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Damages for Defects

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Lucinda Robinson, Fenwick Elliott LLP

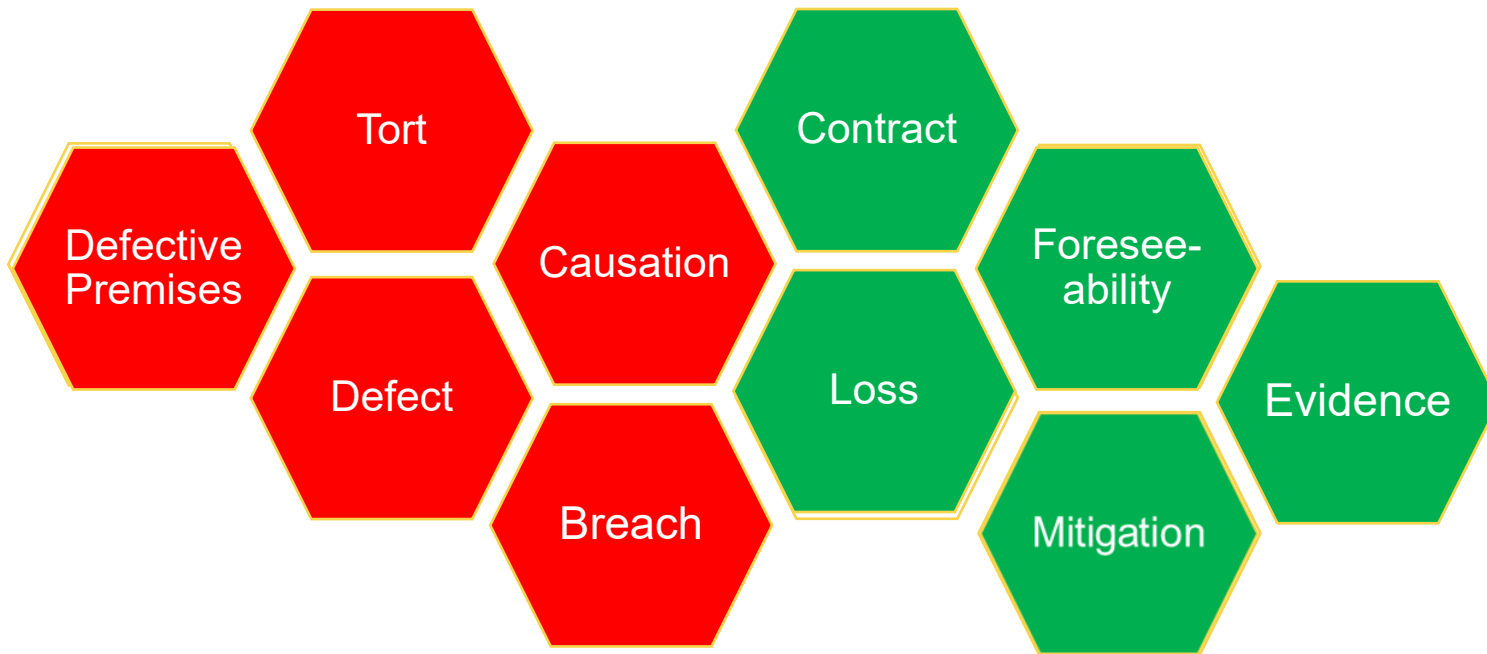
Felicity Dynes, Atkin Chambers



Introduction

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Today's Agenda

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- Introduction
- What losses are recoverable?
- Undermining and restricting claims
- Practical matters: evidence and records
- Key tips – Claimant and Defendant

