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Introduction

1.1 General Introduction to 'Claims'

In construction contracts, the word 'claim' is often synonymous with the contractor seeking additional time and money for what's likely to be perceived as a contentious reason. 'Contentious' in this context means arising from circumstances which fall outside those that are usually encountered when carrying out the works, which may not be immediately understood, and almost certainly require additional explanation. 'Claims' in this context are also misunderstood. Many experienced consultants and contractors have been in situations where a party may threaten to raise a 'claim', either to dissuade the other from a course of action or to elevate his own bargaining position when negotiating. These kinds of 'claim' references conjure up images of a contractor spending months working up a voluminous set of documents in many lever arch files, to triumphantly submit to the employer at the eleventh hour. However, in the case of modern building contracts, such as the Joint Contracts Tribunal (JCT) 2016 editions and New Engineering Contract (NEC4) contracts considered in this book, that scenario is not only far from reality but also unlikely to benefit the contractor. Claims under building contracts should be promptly notified and submitted as soon as possible, so they can be properly assessed and resolved – and the claiming party may benefit from receiving payment as early as is practicable. Whilst it may not be possible to submit a finalised claim within a short period of time, some building contracts permit the claiming party to update their claims, so the principles can be agreed in the first instance, and the quantum (or time) is finalised and agreed at a later date.

A 'claim' can be defined[1] as

- to assert that something is the case; or
- formally request or demand.

In this book, the word 'claim' is taken to mean the assertion of an alleged right (usually by the contractor) to an extension of the contract period and/or to additional payment arising under the express or implied terms of a building contract. However, the forms of building contract considered in this book do not use the word 'claim'. Instead, they include specific provisions for seeking additional payment and/or an extension of time (in the case of the contractor), or payment of damages (in the case of the employer), which operate

1 Oxford Dictionary of English (3rd Ed) 2010.

Building Contract Claims, Sixth Edition. Guy Higginbottom and David Chappell.

in a similar way to the provisions for obtaining payment for additional work. If it was not for 'claims clauses' in building contracts, the contractor would be obliged to fall back on a common law claim for damages, usually, for breach of contract. In that sense, claims clauses may also be considered (albeit, not entirely correctly) as a contractual procedure for dealing with damages.

A party may also make other types of 'claims', such as those where a 'declaration' is sought. These can include obtaining decisions (or declarations) that its works comply with the contract or are being carried out safely. However, this book only considers claims that entitle a party to payment of money or additional time to complete their obligations.

1.1.1 General

For employers, 'claims' are often seen as a problematic and, in certain employer sections of the industry, as an irritation. It is easy to understand why. Claims are often unexpected, seek something that seems initially intangible and often results in the accepted budgets and construction periods being exceeded. The employer's irritation is likely to be compounded by feelings that neither he nor his advisers have control over a project when a claim arises. This perceived 'loss of control' is perfectly normal but is not always easy to accept unless the employer (or the contractor in some cases) and his consultants have experience of dealing with claims. If they have, they should understand that claims develop because the required substantiation may only be obtained over time. Common examples include a contractor being reliant upon his sub-contractors or his own consultants to provide supporting information, or an employer collating the costs that he's incurred. This, often gradual nature of claim development, is frustrating for the recipient, as they want to know at the earliest opportunity if they are liable, and if so, to what extent. The only way to 'shortcut' the claims process is to come to an early agreement, but this can leave the parties feeling that they have traded immediacy for certainty, and perhaps could have obtained a better deal for themselves if they'd waited for more information to be provided.

There is firm evidence[2] that since 2012, around 30% of parties to building contracts in the United Kingdom prefer a 'quicker' resolution to a claim, instead of perhaps a more 'thorough' resolution – judging by the number of projects let under the NEC3 and NEC4 contracts.[3] However, this leaves approximately 70% of building UK contracts being let under other contracts (such as those published by JCT) – under which a far longer period[4] is available for the parties to assess and agree contractor's claims.

