FIDIC Green Book, no time limits are laid down within which the employer must respond.

NEC 3 contemplates a considerable amount of cooperation between the contractor and the project manager with respect to notification and assessment of 'compensation events'. Sub-clause 64.3 states:

> The *Project Manager* notifies the *Contractor* of his assessment of a compensation event and gives him details of it within the period allowed for the *Contractor's* submission of his quotation for the same event. This period starts when the need for the *Project Manager's* assessment becomes apparent.

Section 6 of NEC 3 makes provision for Compensation Events, which include extensions of time and financial compensation. Under NEC 2 there was no sanction for a failure to issue a notice of delay or an extension of time. NEC 3 resolves the anomaly and provides time limits for notification of delay, quotations, responses to quotations and consequences in respect of failures to comply with the time limits. An example of a Compensation Event claim is provided in Appendix C.

The contents of a response to a notice or claim for an extension of time are important. For the following reasons it is good practice to give periods of extension for each separate cause of delay:

- it enables the contractor to be fully aware of the delays which have been considered (within the time limits for granting an extension);
- it facilitates agreement on some of the delays and extensions of time granted therefor, and enables both sides to concentrate on resolving the contentious delays;
- it facilitates agreement on delays which may, in any event, have to be quantified in order to establish the amount of additional payment;
- it enables the contractor to identify which delays apply to which subcontractors so that consistent extensions of time can be granted under each subcontract.

The following are common problems concerning resolution of claims.

Late information

Information may be issued late (having regard to the programme) but not actually cause delay to the progress of the works because the contractor is not ready to commence the work which is affected by the late information. Is the contractor entitled to an extension of time? Factors to be considered include the following:

- Is there a lead time? That is to say, does the contractor have to order materials or arrange for the work to be done by a subcontractor? The architect, or engineer, may be already in delay prior to any delay by the contractor and would therefore not have been in a position to anticipate the site progress. It may well be that the information was required before the contractor commenced the affected work and the contractor had no need to commence prior to receiving the information (see Figure 8.1).
- Is the contractor in delay for matters which would justify an extension, or is he being dilatory?

It may be that even if no extension was justified, the employer could not in any event have been in a position to give the information earlier and could not therefore have obtained use of the project any earlier than the time required to complete the remaining work affected by the late information. The best advice is not to rely on the contractor's delays to put off issuance of information for construction. If it is unavoidable, the contractor may be entitled to the benefit of the doubt and the employer may have no claim against the contractor.

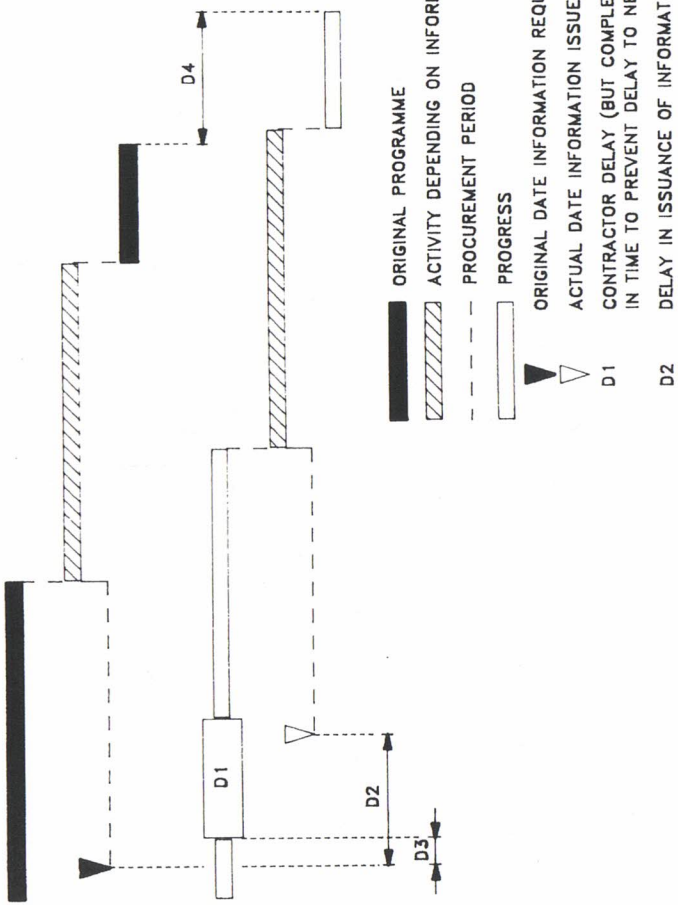

Figure 8.1 Late information concurrent with contractor's delay.