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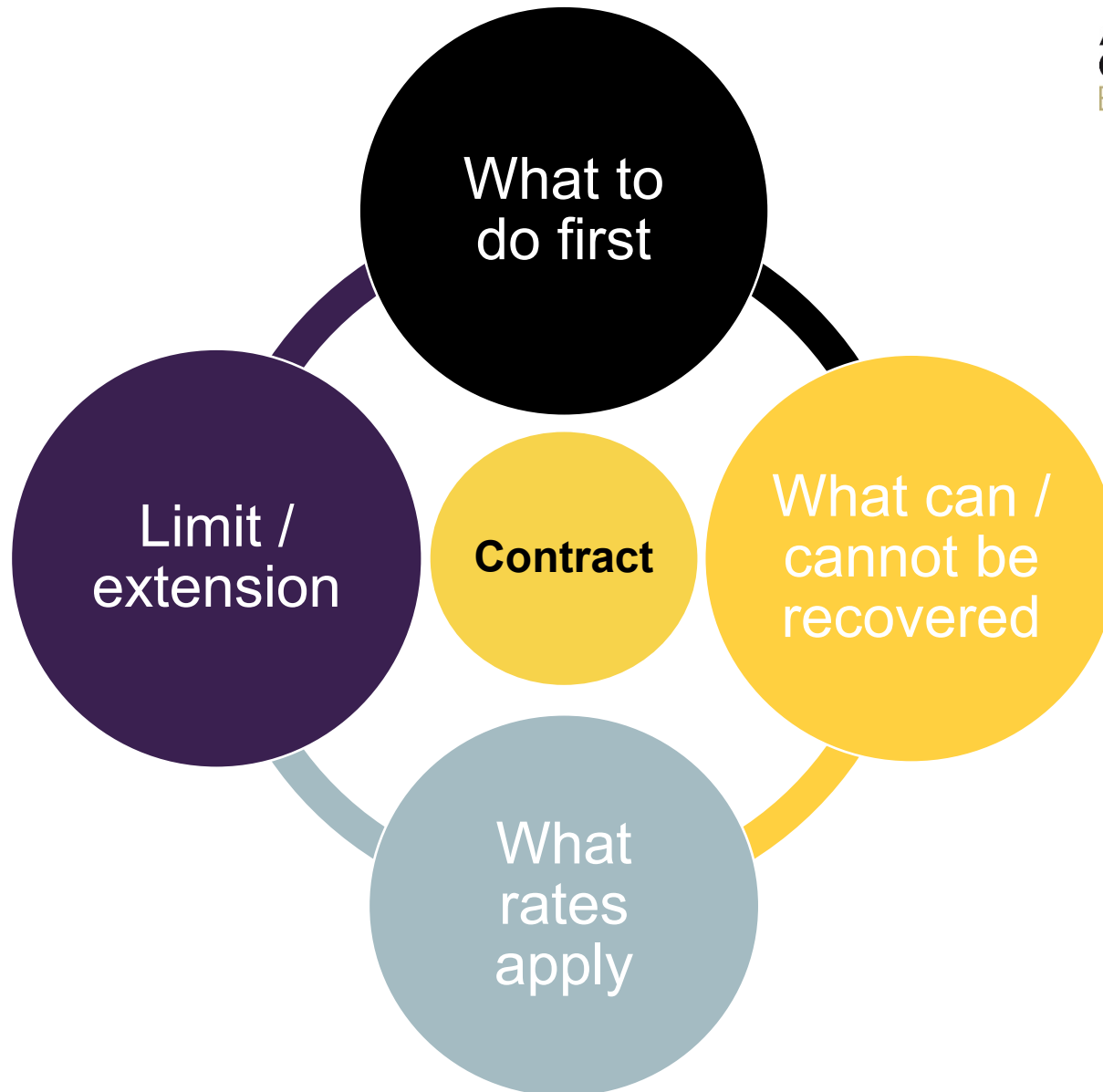
What losses are recoverable?



Check the Contract

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Damages – General Principles

- Damages are to compensate the Claimant for its expectation loss; i.e. put the innocent party into the position it would have been if the contract had been performed properly. *Robinson v Harman (1848) 1 Ex 850*.
- Not intended to be penal or to reward the claimant.
- The recoverable loss is that which the Claimant can prove to be attributable to the breach.

Remoteness and Foreseeability

The qualification: loss must be foreseeable and not too remote.

Hadley v Baxendale (1854) 9 Ex 341

Direct Losses

- Naturally arising from the breach.

Indirect Losses

- In the parties' contemplation when the contract was made.



