Scribbles Squibs[1] #57 (July 28, 2017):

MASS. APPEALS COURT OK'S TOTAL COST METHOD TO DETERMINE DELAY DAMAGES

By Attorney Jonathan Sauer

I. INTRODUCTION.

The plaintiff subcontractor, Central Ceilings, Inc., worked for the defendant general contractor, Suffolk Construction Company, Inc., performing ceiling and drywall work in the construction of three dormitory halls for the owner, Massachusetts State College Building Authority, this being a public project. The plaintiff subcontractor alleged a variety of errors in Suffolk's administration of the project. Plaintiff subcontractor sought $82,538 for 154 pending change orders in addition to damages for lost productivity due to claimed poor administration and design deficiencies in the amount of approximately $321,315. There was a contractual pay-when-paid clause applicable to the subcontract along with a no damage for delay clause.[2] The subcontractor had requested time extensions and according to the decision, no time extensions were given by Suffolk. To complete, the plaintiff subcontractor had to accelerate its performance. The project was supposed to be substantially complete by July 1, 2005.[3]

The general contract provided that Suffolk could earn a 200k bonus for finishing the job on time.

The subcontractor brought suit against the defendant general contractor and its sureties in the superior court in the case of Central Ceilings, Inc. v. Suffolk Construction Company, Inc., Fidelity & Deposit Company of Maryland, Safeco Insurance Company of America and XL Specialty Insurance.

The superior court judgment in that case was discussed in detail in a prior Squib, being Squib Number 23, which was dated January 31, 2014. This is available on my website, www.sauerconstructionlaw.com. Several aspects of the superior court judgment were somewhere between being worthy of note up to being outright startling. And, since the Appeals Court affirmed the judgment of the trial (superior) court, reading Squib # 23 would be useful in understanding the action of the Appeals Court. In that Squib, I commented at length about a number of factors resulting/potentially resulting from that decision which, by and large, are not repeated here. The greatest effect of this Appeals Court decision has less to do with new discussions of the law and more to do with the fact that the superior court decision has been affirmed, essentially for the reasons written. This Squib assumes that a reader interested in these concepts, particularly with regard to the use of the 'total cost' method, will have already read Squib number 23 – or, re-read Squib number 23 – prior to reading this Squib.

The Superior Court awarded the subcontractor damages for Suffolk's 'hindrances and interferences' with the subcontractor's work in a judgment dated December 19, 2013, even in the

presence of a no-damages-for-delay clause. It also allowed the subcontractor to be awarded delay-type damages under the 'total cost' method. And, since one of the factors underlying the Court's decision, referenced several times, was design defects from the project's designer, the decision appears to essentially extend general contractor liability to subcontractors *to some extent* to include the results of those design defects (along with a number of other purely-Suffolk factors). The Court did not award to the subcontractor the value of the pending change orders due to the fact that Suffolk did not get paid for them, thus barring a payment obligation due to the pay-when-paid clause in the subcontract. Judgment *did* enter against Suffolk for damages determined by the total cost method due to delay (or hindrance). The decision is unclear as to what exactly the sureties' liability was in this matter: certain of the subcontractor's claims against the sureties were dismissed.

The case was appealed by both parties and the Appeals Court came out with a decision dated March 29, 2017. (If you would like a copy of the decision, send us an email and we'll send it to you.)

The Appeals Court, in affirming the superior court's decision, held that:

1. The general contractor materially breached the subcontract by refusing to grant time extensions to the subcontractor.
2. The general contractor could not invoke the subcontract's no-damages-for-delay clause to bar the subcontractor's claim.
3. As a matter of apparent first impression, the nature of this construction subcontractor's particular losses made it impossible or highly impracticable to determine them with a reasonable degree of accuracy, as required to use the "total cost method" to calculate damages.[4]
4. The evidence was insufficient to establish that the subcontractor was entitled to payment under the subcontract's pay-when-paid clause for change order requests made to the general contractor.[5]

II. WHAT IS THE 'TOTAL COST' METHOD OF DETERMINING DELAY DAMAGES?

A. What is the total cost method of determining delay damages?

As stated in the Appeals Court decision: "The total cost method "looks to the difference between the amount bid for the work and the actual cost of the work."