Information and variations issued after the completion date

If the contractor is in culpable delay and liable to liquidated damages, further delay caused by information and instructions issued after the completion date has passed may be difficult to deal with within the contractual machinery. In such circumstances, contractors will seize the opportunity to establish extensions of time for the full period up to the date when the delay ceased to affect the progress of the works, plus an allowance to complete the remaining works. Much will depend on the reasons for the late information or variation (see Chapter 5) and the terms of the contract.

If the contract does not provide for extensions of time after the completion date has passed, or if the provisions allow for extensions of time without preservation of the employer's rights to liquidated damages, the employer and his professional advisers will need to give careful consideration to the need for giving any instructions at all, and if they cannot be avoided, what should be done to protect the employer's interests?

If the architect, or engineer, is of the opinion that an extension of time can, and ought to be, made then an extension should be made having regard to the facts and circumstances. If the architect, or engineer, is of the opinion that no extension can be made, then the contractor should be advised accordingly.

Except in the most straightforward of cases, these circumstances may require expert advice on the meaning of the contractual provisions and the period of extension which may be justified (see *Balfour Beatty Building Ltd* v. *Chestermount Properties Ltd* in Chapter 5, Sections 5.2 to 5.4).

Omission of work

The provisions of the JCT Standard Building Contract 2011 contemplate an allowance for any Relevant Omission, which is a defined omission that produces a saving in time. It is to be taken into account when considering the period of any extension of time which may be granted. Clause 2.28.4 requires the Architect/Contract Administrator to:

> fix a Completion Date for the Works or that Section earlier than that previously so fixed if in his opinion the fixing of such earlier Completion Date is fair and reasonable, having regard to any Relevant Omissions for which instructions have been issued after the last occasion on which a new Completion Date was fixed.

The Architect/Contract Administrator may also, after the completion date, fix an earlier completion date than that previously fixed if it should be reasonable to do so having regard to omissions ordered after the date of fixing the previous completion date – clause 2.28.5.2.

Whether or not there should be any omissions, the Architect/Contract Administrator is required to grant an extension of time within 12 weeks of the contractor's notice, or before the completion date, whichever is earlier. Even if notices and particulars and extensions of time are given without delay, the contractual provisions may not allow for omissions to be taken into account. There may be a period when omissions occur that which cannot be taken into account (see Figure 8.2). It should also be borne in mind that, where there is delay in granting an extension of time (even if it should be granted within the requisite period), the contractor may issue a programme which is a fair reflection of the extension due with the exception of any omissions. It would be