Cost of cure / reinstatement

- The loss for which it is fair & reasonable to hold the Defendant accountable.
- Accountability, foreseeability and reasonableness overlap.
- *McGlenn v Waltham & Others* [2007] EWHC 149 (TCC) – repair vs replacement



Alternatives

- Diminution in value of the affected asset caused by the defect.
- Loss of amenity.
- *Ruxley Electronics & Construction Ltd v Forsyth* [1995] UKHL 8

Direct loss – other heads of loss

Management time

Aerospace Publishing v Thames Water [2007] EWCA Civ 3 (CA).

1. Diversion from ordinary work; fact and extent of diversion + disruption = recover wages
2. Additional labour brought in → recover costs

Loss of profits

- Often a direct loss.
- *Chiemgauer Membran Und Zeltbau Gmbh v New Millennium Experience Co Ltd [2002] BPIR 42*

Others

- E.g Compensation
- *GB Gas v Accenture [2010] EWCA Civ 912*

Indirect losses

- Not a natural consequence of the breach, but incurred because of special circumstances (e.g. other contracts of the Claimant).
- Recoverable **if** the Defendant knew about them at the outset, so it was aware that a breach would cause this loss. Otherwise, it would not be fair or reasonable for the Defendant to take this risk.
- *E.g. Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528*
- Why main contracts often include clauses confirming the contractor has read and agrees to take the risk of third party agreements.
- Why subcontracts often state that the subcontractor has read and agrees to comply with the main contract.

Indirect and consequential

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Traditional
Consequential
= Indirect

New*
Consequential
=
Consequential

Traditional**
Consequential
= Indirect

* “Consequential” means what was consequent upon the breach; *Caledonia North Sea Ltd v British Telecommunications* [2002] UKHL 4, *Transocean Drilling UK Ltd v Providence Resources plc* [2016] EWCA Civ 372 and the *Star Polaris* [2016] EWHC 2941 (Comm).

** *2 Entertain Video Ltd & Ors v Sony DADC Europe Ltd* [2020] EWHC 972.

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Undermining / restricting claims



Approaches to restricting / limiting liability

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- Contractual limitations
- Allegations of failure to mitigate
- Remoteness of damage
- Offers to settle



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Contractual limitations

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- Overall cap on liability
- Limitations of liability for particular heads of loss, e.g. loss of profit, loss of use
- Contractual provision for what can be claimed for defective work – e.g. ***Oksana Mul v Hutton Construction*** [2014] EWHC 1797 (TCC)
- Reliance on clauses requiring contractor to be given an opportunity to rectify defects
- Net contribution clause – ***West v Ian Finlay & Associates*** [2014] EWCA Civ 316

Failure to mitigate – what is it?

- No ‘duty to mitigate’ as such
- Legal test of unreasonable conduct:
 - Did the Claimant unreasonably fail to take steps, (i.e. fail to take steps all reasonable people would have taken) or did it take steps no reasonable person would have taken, and did this increase the harm (loss) suffered?
 - Per Potter LJ in ***Standard Chartered Bank v Pakistan National Shipping Corp (No 3)*** [2001] EWCA Civ 55 at para 41:

“in truth, causation and mitigation are two sides of the same coin... In every case where an issue of failure to mitigate is raised by the defendant it can be characterised as an issue of causation in the sense that, if damage has been caused or exacerbated by the claimant’s unreasonable conduct or inaction, then to that extent it has not been caused by the defendant’s tort or breach of contract”.

Failure to mitigate – burden of proof

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- Burden on defendant to prove:
 - Failure to mitigate
 - Consequent increase in the harm suffered

Failure to mitigate – arguments

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- Failure to offer to the contractor an opportunity to rectify the works:
Woodlands Oak Ltd v Conwell [2011] BLR 365
- Failing to obtain / follow specialist advice in unsuccessful or abortive remedial works
- Failing to act quickly enough to start works
- Failing to act with sufficient diligence to complete works in a timely fashion
- Failing to put the works out to tender
- Failing to get the works done more cheaply

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Failure to mitigate in the Courts (1)

- Lord Macmillan in ***Banco de Portugal v Waterlow & Sons*** [1932] AC 452 (HL) at 507:

“Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty.”

