

Contents

List of Cases	<i>xvii</i>
List of Figures	<i>xxxix</i>
List of Tables	<i>xxxiii</i>
Preface to the Fifth Edition	<i>xxxvii</i>
Preface to the Sixth Edition	<i>xli</i>
List of Abbreviations	<i>xliii</i>

Part I 1

1	Introduction	3
1.1	General Introduction to 'Claims'	3
1.1.1	General	4
1.1.2	Contractual Claims	4
1.1.3	Extension of Time and Loss and/or Expense	5
1.1.4	Variations	6
1.1.5	Unexpected Problems	6
1.2	Standard Forms of Contract Considered in This Book	7
1.2.1	JCT 2016 Contracts	8
1.2.2	NEC4 Contracts	9
1.3	Types of Claims by the Contractor	11
1.3.1	Contractual Claims	11
1.3.2	Common Law Claims	11
1.3.3	<i>Quantum meruit</i> Claims	12
1.3.4	Ex gratia Claims	12
1.4	Types of Claims by the Employer	13
1.4.1	Delay Damages	13
1.4.2	Low Performance Damages	13
1.4.3	Reduction of the Contract Price for Non-Compliant Work	14
1.4.4	Other Claims	14
1.5	Structure of This Book	15

2	General Principles	17
2.1	Entitlement	17
2.1.1	Contractual Entitlement	17
2.1.2	Duty, Breach, Causation and Loss	20
2.2	The Burden of Proof	21
2.2.1	The Burden of Proof	21
2.2.2	Res Ipsa Loquitur – It Speaks for Itself	21
2.3	Causation	22
2.4	Categories of Claim	24
2.4.1	Prolongation	26
2.4.2	Disruption	28
2.5	The ‘Knock-on’ Effect	29
2.6	Damages	32
2.7	Mitigation	33
2.7.1	Mitigation of Delay	33
2.7.2	Mitigation of Costs	34
2.8	Betterment	36
2.9	Notices	37
2.9.1	Requirement for Notice	38
2.9.2	Time Bar Clauses	39
2.9.3	Whether a Condition Precedent	41
2.9.4	Waiving the Requirement for Notice	42
2.9.5	Essential Elements of a Notice	43
2.9.6	Giving, Issue and Receipt of Notices	45
3	Time	47
3.1	General Points	47
3.1.1	Time Obligations in Building Contracts	47
3.1.2	Commencement Obligations	48
3.1.3	Progress Obligations	49
3.1.4	Completion Obligations (Including Partial Possession)	53
3.1.5	Time at Large	56
3.1.6	Time of the Essence	59
3.2	Extension of Time Clauses in Building Contracts	60
3.2.1	Basic Principles	60
3.2.2	The Prevention Principle	61
3.2.3	Onerous Clauses	62
3.2.4	Further Delays During a Period of Culpable Delay	62
3.3	Critical Path Analysis and Planning Software	63
3.4	The Society of Construction Law Delay and Disruption Protocol	66
3.5	Methods of Delay Analysis	67
3.5.1	Initial Steps: The Programme	67
3.5.2	Impacted as-Planned	74
3.5.3	Time Impact Analysis	77
3.5.4	As-built v As-planned	84