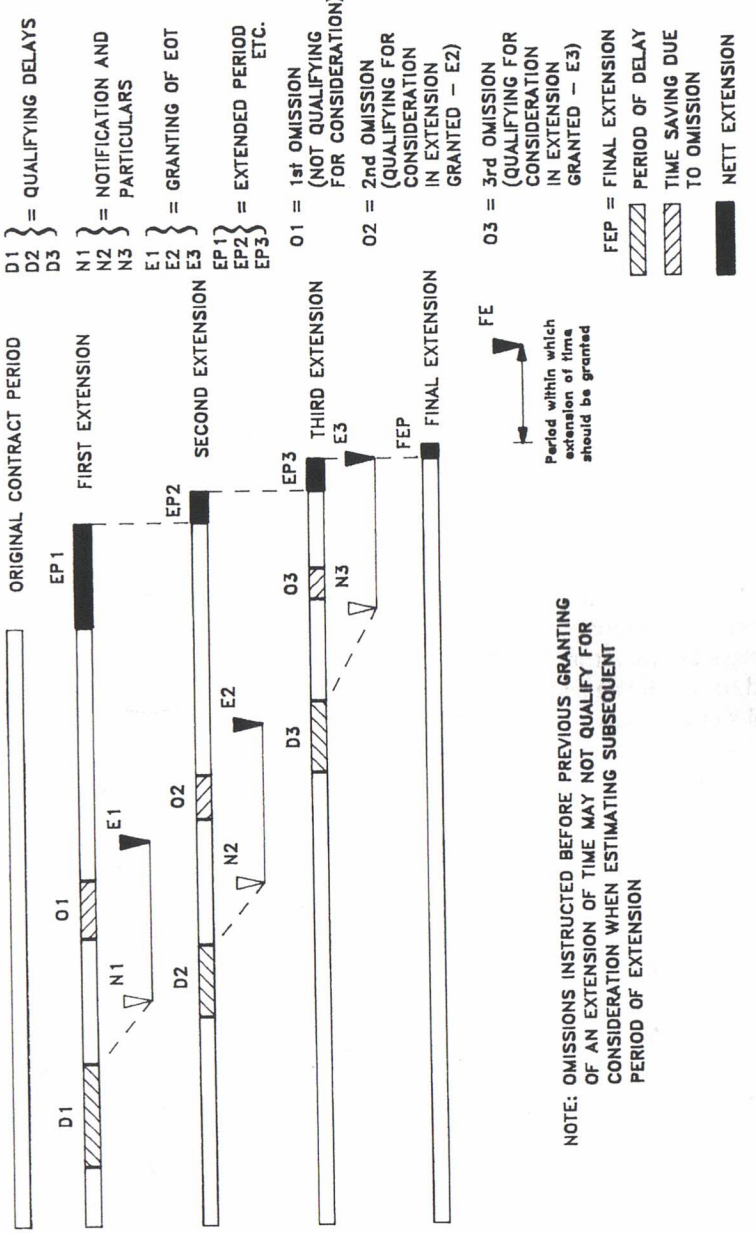

Figure 8.2 Omission of work – clause 2.28.5.2 of JCT 2011.

good policy to bring the omissions to the attention of the contractor before work has progressed in accordance with the revised programme to the extent that the benefit of the omission is lost.

In order to prevent these circumstances arising, where the architect is of the opinion that there is a case to make any allowance for omissions, he should address the matter without delay in consultation with the contractor so that there is no doubt as to the reasonableness of any allowance. In any event, an allowance should only be made where the omission is on the critical path, or is of such a nature that resources (previously required to execute the omitted work) can be diverted to execute work on the critical path *and that there will be a benefit in time.* It is insufficient to make a subjective judgement without a proper analysis of the programme and progress to establish that a saving in time was justified.

NEC 3 does not allow the completion date to be brought forward in consequence of work omitted from the contract.

It is important to note that to have omitted work done by others is a breach of contract and the time saved by such an omission will not qualify to be taken into account when determining an appropriate extension of time.

Concurrent delays

Many architects and contract administrators refuse to grant extensions of time for qualifying delays when the contractor is himself in delay at the same time. Sometimes this is justified, but very often an extension of time is necessary (see Chapter 5, Section 5.3).

Once the contractor has given notice of delay, or if the architect, or contract administrator, is aware of delays on the part of the contractor, it is important that these delays are monitored. The consultants responsible for granting extensions of time and/or certifying additional payment arising out of delay owe a duty of care to the employer to ensure that the contractor is not given any more time or money than is reasonable in all of the circumstances. They will have to consider those matters described in Chapter 5.

In order to ensure that the employer is not exposed to additional costs which should not rightly be borne by the employer, the architect, or contract administrator, will have to be aware of delays by the contractor at the earliest possible time. Once aware of these delays, it is important to keep contemporaneous records.

Any response to claims for extensions of time should state which delays (by the contractor) were concurrent with qualifying delays and which (if any) were considered to be delaying completion of the works. This may not necessarily reduce or affect the extension of time to which the contractor is entitled, but the contractor will be aware of the fact that the architect, or contract administrator, is well informed on the progress of the works.