1.1.2 Contractual Claims

Claims for both time and money under the terms of the contract feature in many building projects. These 'contractual claims' are relatively simple to generate, as the building contract will set out the specific grounds that entitle the contractor or employer to bring a claim

2 National Construction Contracts & Law Reports 2012 to 2022. Approximately, 30% of contracts in 2012 were let under NEC contracts, peaking at over 50% in 2015 and returning to around 30% in 2022.

3 Refer to Section 4.1.2 of this book.

4 Typically, JCT contracts do not conclude 'claims' (for extensions of time and direct loss and/or expense) until between 8 and 14 months after the works have become practically complete, allowing for the rectification period (typically either 6 or 12 months) to expire and a further period (typically 2 months) for the 'Final Certificate' (JCT SBC/Q 2016) or 'Final Statement' (JCT DB 2016).

against the other. However, the parties respective obligation to prove a claim often differ. If an employer is seeking to claim liquidated damages (see Section 8.2), he need only comply with the contract's procedures, and does not have to prove the rate of liquidated damages as this is already agreed. However, contractor's claims are far more difficult to substantiate, and therein lies the employer's protection. Where the claim is brought within the contract procedure, the contractor must also show that it has followed the administrative procedures provided by the contract's terms. Failure to comply with the procedure precisely may create difficulties for the contractor and in some cases may negate the claim. However, that may not mean that the contractor is entirely without a remedy. Above all, claims must be founded on facts and these facts must be substantiated by the contractor. Merely because a contractor is losing money on a particular contract does not mean that it is entitled to look to the employer to make good its loss. It must be able to establish that the loss results directly from some act or default of the employer (or those for whom the employer is responsible in law) or else is referable to some express term of the contract entitling the contractor to reimbursement. Common types of contractual claims are summarised in Section 1.2.1 (submitted by the contractor) and in Section 1.3 (submitted by the employer).

1.1.3 Extension of Time and Loss and/or Expense

Contractual claims for time or money must stem from a particular clause in the contract, and some notable examples are:

- The JCT standard forms all contain provisions for extensions of time, additional costs and variations as follows
  - Extensions of time[5] in the JCT SBC/Q 2016, JCT DB 2016, JCT IC 2016 and JCT MW 2016 contracts are dealt with under separate clauses to
  - Direct loss and/or expense[6] (additional costs); and
  - Variations are also dealt with separately – providing a definition of a 'variation' and which method of valuation applies in the circumstances, with the exception that
  - JCT MW 2016 provides for 'direct loss and/or expense' to be included within the valuation of variations.
- NEC4 includes all the provisions for claiming additional time and money, along with 'variations'[7] together as 'Compensation Events[8]' in clause 60.1 (not separately like in the JCT contracts).

It should be noted that an extension of time does not always entitle the contractor to loss and/or expense. This is often a point that is overlooked in construction projects. The giving of an extension of time is not always linked to a right to loss and/or expense either contractually or otherwise in law[9] – an obvious example being an extension for an event that is the fault of neither the employer nor the contractor – such as adverse weather affecting progress.

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5 Refer to section 3 (*Time*) and section 11 (*Extensions of Time under JCT standard form contracts*).
6 Refer to section 4 (*Financial Compensation*) and section 12 (*Loss and expense under JCT standard form contracts*).
7 Refer to Chapters 3 (*Time*), 4 (*Financial Compensation*) and 5 (*Claims for: Variations …* etc.).
8 Refer to section 13 (*Contractor Claims under NEC4*).
9 *H. Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106, and *Methodist Homes Housing Association Ltd v Messrs Scott & McIntosh*, 2 May 1997, unreported.

1.1.4 Variations

Variations or changes to the work can also be considered to be 'claims', but are usually far less contentious. This is often because the 'variation' is tangible and something that the employer can immediately recognise, such as the contractor carrying out an additional quantity of work or an item of work being substituted for another of a different specification. However, a 'variation' may also occur if the way in which the original work is changed, but the scope (in terms of its specification and / or quantity) of the work remains unaltered. For example, changes in site logistics may require the contractor to change its method of working. The effect of these less tangible changes may prove to be more contentious.