3.5.5	Collapsed As-built	87
3.5.5.1	Summary of Delay Analysis Methods	92
3.6	Float	95
3.6.1	'Financial' Effects of Using up Float	96
3.6.2	'Time' Effects of Using up Float	98
3.7	Concurrency	99
3.8	Acceleration	100
3.8.1	Introduction	100
3.8.2	Acceleration by Agreement or Instruction	102
3.8.3	Unilateral Acceleration	105
3.8.4	Constructive Acceleration	105
3.9	Sectional Completion	108
3.9.1	Where There Is a Single Date for Completion	108
3.9.2	Dependent Sections	108
3.10	'Milestone' or Key Dates	112
3.11	Foreshortened Programme	113
3.11.1	Contractor's Obligation to Complete	113
3.11.2	If the Contractor Could Have Completed Earlier	114
3.11.3	Late Information	116
4	Financial Compensation: Recovery of Direct Loss and/or Expense or Additional Costs	119
4.1	Definition	119
4.1.1	JCT 2016 v NEC4 Contracts – Different Approaches	120
4.1.2	JCT 2016 Contracts – 'Direct Loss and/or Expense'	120
4.1.3	NEC4 – 'Change in the Prices'	121
4.2	Direct v Indirect	122
4.3	Exclusion of Indirect or Consequential Loss	123
4.4	The More Common Heads of Loss	126
4.4.1	General Principles	126
4.4.2	Prolongation Costs	126
4.4.2.1	On-site Establishment Costs	127
4.4.2.2	Management Personnel Costs	128
4.4.2.3	Plant	129
4.4.2.4	Winter Working	132
4.4.2.5	Head Office Overheads	132
4.4.2.6	Loss of Profit	137
4.4.3	Disruption Costs – Uneconomic Working	138
4.4.4	Other Costs	141
4.4.4.1	Increased Costs	141
4.4.4.2	Interest	143
4.4.4.3	Financing Charges	144
4.4.5	Costs of a Claim	145
4.4.6	Sub-Contractor Claims	147
4.5	Quantum Meruit Claims	148

4.5.1	Circumstances Giving Rise to Quantum Meruit Claims	148
4.5.2	Valuation of Quantum Meruit Claims	149
4.6	Exclusive Remedy Clauses	150
4.7	Claims at Termination of Contractor's Employment	151
4.7.1	Termination Claims Under JCT 2016 Contracts	151
4.7.2	Termination Claims Under NEC4	156
5	Claims for Variations Under the Contract, Acceleration, Bonus Clauses and Contractor's Share	161
5.1	Definitions and Scope	161
5.1.1	Definition of a 'Variation'	162
5.1.2	Scope of a 'Variation' – Contract Documents	164
5.1.3	Scope of a Variation – Bills of Quantities	166
5.1.4	Other Pricing Documents	172
5.2	JCT 2016 Contracts – Definitions of Variations	172
5.2.1	Alteration of Design, Quality or Quantity of the Work	172
5.2.2	Changes or Restrictions Imposed by the Employer	175
5.2.3	Instructions and Other Circumstances Giving Rise to a 'Variation'	178
5.2.3.1	Corrections to Contract Documents (Resolving Discrepancies, Ambiguities, Inadequacies, etc.)	179
5.2.3.2	Instructions	183
5.2.3.3	Design Submission Procedure and Contractor's Designed Portion ('CDP')	191
5.3	NEC4 Contracts – Definition of 'Compensation events' (Including Variations)	193
5.3.1	NEC4 – Compensation events	193
5.3.2	NEC4 – Compensation Event Procedure	196
5.4	Valuation Under JCT 2016 Contracts	203
5.4.1	The 'Valuation Rules' and Their Application	206
5.4.1.1	Valuation by Measurement	207
5.4.1.2	If the Work Cannot be Measured – Valuation on a Daywork Basis	212
5.4.1.3	Valuation of the Contractor's Design (Including the 'Contractor's Designed Portion') and 'Provisional Sums'	214
5.4.2	Variation and Acceleration Quotations and Contractor's Estimates	217
5.5	Valuation Under NEC4 Contracts (Including 'Contractor's Share')	221
5.5.1	Assessing Changes to the Prices	223
5.5.2	Contractor's Share (Options C and D) and Incentive Payment (Option X22)	230
5.6	Acceleration Provisions	233
5.6.1	Acceleration Under JCT SBC/Q 2016 and JCT DB 2016	233
5.6.2	Acceleration Under NEC4	234
5.6.3	Summary of Acceleration Provisions	234
5.7	Bonus Clauses	235
5.7.1	Contractor's Share	236
5.7.2	Early Completion Bonus	236