8.3 Claims for additional payment

While a prompt response to claims for extensions of time is essential for practical reasons, and to keep the liquidated damages provisions alive, a response to claims for additional payment is not usually subject to the same urgency. Nevertheless, provided that the contractor gives notice and particulars in accordance with the contractual provisions, assessment of the sums due and certification for payment should be done as soon as possible. It is often in the employer's interests to deal with these claims

as early as possible. Agreement of claims and settlement from time to time during the course of the project reduces the contractor's ability to collect all outstanding claims into a 'global claim', which may be little more than a statement claiming the difference between the certified value of all completed work and the actual cost.

Many contractors may prefer to wait until the end of the contract before submitting a formal claim. If that is the case, the employer may not be disposed towards any attempt to encourage the contractor to submit his claims as they arise so that they can be settled and set aside. In such circumstances, the employer's professional team should be aware of potential claims and make whatever assessment they can from their own investigations and records. The employer will be interested in knowing the amount of the potential claim, but no action should be taken to effect payment before the contractor has complied with the contractual procedures (unless a deduction in the contract price may be justified). Once the contractor's particulars are received, the assessment can be modified in the light of such particulars and a prompt settlement may be possible.

If the contractor has gone to a great deal of time and trouble to submit a well thought-out claim with full particulars and sensible calculations, then a written response merits a similar amount of detail, indicating where there is agreement and reasons for any adjustments, which, in the opinion of the architect, or quantity surveyor, or contract administrator, are considered to be appropriate. If, on the other hand, the contractor's submission is poorly argued and presented the temptation to dismiss the claim out of hand should be resisted. A response should explain why the submission is unsatisfactory and it should give the contractor the opportunity to clarify or amend the claim. Further particulars may be requested and these should be specified. If it is a frivolous or unfounded claim, the contractor should be politely told so. If the claim is justified and has merit it is unlikely to go away, in which case it may be appropriate to give the contractor some guidance as to presentation. It may well be that the matter which is the subject of the contractor's claim is one which ought to be dealt with as a variation, thereby giving the architect, contract administrator, or quantity surveyor, the scope to deal with the matter within the rules for valuation of variations. Provided that the employer is not disadvantaged, this approach may be the most acceptable to all concerned.

The NEC conditions require cooperation and an early response to all compensation events by the project manager within the time provided in sub-clause 64.3 (see above). Sub-clause 64.4 states that the contractor's quotation will become binding if it has not been responded to by the project manager within the contractual time period and the contractor has given notice.

The 1999 FIDIC conditions require the engineer to consult with the employer and the contractor and to respond within 42 days in accordance with sub-clause 20.1. Under the Silver Book, the employer responds to the claim and his decision may become binding if the contractor fails to register dissatisfaction within 14 days (see above).

8.4 Counter-claims; liquidated damages; general damages

Many claims which may be levied by the employer against contractors are overlooked or are not considered to be worth pursuing. This may be because employers are fearful that such claims could be the reason for large claims by contractors which may otherwise have been waived.

which may be levied against contractors include those arising out of ...ve work and failure by the contractor to execute work expressly authorised under the terms of the contract. Some claims may be made under the terms of the contract and the amounts of the claims may be set off against interim or final payments due to the contractor from the employer. Others may be common law claims.

The most common counter-claim against contractors is the deduction of liquidated damages for late completion of the works (or if provided for in the contract, for late completion of sections of the works). In order to be enforceable, a liquidated damages provision must be unambiguous and the sum stated in the contract must be a genuine pre-estimate of the employer's likely loss, estimated at the time of making the contract in the event of delay to completion. If the sum stated is a penalty, the employer cannot rely on the clause (unless the law expressly permits penalties). It will not be deemed to be a penalty merely because the employer's actual loss is less than the liquidated damages (for example, if the liquidated damages were based on realistic anticipated rents at the time of making the contract, and the market had collapsed by the time the works were complete, the contractor could not argue that the sum was a penalty).

The employer's professional team may have to advise the employer on the amount of liquidated damages to be inserted in the contract and on the contractor's potential liability for liquidated damages when the contractor is in delay during the course of the contract. However, consultants should not use the threat of liquidated damages in any response to a contractor's delay claim, even if it is clear that the contractor is in default. Such matters should be for the employer alone, and then only when the consultants have properly considered all delays which may give rise to an extension of time.