1.1.5 Unexpected Problems

If the contractor is simply finding the work more difficult, then unless the building contract contains some express (or implied) entitlement (such as a target cost or cost reimbursable contract), the contractor usually has no basis for a claim. If the contractor encounters physical or logistical problems with the work or incurs additional expense, then if the contract is for a fixed price, it's likely that he will be responsible for any additional time needed for completing the works and will also have to bear the additional costs himself.

Some claims are produced because the contractor underestimated the cost of doing a job. It may become apparent from the contractor's correspondence during a project that he intends to make a claim at a later date. Further, it is not uncommon to find that there are some contractors who are intent on making claims right from the outset. Indeed, a claim may form part of a contractor's commercial strategy before any work is carried out on site. An employer should therefore take care when selecting contactors for a project. Modern pre-qualification processes and obtaining references from the contractor's previous clients (and their consultants and advisers) should go some way to identifying more unscrupulous contractors. In addition, thorough analysis of the contractor's tender using appropriate cost data can identify any obvious shortcomings or anomalies in the contractor's price. On the other hand, there are many examples of contractors delayed and disrupted by the actions or inactions of the employer or the professional team, but who find it quite difficult to recover the appropriate loss and/or expense.

The contractor should therefore be fully aware of the physical, logistical and commercial risks that he accepts when agreeing the terms of a building contract. Problems can arise if a contractor mistakenly believes that he's entitled to additional time or money, but no such entitlements are found in the contract. This may be for a number of reasons:

- The contractor may simply be mistaken over what entitles him to make a claim. An example of this could be if a contractor is more familiar with contracts where the employer is responsible for design but then carried out work under a design and build contract; or
- If the contractor mistakenly believes that he's included a qualification or caveat in the contract that entitles him to claim, but it's not been included in (or incorporated into) the finalised contract. In one case,[10] the contractor believed that the contract

10 *Davis Contractors Ltd v Fareham Urban District Council* [1956] 2 All ER 145 HL.

price was subject to adequate labour being available, as it had set this out in a letter during negotiations. However, the letter had not been incorporated into the contract, so the contractor was bound by the contract price and was not entitled to payment on a *quantum meruit* basis. The Court's reasoning included:

- Just because a contract became more difficult to perform than initially envisaged was no reason to excuse the contractor from further performance; and
- '*We could seriously damage the sanctity of contracts if we allowed a builder to charge more, simply because, without anyone's fault, the work took him much longer than he thought*'.[11]

1.2 Standard Forms of Contract Considered in This Book

Previous editions of this book have referred to a variety of building contracts. By the 'building contract' nature of this book, there are no dedicated chapters or sections that focus on civil engineering contracts.[12] For many years since the first edition of this book in 1983, the most common forms of building contract used in the United Kingdom have been those published by the 'Joint Contracts Tribunal' (JCT). Previous editions of this book considered the more common JCT contracts, which have been derived from the 'Standard Form of Building Contract' (currently the JCT SBC/Q 2016[13] for its 'with quantities version'). Other JCT contracts have been derived from what's now become the JCT SBC/Q 2016[14] contract, such as

- The Design and Build Contract (JCT DB 2016)
- The Intermediate Contract ('JCT IC 2016')[15]
- The Minor Works Contract (JCT MW 2016).[15]

The previous editions of this book also included sections covering other JCT standard forms of contract, such as the Management Building Contract, Prime Cost Building Contract, Construction Management Trade Contract, Major Project Construction Contract, Measured Term Contract and Constructing Excellence Contract. However, this edition only focusses on the most popular versions: JCT SBC/Q 2016, JCT DB 2016, JCT IC 2016 and JCT MW 2016.

Since the mid-1990s, the New Engineering Contract ('NEC') has become increasingly popular. The NEC contracts are now published in their fourth edition (NEC4) and include the following versions:

- NEC4 Option A: Priced Contract with Activity Schedule
- NEC4 Option B: Priced Contract with Bill of Quantities

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11 Ibid as per Denning LJ at 278.