Failure to mitigate in the Courts (2)

- Per Roskill J (as he then was) in ***Harlow & Jones Ltd v Panex (International) Ltd*** [1967] 2 Lloyd's Rep 509 at 530:

“The defendants broke this contract. It is they who put the plaintiffs in this difficulty. Of course, a plaintiff has always to act reasonably, and of course he has to do what is reasonable to mitigate his damages. But he is not bound to nurse the interests of the contract breaker, and so long as he acts reasonably at the time it lies in the mouth of the contract breaker to turn around afterwards and complain, in order to reduce his own liability to a plaintiff, that the plaintiff failed to do that which perhaps with hindsight he might have done.”

Failure to mitigate in the Courts (3)

- Per Leggatt J (as he then was) in *Thai Airways v KI Holdings* [2015] EWHC 1250 (Comm):

*“The standard of ‘reasonableness’ is, however, applied with some tenderness towards the claimant having regard to the fact that the claimant’s predicament has been caused by the defendant’s wrongdoing... Thus **the claimant is not expected to take steps which would involve unreasonable expense, risk or inconvenience...** In addition, the burden of proof is on the defendant to show that there was a course of action which it was reasonable to expect the claimant to adopt that would have avoided all or an identifiable part of the claimant’s loss... Furthermore, **there is often a range of responses available to the claimant which will be regarded as reasonable.** As stated by Potter LJ in Wilding v British Telecommunications Plc [2002] EWCA Civ 349; [2002] ICR 1079 at para 55:*

‘If there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed.’”

Offers to settle

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- Part 36 / Calderbank offers
 - Addressing particular defects
 - Lump sum
- Offer to undertake remediation / rectification
 - Control over remedial scheme
 - Control over timetable / costs

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Practical Matters – Witnesses