5.7.3	'Budget Incentive' for Early Contractor Involvement (Option X22)	236
5.7.4	Bonus Clauses and Acts of Prevention	237
6	Basis for Common Law Claims	239
6.1	General	239
6.1.1	Authority of Employer or His Representative	241
6.1.2	Effect of 'Final Certificates'	242
6.2	Implied Terms	243
6.2.1	General Principles	243
6.2.2	Terms Implied (or Imposed) by Statute	244
6.2.3	Common Law (Case Law)	245
6.2.4	Other Bases for Implied Terms in Building Contracts	249
6.3	Variation of the Contract Itself (Not a Variation Under the Terms of the Contract)	249
6.4	Omission of Work to Give it to Others	250
6.5	Extra Work	253
6.6	Possession of the Site	255
6.6.1	General Position	255
6.6.2	Sufficient Possession	255
6.6.3	Failure to Give Possession	256
6.6.4	Deferring Possession and Suspension by the Employer	257
6.7	Incorrect Information	258
6.7.1	Basis of Claim	258
6.7.2	Provision of Correct Information	258
7	Global Claims	263
7.1	General Points	263
7.2	Basic Principles of Global Claims	263
7.3	The Current Position	265
7.4	Summary	267
8	Employer Claims Against the Contractor	269
8.1	General	269
8.2	Delay Damages (Liquidated Damages) for Late Completion	270
8.2.1	The Meaning and Purpose of Liquidated Damages	270
8.2.2	Liquidated Damages Clauses Must be Clear and Unambiguous	272
8.2.3	'Liquidated Damages' or a 'Penalty'	273
8.2.4	The Sum Expressed as Liquidated Damages and its Calculation	276
8.2.5	Liquidated Damages as the Only Remedy	279
8.2.6	Where There Is Partial Possession	280
8.2.7	Maximum Recovery – Including a Damages 'cap'	282
8.3	Procedures for Deducting Liquidated Damages for Late Completion	284
8.3.1	General Points	284
8.3.2	Liquidated Damages Under JCT 2016 Contracts	284
8.3.3	Liquidated Damages Under NEC4	286

8.3.4	Damages for Late Completion Summary	288
8.4	Defences to Liquidated Damages for Late Completion	288
8.4.1	By Agreement	288
8.4.2	Deficiencies in the Building Contract	291
8.4.3	Employer Failing to Observe the Contract Terms	291
8.4.4	Time Has Been Extended	292
8.4.5	Time Is at Large	292
8.4.6	The Contract Is Terminated	293
8.4.7	The Stipulated Sum Is Actually a Penalty	294
8.5	Defects: Reduction/Abatement of the Contract Price	295
8.5.1	General Points	295
8.5.2	Abatement/Reduction of the Contract Price	295
8.5.3	Abatement Under JCT 2016 Contracts	296
8.5.4	Abatement Under NEC4	297
8.5.5	Costs of Rectifying Defective Work	298
8.6	Employer Claims for Other Breaches of Contract	300
8.6.1	Liquidated Damages for Failing to Construct the Work to a Specified Area (m ² or ft ²)	300
8.6.2	Other Damages and Costs Payable Under NEC4	301
9	Duties of the Employer's Representative	303
9.1	Employer's Representatives (Architects', Contract Administrator's and Project Manager's) Powers and Liability to the Contractor	303
9.1.1	General Points	303
9.1.2	Employer's Representative(s) – General Duties	305
9.1.3	Employer's Representative(s) – Relevant Duties	306
9.1.4	The Relevance of the Building Contract's Terms	307
9.1.5	Agency	308
9.1.6	Employer's Representative's Authority, Exercising Discretion, and Making Decisions	309
9.1.7	Employer's Representative and the Contractor	311
9.1.8	The Employer's Representative's Duties - Extensions of Time	311
9.1.9	Extension of Time Decisions and Time Limits	315
9.1.10	Loss and Expense Decisions and Time Limits	317
9.1.11	Employer's Liability for Breaches by the Employer's Representative	318
9.2	Quantity Surveyor's Role	319
9.2.1	Valuation of Work	323
9.2.2	Direct Loss and/or Expense	323
9.2.3	Quantity Surveyor's Duty	324
9.2.4	Duty to the Employer	325
9.2.5	Quantity Surveyor's Liability to Others	326
9.2.6	Quantity Surveyor Functions Under JCT 2016 Contracts	326
9.2.7	Quantity Surveyor Functions Under NEC4	330
9.2.8	Commercial Settlements	331