12 Such as the Institute of Civil Engineers Contract ICE 7th (1999) now replaced by the Infrastructure Conditions of Contract 2014, or one of the contracts published by the Federation Internationale Des Ingeniurs-Conseils ('FIDIC'), such as the Conditions of Contract for Building and Engineering Works designed by the Employer ('Red Book'), Conditions of Contract for Plant Design-Build ('Yellow Book') and 'Silver Book'.

13 Previous versions were 'JCT 63', 'JCT80', JCT98, JCT 2005 and JCT 2011.

14 The 'Standard Building Contract' also includes variants for 'Without Quantities' (JCT SBC/XQ 2016) and with 'Approximate Quantities' (JCT SBC/AQ 2016).

15 There are also versions of these contracts where elements (or all) of the design are the responsibility of the contractor – JCT ICD 2016 and JCT MWD 2016.

- NEC4 Option C: Target Contract with Activity Schedule
- NEC4 Option D: Target Contract with Bill of Quantities
- NEC4 Option E: Cost Reimbursable Contract

Certain key aspects of NEC4 contracts operate in fundamentally different ways to their JCT counterparts and place great importance on matters that may not have been addressed in any detail by JCT contracts. Early into their more widespread use, it was not unusual to see parties attempting to administer an NEC contract in a similar way to a JCT contract – a clear mistake which was often incompatible with the NEC ethos. Since the third editions of the NEC contracts (NEC3) were introduced in 2005, the building industry had become more accustomed to the operation of NEC contracts, so these earlier mistakes are less likely to be repeated. NEC contracts have now largely replaced the General Conditions of Government Contracts for Building and Civil Engineering Works (GC/Works/1) for most public projects.

Other contracts that were covered in previous editions included the Form of Building Agreement (ACA 3) and the Standard Form of Contract for Project Partnering (PPC 2000) both published by the Association of Consultant Architects. Like GC/Works/1, these forms of contract have either fallen out of common use (ACA3) or are only used for a small number of projects, relative to those procured under a JCT 2016 contract or under NEC4. Whilst this edition focusses on the JCT 2016 contracts and the NEC4 contracts, many of the principles relating to claims under these current building contracts will apply to claims under the older forms. Previous editions of this book is still available from the publisher.

This book also considers sub-contractor claims under their JCT 2016 and NEC4 counterparts. Many of the principles applicable to the JCT 2016 and NEC4 main contracts will apply to claims under their respective sub-contracts.

A new chapter covering claims for professional fees has been introduced. This includes claims under the NEC4 Professional Services Contract (many aspects of which are similar to claims under the NEC4 main contracts and sub-contracts), along with claims under other forms of consultant's appointments published by the RIBA, ACE and the RICS.

1.2.1 JCT 2016 Contracts

The JCT contracts considered in this book have been developed over time. JCT published its standard form of contract in 1963 (JCT 63), where the employer remained responsible for the project's design (this is often called 'traditional procurement'). JCT 1963 was revised in 1980 (becoming 'JCT 80') and its minor works contract (MW80) was also published. Design and Build contracts, as we now know them, did not appear until 1981 when the JCT published the 'with Contractor's Design' contract (CD 81), which followed the format of JCT 80. In 1984, JCT published its 'Intermediate' form of contract (IFC84) – for projects whose values were in between those usually procured under the JCT80 and MW80 contracts. In 1987, JCT then published its Management Contract (MAN87). Between 1984 and 1998, developments in case law and statutory law caused JCT 80 (then consisting of 42 clauses) to be extensively amended, with around 18 amendments being published. The JCT contracts were further revised in 1998 and again (adopting the current 9 section format of the standard building contract) in 2005, 2011 and 2016.