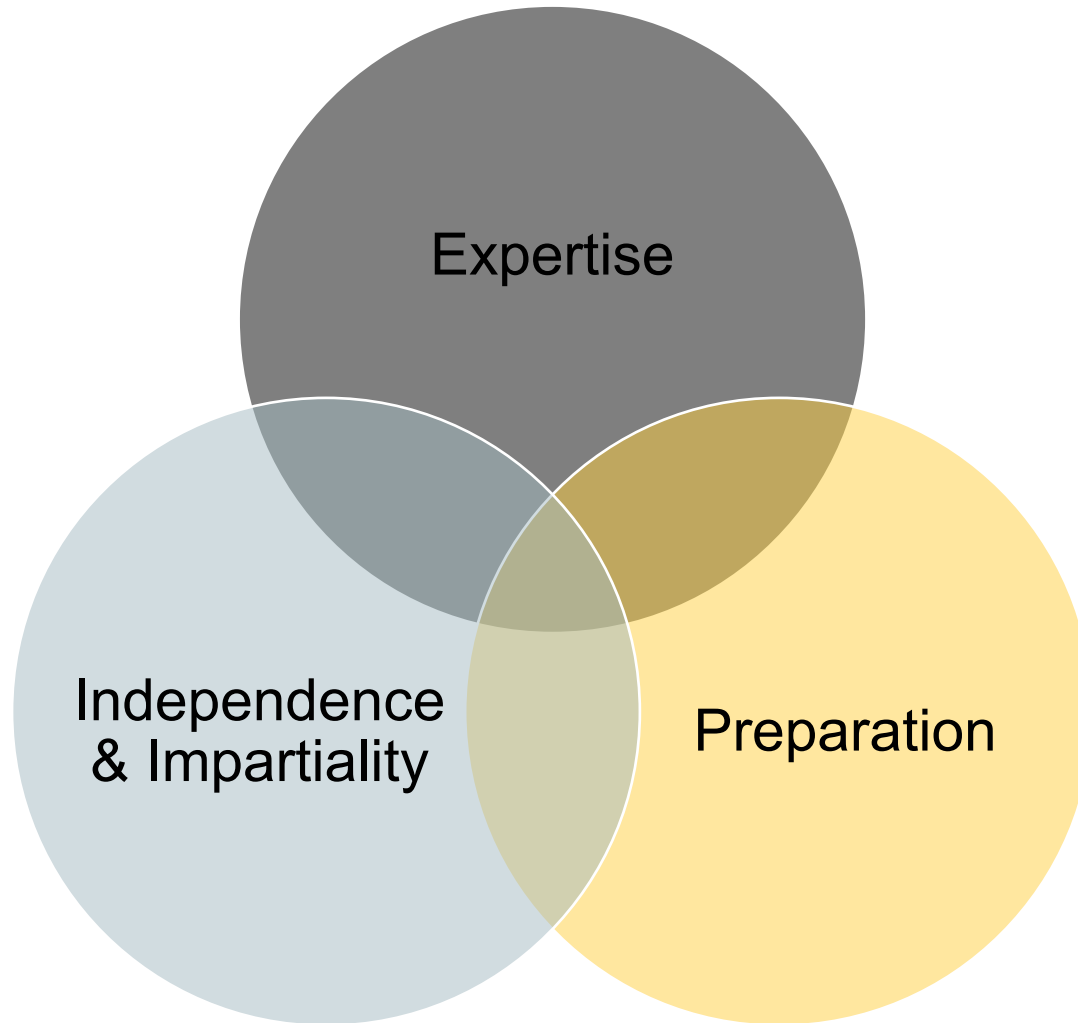
Witnesses of fact

1. What the witnesses will need to cover – cost of cure, loss of profits, management time, compensation paid etc.
2. Who is best to cover each of those points:
 - First hand knowledge;
 - Role on the project;
 - Whether they are still with the business or friendly towards it; and
 - How they will present in the witness box.
3. Practice Direction 57 AC and Statement of Best Practice

Expert witnesses

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Expert witnesses

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Expertise:

- Check the expert really is an EXPERT.

Impartial & Independent:

- *Essex County Council V UBB Waste (Essex) Limited [2020] EWHC 1581 (TCC)*. Technical expert was the MD of the engineering firm who had provided significant design advice to UBB during the works.
- *Blackpool Borough Council v Volkerfitzpatrick [2020] EWHC 1523 (TCC)*. The parties' experts agreed to use a single testing house, but the Claimant's expert unilaterally instructed additional tests. It shared the results but this was not best practice.

Preparation:

- Explain the story using documents, witnesses, site visits and meetings.
- Collate and provide data about costs; e.g. tender requests, responses and assessments, purchase orders and contracts, instructions and variations, payment applications, payment notices, pay less notices, invoices and bank statements.

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Practical Matters – Record-keeping



Record-keeping

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- Why proper records are needed
- What kinds of records are needed for the different heads of loss?
- Putting systems in place in order to maintain and formalise records

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What kinds of records? (1)

- Remedial works
 - Invitations to tender
 - Scope of works and contracts / instructions / variations
 - Instruct contractors to keep timesheets / descriptions of work carried out
 - Expert/specialist advice on remedial schemes
 - Invoices / Applications for payment / payment certificates
 - Evidence of payments

What kinds of records? (2)

- Management time
 - Payroll information and overheads
 - Employees to keep timesheets of time spent on particular defects / management of rectification
- Alternative accommodation
 - Receipts / invoices
- Loss of profits
 - Fact-dependent but likely to be driven by expert advice and valuation of the business / asset

Putting systems in place

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- Instructions to the business/contractors to maintain records
- Recording and collating costs against individual defects where possible
- Additional support if required



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Summary: Top Tips



No.	Tip
1.	Check the contract <ul style="list-style-type: none">- Preliminary steps- Exclusions or limitations of liability- Right to undertake remedial works
2.	What types of losses have been suffered? <ul style="list-style-type: none">- Identify the heads of loss- Are they direct or indirect?
3.	How much has been incurred? <ul style="list-style-type: none">- Calculations / valuations- What is reasonable, foreseeable and attributable
4.	Prove it! <ul style="list-style-type: none">- Documents- Witnesses- Experts

Defendant

No.	Tip
1.	Check the contract <ul style="list-style-type: none">- Overall cap?- Exclusions or limitations of liability for certain heads of loss?- Net contribution clause?- Contractual code for defects claims?
2.	Causation <ul style="list-style-type: none">- Does the expert and factual evidence support the case on liability and quantum?- Is key evidence / documentation missing?- Did the claimant act unreasonably?- Are the damages claimed too remote?
3.	Consider settlement / protection by making settlement offers
4.	Be selective!

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**Thank you!
Questions?**

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