The JCT Standard Building Contract 2011 requires the architect/contract administrator to certify that the contractor had failed to complete the works by the completion date (as a fact) before the employer can give notice and deduct liquidated damages – clause 2.32. Many other forms of contract do not require a certificate of any sort as a prerequisite to the employer exercising its rights to deduct liquidated damages.

NEC 3 makes provision for liquidated and ascertained damages as a secondary optional clause (clause X7). The parties are free to choose whether to include the provision. If included in the contract, there is no requirement for the project manager to certify non-completion before the employer can deduct liquidated and ascertained damages.

Th Measurement Version of the Infrastructure Conditions of Contract 2014 does not include a liquidated damages provision. It is often argued that the architect cannot certify that the contractor has failed to complete the works by the completion date unless and until he has considered all of the delays for which an extension of time may be granted: *Token Construction Co Ltd* v. *Charlton Estates Ltd* (1976) 1 BLR 48. If, however, a further extension of time is granted after liquidated damages have been deducted, the employer must repay the liquidated damages for the relevant period of further extension. An appropriate provision for the repayment of liquidated damages is included at clause 2.32.3 of the JCT Standard Building Contract 2011. It has been held that the contractor is entitled to interest on the liquidated damages withheld and subsequently repaid: *Department of Environment for Northern Ireland* v. *Farrans* (1981) 19 BLR 1. If there are no provisions in the contract for liquidated damages, the employer may be able to levy a claim for general damages. Where there is a provision for liquidated damages for late completion of the works, but there are no provisions to deduct liquidated damages for late completion of each phase (assuming that the contract contemplates phased completion), the employer may have a claim for general damages for late completion of any phase: *Mathind Ltd* v. *E. Turner & Sons Ltd* (see Chapter 3). Where the employer has lost his rights to liquidated damages, he may be able to claim general damages for late completion (see Chapter 1).

General damages may arise if the employer suffers loss as a result of any breach of contract by the contractor. Provided that the nature and cause of the loss are not identical to those which may be recovered under a liquidated damages provision, then general damages may be recoverable in addition to the liquidated damages for late completion. Some tailor-made conditions of contract provide for liquidated damages *and* general damages for delay and may be enforceable provided there is no duplication with liquidated damages. For example, if the liquidated damages were a genuine pre-estimate of the loss of revenue and direct costs of supervision during the period of overrun, a separate claim to recover delay costs levied by other contractors (who were delayed by the contractor) would not be a duplication of the same damages and may be recoverable in appropriate circumstances.

The 1999 FIDIC Red, Yellow and Silver Books require the employer to give notice of any claims against the contractor as soon as practicable (sub-clause 2.5) and the engineer (the employer in the case of the Silver Book) is required to determine the claim in accordance with sub-clause 3.5. This procedure is a prerequisite to deduction from sums due to the contractor or payment from the contractor. Under the Silver Book, where the employer deals with such matters (as there is no engineer), the contractor must register his dissatisfaction with the employer's assessment of his claims within 14 days or it becomes binding. If the contractor registers dissatisfaction within 14 days, the dispute may be referred to adjudication.

8.5 Claims against subcontractors

There is an increasing incidence of claims made by subcontractors against contractors and by contractors against subcontractors. Some forms of subcontract devised by contractors are aimed at precluding any claim at all from subcontractors and they attempt to provide for claims to be made against subcontractors on dubious grounds with little supporting evidence. Fortunately, the majority of contractors use recognised standard forms of subcontract and apply the provisions fairly. For those that do not operate the provisions fairly, there are the mandatory provisions of the Housing Grants, Construction and Regeneration Act 1996 (as amended, see Chapter 1, Section 1.10 and Chapter 9, Section 9.4) concerning notice of payment, notice of withholding and adjudication to contend with. Those provisions require clear details of payment and withholding and swift redress in the event that payment is not made in accordance with the contract.

Where a subcontractor is in delay, or is disrupting the progress of the works, the contractor will naturally wish to recover any losses incurred from the defaulting subcontractor. Where there is only one subcontractor in delay, and there are no competing delays, it is possible to establish liability with relative ease. However, it is probable that there will be several delays occurring at the same time, in which case the contractor will be faced with the difficulties which have been mentioned in respect of concurrent delays in Chapter 5 at Section 5.3. Only the most careful

attention to records and regular updating of programme and progress schedules will enable the contractor to establish liability and quantum of damages which may be recoverable from several subcontractors (and possibly from the employer) for what may be substantially the same period of delay.