10	Preparation and Substantiation of Claims	333
10.1	Preparing a Claim	333
10.1.1	Introduction	333
10.1.2	General Principles	334
10.1.3	Requests for Further Information	335
10.1.4	Setting Out the Claim	337
10.1.5	Likely Content of a Claim	339
10.2	Types of Evidence Required to Support a Claim	340
10.2.1	Introduction	340
10.2.2	The Explanation (or Narrative)	344
10.2.3	Time Records (Programmes and Similar Documents)	346
10.2.4	Cost Records	347
10.2.5	Correspondence and Similar Documents	349
10.2.6	Photographs, Time-Lapse Video	350
10.2.7	Other Records (Site Meetings, Site Diaries, Labour Returns)	350
10.2.8	A Scott Schedule	352
	Part II	355
11	Extensions of Time Under JCT 2016 Contracts	357
11.1	Introduction	357
11.1.1	Definitions and Interpretation	357
11.1.2	The Contractor's Obligation to Notify a Delay to Progress	359
11.2	The Contractor's Notifications	359
11.2.1	The Notice	359
11.2.2	Particulars of the Delay(s) - Expected Effects	362
11.2.3	Updates: Material Change in Estimated Delay	363
11.3	Fixing a New Completion Date	363
11.3.1	Introduction	363
11.3.2	Fixing a New Completion Date During the Course of the Work	365
11.3.3	Fixing a New Completion Date After the Completion Date Has Passed	372
11.3.4	Other Conditions for Extensions of Time	373
11.4	Relevant Events – Grounds for Extensions of Time	375
11.4.1	Variations or Changes	375
11.4.2	Instructions	375
11.4.3	Deferment of Possession	377
11.4.4	Antiquities	378
11.4.5	Inaccurate Approximate Quantities	379
11.4.6	Contractor's Suspension for Nonpayment	379
11.4.7	Impediment, Prevention or Default by the Employer	380
11.4.7.1	Late Provision of Information	381
11.4.7.2	Work Not Forming Part of the Contract	383
11.4.7.3	Provision of Materials or Goods by the Employer	384
11.4.7.4	Failure to Give Access, Ingress or Egress	385

11.4.7.5	Compliance or Non-compliance with CDM Regulations 2015	385
11.4.8	Statutory Undertaker's Work	386
11.4.9	Exceptionally Adverse Weather Conditions	387
11.4.10	Loss or Damage Occasioned by One or More of the Specified Perils	388
11.4.11	Civil Commotion or the Use or Threat of Terrorism	389
11.4.12	Strikes, Lock Out etc.	390
11.4.13	New Legislation After the Base Date	390
11.4.14	Delay in Receiving the Necessary Permissions (JCT DB 2016 only)	391
11.4.15	Insolvency of a 'Named Specialist' (JCT SBC/Q 2016 only)	391
11.4.16	'Named Sub-Contractors' (JCT IC 2016 Only)	392
11.4.17	Force Majeure	394
12	Loss and/or Expense under JCT 2016 Contracts	397
12.1	Introduction	397
12.1.1	General Points	397
12.1.2	No Relationship Between Relevant Matters and Relevant Events	400
12.2	The Contractor's Application and Assessment	402
12.2.1	The Key Loss and Expense Clause	402
12.2.2	Commentary on the Key Loss and Expense Clause	403
12.2.3	Content of the Contractor's Application	406
12.2.4	Timing of the Contractor's Notification ('Relevant Matters')	407
12.2.5	Meaning of Loss and Expense	411
12.2.6	Reimbursement Under Other Conditions of the Contract	411
12.2.7	Quotations and Estimates for Loss and Expense and Acceleration	413
12.2.8	Effect on Regular Progress	415
12.2.9	Provision of Further Information	416
12.2.10	'Form and Manner' of Requested Information	419
12.3	Ascertainment by the Employer or His Representative	419
12.3.1	Criteria for Ascertaining Loss and Expense	419
12.3.2	Ascertainment	421
12.3.3	Timing, Content and Detail of the Ascertainment	423
12.3.4	Matters within the Employer's or His Representative's Knowledge	425
12.4	The 'Relevant Matters'	427
12.4.1	Deferment of Possession	427
12.4.2	Variations or Changes	428
12.4.3	Other Circumstances giving rise to a Variation (or Change)	429
12.4.4	Instructions	429
12.4.5	Antiquities	431
12.4.6	Contractor Suspending Performance of His Obligations	432
12.4.7	Inaccurate Approximate Quantities	432
12.4.8	Delay in Receiving Permissions (JCT DB 2016 only)	433
12.4.9	Impediment, Prevention or Default by the Employer	433
12.4.10	Amounts Ascertained to Be Added to the Contract Sum	434
12.4.11	Contractor's Other Rights and Remedies	435

