# The brown clause for loss and expense

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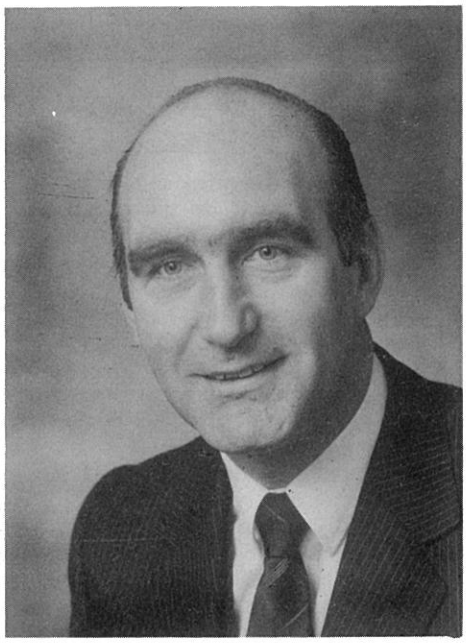

Paul Jensen trained as a quantity surveyor in professional firms in Liverpool and became a member of the RICS in 1968. After qualification he held the post of chief estimator and quantity surveyor in a medium sized firm of building contractors. During this period he developed an interest in the legal aspects of the building industry and as a result he studied law and became a barrister. He is now employed full time in dealing with building disputes and arbitrations at James R. Knowles & Associates, Knutsford, Cheshire.

Sales of smelling salts to builders' estimators must be rising steadily at the moment as a growing number of startled building contractors are being faced for the first time with tendering on the J.C.T. form of contract amended as follows:

*OMIT* Clause 11(6)

Clause 24

Clause 34(3)

Clause 23—3rd and 4th line omit: "is likely to be or" and "beyond the date" and 4th and 5th lines entirely and in the last paragraph "beyond the date or time aforesaid".

*ADD* In Clause 23, first line between the words "is" and "delayed" add "or will be".

24(1) Where the Architect properly makes a fair and reasonable extension of time for completion of the Works under Clauses 23(e), 23(f). 23(h), 23(i) or 23(k) of these Conditions then, subject to the Contractor having given to the Architect the written notice required by Clause 23 of these Conditions immediately upon it becoming reasonably apparent that the progress of the Works is or will be delayed, a sum calculated at the rate stated by the Contractor in the Bills of Quantities as Liquidated and Ascertained Loss and Expense for the period of the said extension of time shall be added to the Contract Sum and if an Interim-Certificate is issued after the date of calculation, any such sum shall be added to the amount which would otherwise be stated as due in such certificate.

24(2) The Contractor shall have no other rights or remedies for loss and/or expense caused by reason of the regular progress of the Works being delayed.

These amendments which are fast becoming known as the "Brown Clause", after the founder, are currently being used by one of the larger passenger transport authorities.

A provisional number of weeks of liquidated and ascertained loss and expense is incorporated into the bills of quantities to ensure that tenderers pre-estimate their loss at a realistic rate. The first attempt, at the end of last year, was a complete success in that a satisfactory tender was obtained in accordance with the amended contract but a number of tenderers failed to price the damages section of the bills of quantities. However, it would seem that contractors are gradually becoming accustomed to the idea as on recent schemes which have gone out to tender nearly all the tenderers have been prepared to price the loss and expense section of the bills of quantities.

The scheme has tremendous advantages to the employer as it will save the countless man-hours at present employed in negotiating the value of contractors' claims for direct loss and expense with the consequent uncertainty, very often for years, of the final amount for which the employer will eventually be liable. In these days of high interest rates, it may be thought that there is some advantage to the employer in making payment later rather than sooner but any advantage there might have been has quickly evaporated since the welcome judgement in F. G. Minter Limited v. Welsh Health Technical Services Organisation where it was held that interest on direct loss and expense was itself an allowable part of the direct loss and expense and it is now normal for interest to be paid on claims for delay and for arbitrators to award it.

For any form of contract to be successful, it should always be reasonable to both sides and so we must look at the "Brown Clause" from the contractor's view point to see whether the use of smelling salts is justified or just the expected initial reaction. The big advantage to the contractor of course is that once the grounds for delay have been established then he can expect immediate payment of his loss and expense without waiting for a considerable time whilst the valuation of the claim is agreed and this is a most important step forward particularly on large contracts where a sizeable claim for costs incurred because of delay can be the controlling factor in governing the contractor's financial stability. For too long builders have suffered in this way and anything that can be done to facilitate early payments of contractors' claims for delay should be welcomed in the industry. The stumbling block of course is the number of variables affecting the amount of loss incurred by delay on any occasion. The amount of loss will vary with the presence or absence of plant or scaffolding on site and on liability to sub contractors and these are just a few examples. We can all think of many arguments to show that pre-estimation of loss is impracticable but perhaps we should rather realise that estimators are well used to allowing for the unpredictable and on the standard forms of contract they already have to allow for the losses caused by delays for which the contracts do not provide recompense such as inclement weather.

Strangely enough it is always taken for granted by the drafters of standard forms of building contracts that one party to the contract, i.e. the employer will be capable of pre-estimating his damages due to delay in completion but that the other party will not. In fact it is often the case that the employer has a far more difficult task in assessing his likely damages than the builder but nevertheless he always chooses to do it rather than lose the advantage of avoiding the onerous task of proving his actual damage. Perhaps the builders should learn from the employers, after all, they seem to be the ones with all the money these days.