It is important to summarise the operation of JCT 2016 contracts, and differentiate between this, and the way that NEC4 contracts operate, as this will aid understanding of

both suites of building contract. The aims of JCT 2016 contract can be summarised as the parties wanting to get on with the works and sort out the precise details at the end. This approach is evident, partly from (1) the manner in which claims for the value of work done, extensions of time and loss and expense are dealt with as the work proceeds (i.e. on a progressive basis), but mainly from (2) the 'concluding steps' that each of the JCT 2016 contains, be that in the form of a Final Certificate (found in JCT SBC/Q 2016, JCT IC 2016 and JCT MW 2016) or the relevant Final Statement (in JCT DB 2016). These 'concluding steps' take place in the months following practical completion of the works and depend upon the length of the agreed 'Rectification Period' (they may take place between a total of 8 and 14 months after[16]). This length of time can be problematic for both parties. First, from the contractor's perspective, he will have completed the works (save for making good any defects), and his cash flow may be suffering because he has not concluded the values of his work (most likely the values of variations) and/or loss and expense with the employer. Conversely, from the employer's perspective, he may have obtained his completed project, but may feel that he's overpaid for the project, and may have to wait until the 'concluding steps' to recover any overpayment. The JCT 2016 contracts all provide the means for the precise answer to be obtained; however, it may take more time than the parties may expect.

1.2.2 NEC4 Contracts

The first edition of the NEC was published in 1993. Although from its title, one might be excused for believing that it was not suitable for use for building works, but as we have seen in the following years, it is used for both civil engineering and building projects. Its second edition was published in 1995, changing its title to the Engineering and Construction Contract although it was still known by the initials 'NEC'. Amendments were published that dealt with the Housing Grants, Construction and Regeneration Act 1996 and a third edition ('NEC3') was published in June 2005 and subsequently re-published with further minor amendments in June 2006 and again in April 2013. NEC4 was published in June 2017, with some further amendments published in January 2023. The NEC philosophy remains very different from the JCT 2016 contracts and is sometimes thought of as a 'project manager's' building contract.

Although the form was praised by Sir Michael Latham, as containing the kind of provisions advocated in his report 'Constructing the Team'[17], it has been the subject of some criticism by legal commentators.[18] Some perceived shortcomings are that the syntax and grammar is not good. This is partly because the present tense[19] is used almost exclusively even where one would normally expect to the see past or future tenses. NEC contracts are supposed to be a model of simple English, but sticking almost exclusively to one tense may not always assist understanding of what can be an essential part for a legally binding

16 On the basis that neither party commences adjudication (or other) proceedings against the other to resolve any valuation or payment disputes before the 'concluding steps' take place.

17 HMSO July 1994.

18 *D G Valentine, The New Engineering Contract* (1996) 12 Const LJ 305.

19 *'I have to confess that the task of construing the provisions in this form of contract is not made any easier by the widespread use of the present tense in its operative provisions. No doubt this approach to drafting has its adherents within the industry but, speaking for myself and from the point of view of a lawyer, it seems to me to represent a triumph of form over substance'. Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd* [2010] EWHC 1529 (TCC) at 28 per Edwards-Stuart J.

contract. It can be difficult to know whether something is being expressed as a power or a duty or just as a fact.

Another perceived shortcoming of NEC contracts is that many commentators feel that their provisions have not been robustly tested in the same way that provisions of JCT contracts have been. The example of 18 amendments to JCT80 is mentioned above, with a number of these being implemented following new legislation and decisions of the Court. There are only a few reported cases dealing with the NEC forms contract. Consequently, and whilst there are some excellent texts devoted to NEC contracts, the relative absence of cases that specifically address issues exclusive to NEC can leave the reader feeling that some textbook guidance may be rather 'general' in its nature.

The operation of NEC contracts (now NEC4) significantly differ from that of a JCT 2016 contract (or its predecessors) in the following fundamental ways:

- Any variation to the work, or other matter entitling the contractor to additional payment or additional time (collectively referred to as 'compensation events'), cannot be the fault of the contractor, so he cannot lose out; and
- The vast majority of the contract's administrative functions are concluded during the course of the works, i.e. before completion. Very little is left to be determined once the work is completed so there is no detailed 'final account' stage (or 'concluding steps') that are found in JCT 2016 contracts.