Where the contractor becomes liable to liquidated damages for late completion of the main works, he will seek to recover some, or all, of the damages from defaulting subcontractors.

Apportionment in the event of delay by several subcontractors is almost bound to cause difficulty. Even where the contractor has been able to calculate the sum which is due from the subcontractor, the provisions for set-off in the subcontract may frustrate the contractor's ability to deduct the amounts due from payments which would otherwise be paid to the subcontractor. The general rule is that the contractor's rights to set-off at common law are not affected by the contractual provisions unless there is clear language in the contract to bar the general right of set-off: *Gilbert Ash (Northern) Ltd* v. *Modern Engineering (Bristol) Ltd* [1974] AC 689. However, where the contract terms are explicit, and the set-off provisions are exclusively laid down in the subcontract, the contractor's rights to set-off will be determined by the contractual provisions.

The Housing Grants, Construction and Regeneration Act 1996 (as amended) outlaws 'pay when paid' in construction contracts in the UK. Section 113(1) states:

> A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.

In addition to claiming all or part of the liquidated damages for late completion of the main works from a defaulting subcontractor, the contractor may also have a claim for other loss and expense, such as prolongation and/or disruption costs incurred by the contractor and by other subcontractors. The quantification of such claims where there are several competing delays is bound to be fraught with problems and unless a commercial settlement can be reached between the contractor and the subcontractors the matter may have to be settled by several separate adjudications or arbitrations or by the same court proceedings involving several parties.

9 Avoidance, Resolution and Settlement of Disputes

9.1 Commercial attitude and policy

Many contractors and subcontractors genuinely wish to avoid claims even when there are good grounds for them. This attitude is usually adopted in the belief that firms with a reputation for claims will not be included on some tender lists, and where they are included, they may be disadvantaged if tenders are very close. In some sectors of the industry firms may be justified in believing that a history of claims will be a dominant feature in the evaluation of their suitability for new projects. However, provided that the firm submitting the claim follows some simple rules, there is no reason to suppose that the pursuit of valid claims is detrimental in the long term.

It is, of course, very helpful if the contractor has done a good job, finishing as soon as was reasonably possible, and has cooperated with the employer and the design team. However, if the contractor has submitted a poor tender, underestimated the complexity and/or under-resourced the project, his claim may well be seen by the recipient as a means to recover some of the contractor's losses caused by a poor tender and poor management. It is quite natural, in these circumstances, for the employer and his professional advisers to suspect the contractor of employing a pricing policy to obtain work with the intention of using every possible means to recover a much larger sum when the project is complete. It is not surprising if relations between the parties deteriorate almost before the ink on the first interim payment certificate has dried. Very often this policy will be obvious to the design team if the contractor is complaining of late information at every opportunity even when it is clear that no delay will be caused. Every letter will be an attempt to create evidence for a dubious claim at some future date.

On the other hand, a contractor with a valid claim will be doing himself no favours if he proceeds reasonably well with the project and cooperates with the employer and consultants but hardly mentions the fact that he intends to submit a claim until the end of the job. Some contractors adopt this policy purely to maintain good relations or in the hope that a favourable opinion on extensions of time and/or borderline compliance with specifications will be forthcoming. It may be expecting too much to believe that the consultant will form a favourable opinion about a substantial claim for additional payment when the consultant has not been given any information to enable the employer to make provision for payment.

The contractor who does a good job and properly manages the project will often stimulate the design team to perform well. If, at the same time, the contractor gives notices and particulars in accordance with the contract, avoiding provocative language and frivolous claims, then he is more likely to be able to resolve his claims painlessly.

Even when contractors have, for commercial reasons, made a policy decision not to submit a valid claim, this policy will be soon reversed if the employer decides to levy a claim for liquidated damages after an insufficient extension of time has been granted. Many consultants and employers have underestimated the potential for the contractor to claim considerable sums of money when he is forced into a corner. For this reason, the employer's professional advisers should monitor all potential claims