13	Claims Under NEC 4	437
13.1	Introduction	437
13.1.1	Compensation Events	438
13.1.2	Compensation Events Procedure	438
13.2	Assessing Changes to the Prices	438
13.3	Assessing a Delay to the Completion Date and/or a Key Date	438
13.4	The Project Manager's Assessments	441
13.4.1	Clause 64 – the Project Manager's Assessments	441
13.5	The Compensation Events	442
13.5.1	Project Manager's Instructions Changing the Scope – Clause 60.1(1)	443
13.5.2	The Client's Failure to Allow Access to and Use of Part of the Site by Whichever is the Later of the Access Date and the Date Shown on the Accepted Programme – Clause 60.1(2)	443
13.5.3	The Client Fails to Provide Something by the Date in the Accepted Programme – Clause 60.1(3)	445
13.5.4	The Project Manager's Instruction to Stop Work or Not to Start Work or Changing a Key Date – Clause 60.1(4)	446
13.5.5	The Failure of the Client or Others to Work (a) Within the Times on the Accepted Programme or (b) the Conditions Stated in the Scope or (c) Carrying Out Work on the Site that's Not in the Scope – Clause 60.1(5)	446
13.5.6	The Project Manager or the Supervisor Fails to Respond to a Communication Within the Agreed Period – Clause 60.1(6)	447
13.5.7	The Project Manager gives Instructions about an Object of Value, or Historical or Other Interest Found Within the Site – Clause 60.1(7)	449
13.5.8	The Project Manager or Supervisor Changes a Decision Previously Communicated to the Contractor – Clause 60.1(8)	449
13.5.9	The Project Manager Withholds an 'acceptance' for a Reason Not Stated in the Contract – Clause 60.1(9)	450
13.5.10	No Defect is Found After the Supervisor Instructs the Contractor to Search – Clause 60.1(10)	450
13.5.11	A Test or Inspection Carried Out by the Supervisor Causes Unnecessary Delay – Clause 60.1(11)	451
13.5.12	Physical Conditions Encountered by the Contractor Within the Site – Clause 60.1(12)	452
13.5.13	A 'weather measurement' is Recorded – Clause 60.1(13)	454
13.5.14	An event which is 'Client's liability' Occurs – Clause 60(14)	456
13.5.15	Taking Over of Part of the Works is Certified by the Project Manager before Both Completion and the Completion Date – Clause 60.1(15)	457
13.5.16	The Client Fails to Provide Materials, Facilities and Samples for Tests in Accordance with the Scope – Clause 60.1(16)	458
13.5.17	The Project Manager Notifies a Correction to an Assumption Regarding a Compensation event – Clause 60.1(17)	458
13.5.18	The Client Commits a Breach of the Contract that's Not a Compensation Event – Clause 60.1(18)	458

13.5.19	An Event that Prevents the Contractor Completing the Works in Accordance with the Contract Occurs – Clause 60.1(19)	459
13.5.20	The Contractor is Notified by the Project Manager that a Quotation for a Proposed Instruction is Not Accepted – Clause 60.1(20)	460
13.5.21	Additional Compensation Events in Contract Data Part One – Clause 60.1(21)	461
13.5.22	Main Options B and D – A Difference Between the Final Quantity of Work Done and the Quantity for an Item in the Bill of Quantities – Clause 60.4	462
13.5.23	Main Options B and D. A Difference Between the Final Total Quantity of Work Done and the Quantity for an Item in the Bill of Quantities at the Contract Date which Delays Completion or a Key Date – Clause 60.5	464
13.5.24	Main Options B and D. Project Manager Corrects Mistakes in the Bill of Quantities which are Corrected by the Project Manager – Clause 60.6	464
13.5.25	Main Options B and D. Correcting an Inconsistency Between the Bill of Quantities and Another Document When Assessing a Compensation Event – Clause 60.7	465
13.5.26	Secondary Option X2.1. The Applicable Law Changes After the Contract Date	465
13.5.27	Secondary Option X12.3(6) An Instruction Given by the Core Group to the Partners to Change the Partnering Information	466
13.5.28	Secondary Option X14.2 – Delay in Making the Advanced Payment	466
13.5.29	Secondary Option X15.2 – The Correction of a Defect for Which it was Not Liable by the Contractor	467
13.5.30	Secondary Option Y(UK)2 Y2.5 Suspension of Performance by the Contractor under the Housing Grants, Construction and Regeneration Act 1996 ('the Act')	467