A relevant example for the first difference could involve the contractor being instructed to carry out an additional quantity of work. Under a JCT 2016 contract, if the applicable unit rate or price for valuing this work was a loss-leader for the contractor, his losses would increase by carrying out the variation. However, this would not be the case under NEC4, as the basis of valuing the additional quantity of work would be based upon the relevant 'defined cost' of the additional quantity of work, so the contractor should not lose any money.

The effect of the second difference is that NEC4 requires many of its administrative functions to be carried out contemporaneously. This means that the values for variations, extensions of time and any loss and expense are agreed as the work proceeds, and once agreement has been reached, any changes to the price for the works or to the time taken for the works cannot (under most circumstances) be adjusted or revised. Comparing how NEC4 contracts operate against JCT 2016 contracts shows that instead of concluding all matters under the contract at a date sometime after completion, NEC4 requires matters to be progressively concluded to an acceptable detail (i.e. during the works and before completion). In order to do this, and to emphasise the 'project management' nature of the contract, NEC3 and now NEC4 place time constraints (also called 'time bars') on a number of important administrative functions. Some examples include using the contractor's programme as a key project management and monitoring tool (requiring it to be regularly updated and 'accepted'), default acceptances of the contractor's programme and quotations for compensation events if not accepted within the agreed time constraints, and perhaps the most controversial – a condition precedent that removes the contractor's entitlement to additional payment and/or time if he fails to notify compensation events within the specified period.

It is not the purpose of this book to take sides over whether the JCT 2016 contracts or NEC4 contracts are better or worse. It is not difficult to envisage projects where NEC4 contract would be more suitable than a JCT contract, and vice versa.

1.3 Types of Claims by the Contractor

It is useful to classify claims by the parties to a building contract into the following categories:

- Contractor claims:
  - contractual claims,
  - common law claims,
  - quantum meruit claims and
  - ex gratia claims.

1.3.1 Contractual Claims

Contractual claims are those based on clauses in the contract which expressly provide for the contractor to make a claim in certain situations. Some examples of contractual claims made by the contractor are as follows:

- JCT Standard Building Contract with Quantities 2016 (JCT SBC/Q 2016):
  - Extension of time[20] clauses 2.26–2.29.
  - Loss and expense clauses 4.20–4.24. With the exception of the Minor Works contract, other JCT contracts follow a similar format to SBC/Q in setting out the grounds for extensions of time and loss and/or expense in separate sections.
  - Variations (and their valuation) clauses 5.1–5.10.
- NEC4:
  - Compensation Events clauses (typically clauses 60–66, depending upon which Main Option Clauses are selected).

Such claims make use of the clauses in the contract to first establish an entitlement, then set out how the parties process the claim and finally produce a result. The principal reason for having such provisions in the contract is to provide the parties with the certainty of knowing the precise circumstances and events that give rise to a claim. This avoids the necessity for either party to have to seek redress at common law and the inevitable expense involved for both parties in doing so. Many standard form contracts preserve the contractor's right to seek damages at common law if it is not satisfied with its reimbursement under the contract.

1.3.2 Common Law Claims

Common law claims are claims for damages, usually but not exclusively, for breach of contract under common law. The breach giving rise to the claim will normally be a breach of one of the 'implied terms' of the building contract. Implied terms are essentially those setting out obvious or 'common-sense' terms that every contract ought to contain. There are a number of these implied terms and these are explored in more detail in Chapter 6 (*Basis for common law claims*). Common law claims may also embrace claims for breach of some other aspect of the law such as tortious claims or claims for breach of statutory duty. Most standard forms expressly reserve the contractor's right to make such claims, two examples

20 Referred to as 'Adjustment of the Completion Date'.

being clause 4.22.5[21] of JCT SBC/Q 2016 and clause 60.1(18)[22] of NEC4. A common law claim may also be made when it is impossible or difficult to make the claim by relying upon the contract clauses, or it may be for another breach which is not expressly covered by the contract's express conditions. A contractor may raise a 'common law claim' for damages for the following:

- A breach of the building contract by the employer that is not covered by the extension of time, loss and expense,[23] compensation event[24] or risk clauses in the contract; or
- A breach by the employer of one of the implied terms of the building contract. An 'implied term' is one which applies to most contracts for reasons of common sense – for example, the employer shall not hinder or prevent the contractor from carrying out the works (for more details, see Sections 3.2.2 and 6.2.2).

Common law claims are sometimes referred to as 'ex-contractual' or 'extra-contractual' claims. These terms are sometimes confused with the term *ex contractu* – a term rarely found in legal textbooks when referring to claims which arise from the contract.

1.3.3 *Quantum meruit* Claims

'Quantum meruit' (meaning 'as much as he deserves[25]') enables a party providing a service (such as building work) to recover a sum in payment (see Section 4.5).

1.3.4 Ex gratia Claims

An ex gratia claim (meaning 'done as a matter of favour[25]') is a claim which has no contractual or legal basis. Consequently, if a contractor raises one, the employer is not obliged to consider it, let alone pay for it. Hence it is often referred to as a 'hardship claim'. Despite there being no strict obligations on the employer to consider or pay such a claim, making an 'ex gratia' payment to a contractor may have an external commercial benefit to the employer. For example, if a contractor is suffering cash-flow difficulties on another project, it may be in the employer's interest to make an 'ex gratia' payment to the contractor, so he completes his project (compared to the expense of appointing another contractor). This situation may arise where the works are almost complete and will swiftly provide the employer with income (e.g. from rental or purchases). However, such payments should be made with caution, particularly if the contractor is at risk of becoming insolvent.

The employer's representative normally has no powers under standard form contracts to consider or certify[26] 'ex gratia' claims, unless given express authority by the employer. An employer's representative would likely to become liable to the employer if an 'ex gratia' payment was certified, then made but was then irrecoverable if the contractor became insolvent.

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21 JCT SBC2016, clause 4.22.5 – loss and expense for *'any impediment, prevention or default … by the Employer'*.
22 NEC4 – clause 60.1(18) – a compensation event arising from a *'breach of contract by the Client'*.
23 JCT 2016 contracts.
24 NEC4 contracts.
25 Oxford Dictionary of Law (2018).
26 Via a 'payment notice' complying with s110A(1)(a) of the Housing Grants Construction and Regeneration Act 1996 (as amended) or its equivalent.

1.4 Types of Claims by the Employer

Clearly, a contractor may be in breach of the building contract and this will entitle the employer to make a claim against him. Typical claims by employers often include:

- Delay damages - for late completion of the work (or parts of the works).
- Damages for specific matters (e.g. failure to construct the works to a specified size or achieve a particular performance output).
- Reduction of the contract price for non-compliant work.
- Balance owing on a final certificate (or equivalent).

1.4.1 Delay Damages

The most common claim an employer raises against the contractor is damages arising from the contractor's failure to complete the works (or parts of the works if appropriately divided into sections) by the agreed completion date. This kind of claim is known as 'delay damages' (see Section 8.2). The employer's entitlement to claim and often the method of claiming damages from the contractor for such a breach are often relatively straightforward, although there is usually a very formal administrative process for the employer to follow. It is usually self-evident that the contractor has failed to complete by the completion date, so in most cases, it will not be difficult for the employer to demonstrate the contractor's breach:

- Upon demonstrating the contractor's breach, the employer then becomes entitled to claim damages from the contractor immediately, or after some administrative process has been concluded – such as serving a formal notice (or notices) confirming the contractor's failure and/or notifying the contractor of the employer's intent to claim damages;
- In many cases, the employer can recover damages by deducting them from sums that are otherwise due and payable to the contractor, instead of subsequently claiming payment from the contractor; and
- There is often no disputing the amount (or quantum) of the employer's damages as it is calculated by applying a rate (£ per week or £ per day) that has already been agreed by the contractor (referred to as 'liquidated damages'). If no such rates have been agreed, the employer will have to demonstrate its actual costs arising from contractor's breach (referred to as 'un-liquidated damages').