Part III 469

14	Sub-Contract Claims	471
14.1	Introduction	471
14.1.1	JCT 2016 Sub-Contracts	472
14.1.2	NEC4 Sub-Contract	475
14.2	Variations Under the Sub-Contracts	476
14.2.1	Variations Under the JCT 2016 Sub-Contracts	476
14.2.2	NEC4 Sub-Contracts	478
14.3	Extensions of Time Under Sub-Contracts	486
14.3.1	JCT 2016 Sub-Contracts' Delay Notifications	486
14.3.2	JCT 2016 Sub-Contracts: Fixing Period for Completion	489
14.3.3	JCT 2016 Sub-Contracts: Relevant Sub-Contract Events	496
14.3.4	NEC4 Sub-Contracts	501
14.4	Loss and Expense Under the Sub-Contracts	501
14.4.1	JCT 2016 Sub-Contractor's Application and Main Contractor's Assessment	501
14.4.2	JCT 2016 Relevant Sub-Contract Matters	508

- 14.4.3 Reservation of Rights and Remedies 510
- 14.5 Main Contractor Claims Against Sub-Contractors 510
- 14.5.1 Main Contractor's Claims 510
- 14.5.2 Delayed Completion by the Sub-Contractor 512
- 14.5.3 Common Heads of Loss and Expense Claimed by the Main Contractor Against the Sub-Contractor 514

15 Professional Fee Claims 517

- 15.1 Introduction 517
- 15.1.1 Means of Appointing Professional Consultants 517
- 15.1.2 Consultants' Core Obligations 519
- 15.1.3 Client's Core Obligations 523
- 15.1.4 Basis for Consultant's Fees 523
- 15.1.5 The Basis for Charging for Consultant's Fees 525
- 15.2 Claims Made by Consultants 527
- 15.2.1 Claims for 'Variations' (Additional Services) 528
- 15.2.2 Adjusting the Time (Programme) for the Consultants' Services 528
- 15.2.3 NEC4 PSC Compensation Events 530
- 15.2.4 Consultant's Claims for Extensions of Time 532
- 15.2.5 Consultant's Claims for Additional Fees 536
- 15.2.6 Consultant's Claims for Common law Damages 538
- 15.3 Client Claims Against Consultants 538
- 15.3.1 Establishing the Standard for the Consultant's Services 539
- 15.3.2 Common Claims by the Client Against his Representative 539
- 15.3.3 Common Claims by the Client Against a Designer 540
- 15.3.4 Common Claims by the Client Against a Quantity Surveyor 541

Appendix A Example of Contractor's Claim for Reimbursement of Direct Loss and/or Expense Under the JCT 2016 Contracts 543

- A.1 Introduction 543
- A.2 Example Particulars 544
- A.3 Explanation of Costs or Expenditure 546
- A.4 Loss and Expense for Employer Delay 1 – Details 549
- A.5 Loss and Expense for Employer Delay 1 – Entitlement and Quantum 550
- A.6 Loss and Expense for Employer Delay 2 – Details 550
- A.7 Loss and Expense for Employer Delay 2 – Entitlement and Quantum 550
- A.8 Observations for Loss and Expense for Employer Delay Claims 1 and 2 555

Appendix B Example of Compensation Event Claim Under NEC4 561

- B.1 Introduction 561
- B.1.1 Details of the Compensation Event 561
- B.1.2 Observations on the Compensation Event Assessment 564

Index 581