The relative simplicity for an employer to claim delay damages (particularly liquidated damages) should not be taken for granted. Even if the works are continuing after the completion date and a rate of liquidated damages has been agreed, the contractor may challenge the employer's claim on several grounds (see Section 8.4). The employer may also be able to deduct damages if the contractor fails to meet the conditions for a particular event to occur (such as achieving a 'Key Date' under NEC4 – see Section 8.6.2).

1.4.2 Low Performance Damages

A number of civil engineering or process engineering contracts allow the employer to claim damages from the contractor if the completed works do not meet the levels of performance required by the contract (see Section 8.6.2). Typically, the contractor is constructing

something with a clear function or purpose – such as a power station, a chemical plant or a highway or railway, where the function (or purpose) can easily be measured in terms of its output. NEC4 contracts contain an option[27] for 'low performance damages', where the contractor has to pay a sum of money to the employer if the works' performance falls below a particular level.

1.4.3 Reduction of the Contract Price for Non-Compliant Work

Many forms of contract allow reduction (also called 'abatement') of the contract price if the standard of work performed does not satisfy that specified in the contract. Building contracts are no different (see Section 8.5). The employer has a common law right of reduction (or abatement), and this is expressly confirmed in standard forms of contract as follows:

- JCT contracts[28] permit the employer to accept a defect in return for reduction of the contract price; and
- NEC4[29] not only permits the acceptance of a defect in return for a reduction in the 'Prices', but it provides that the works' specification is adjusted (reduced) accordingly so the contractor's work is then compliant.

1.4.4 Other Claims

The types of employer claims described in Section 1.4 are expressly set out in the JCT and NEC4 contracts. However, the employer may have other 'claims' to raise against the contractor, such as

- Recovering an overpayment. Paying the contractor a sum that exceeds that which ought to be due to it, may arise for a number of reasons, including:
  - Subsequent discovery of defects which reduce the value of the contractor's work; and
  - Negligent over-valuing or over-certifying the value of the contractor's work.

  If the contractor has not completed the works and remains entitled to receive interim payments, then the employer may simply be able to correct the amount properly due to the contractor for the next interim payment:
- Damages for the contractor breaching any other terms of the contract. If the contractor breaches its principal obligations to complete on time and/or achieve the specified standard of work, the employer is likely to suffer a loss, which could be significant. However, if the contractor commits lesser breaches of the building contract, then the employer may not suffer significant loss at all. NEC4 provides for the contractor to complete discrete parts of the works by 'Key Dates[30]' (see Section 8.6.2). In the event that the contractor fails to complete the work for a Key Date, then clause 25.3 of NEC4 provides that the employer may recover his 'additional cost'.

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27 NEC4 – Option X17: Low Performance Damages.

28 JCT SBC/Q 2016 – clause 2.38, JCT DB 2016 – clause 2.35, JCT IC 2016 – clause 2.30, JCT MWD clause 2.11.

29 NEC4 clause 45 (Accepting Defects).

30 NEC4 clause 11.2(11) defines a 'Key Date'. The work required to achieve a Key Date is not treated in the same way as if the works (as a whole) are divided into sections. The Employer is not permitted to deduct liquidated damages from the contractor for failure to achieve a 'Key Date'; instead, the Employer may recover his actual costs.

1.5 Structure of This Book

The book has been arranged into the following parts:

• Part One	Introduction, general principles of claims, claims for time and money (including common law and global claims), claims by the employer, employer's Representative's duties and preparation and substantiation of claims
• Part Two	Extensions of time and loss and expense under JCT main contracts and compensation events under NEC4
• Part Three	Sub-contractor claims and professional fee claims
• Appendices	Examples of claims under JCT 2016 and NEC4 contracts