Essentially, and not all that simplistically, it is an A minus B approach, achieving a bottom line of C. This should ordinarily be fairly simple to compute. How fair that is, on the other hand, in including designer defects as grounds for a lost productivity award against Suffolk may be another story entirely.

B. When is it applicable?

As indicated in the Appeals Court decision in this case, for a plaintiff seeking to utilize this method, it must prove that: (1) the nature of the particular losses make it impossible or highly impracticable to determine with a reasonable degree of accuracy; (2) that the plaintiff's bid or estimate was realistic; (3) that the actual costs incurred were reasonable; (4) it was not responsible for the added expenses.[6]

The Court also pointed out that courts have suggested that the method be used only "as a last resort . . .in those extraordinary circumstances where no other way to compute damages was feasible and where the trial court employed proper safeguards."

C. Usual methods of determining damages in Massachusetts.

Initially, a delay damage is a kind of 'consequential damage,' meaning that is not an amount to rectify the direct costs resulting from a breach of contract as compared with compensation for the results – the 'consequences' – of a breach of contract.

Some basic principles. A party entitled to recover on a breach of contract should be allowed damages which are the natural, direct, and proximate result of the breach. (case cited). One breaching a contract is liable for consequences reasonably foreseeable when the contract was made. (case cited)

Certainly, one can argue that if one delays a party in the performance of its contract, there will be certain amounts of damages incurred. But, how does one determine what those damages should be? And, although *some* amount of delay damages is 'reasonably foreseeable when a contract is made', how does one get a handle on what *amount* of damages would be foreseeable when a contract is breached?

So, how are amounts of damages proved?

First of all, mathematical certainty is not required.

In the case of business torts, an element of uncertainty in the assessment of damages is not a bar to recovery. (case cited) Mere uncertainty in assessing amount of damages should not jeopardize an injured party's right to recover as long as those damages are the certain result of the wrongdoing. (case cited) While damages may not be determined by speculation or guess, an approximate result is permissible if the evidence shows the extent of damages to be a matter of just and reasonable inference. (case cited) An element of uncertainty in assessment of damages is not a bar to their recovery. (case cited)

OK. So, 'an element of uncertainty' doesn't preclude damages. An 'approximate result' is permissible.

But, does an A-B = C result meet these requirements? Again, since neither the trial court's decision nor the Appeals Court decision attempted to segregate loss of productivity

factors that were due to principally designer error from loss of productivity factors principally attributable to Suffolk, the decisions cannot be understood other than as having the general contractor bear *some* liability for designer defects. That a somewhat simplistic formula may make the calculation of *all* lost productivity factors easier, does this make it fairer, particularly where a general contractor bids on the same contract documents as does a filed subbidder and the general contractor cannot protect itself directly with regard to designer defects because the general contractor has no contract with the designer.

D. Cases from other jurisdictions.

Courts have applied this method when the impacted work is so interwoven with other unaffected work that isolating the cost of the impacted work was not possible or where there are so many delays, changes or breaches that the particular damages of each cannot be traced. A contractor's simple failure to produce or to maintain adequate records will not persuade the court to apply the total cost method.

One court said that the simple lack of records does not justify the use of the total cost method. The contractor must show that it could not track the claimed costs as they were being incurred. Its failure to do what it could have done prevents application of the method.

III. FACTORS OF IMPORTANCE TO THE APPEALS COURT DECISION.

A. Suffolk had not granted time extensions. There seemed to be a difference of opinion between the parties as to whether or not Central even requested them. But, the Appeals Court referenced Central testimony to the effect that Suffolk had made it clear that no time extensions would be granted. (ED. Although not referenced in the decision, there is Massachusetts law to the effect that a party can be excused from performing an otherwise-required act when performing that act is clearly futile.) The Court figured into the discussion that Suffolk had a financial incentive to avoid time extensions, so it could earn the 200k bonus for finishing the job on time, a bonus that Central would have not been sharing.

B. By not granting Central time extensions, Suffolk had deprived Central of its sole remedy in the event of delay and this was a material breach of contract. And, through cases such as the *Farina* case, discussed at some length in Squib Number 23, a failure to give legitimate time extensions makes the general contractor liable not for *delay* damages but for damages *due to the failure to grant a time extension!* This has always looked to me to be a distinction without a difference.

C. Courts have uniformly held that no-damages-for-delay clauses must be strictly construed due to the hard effects they impose. (ED. 'Strictly construing' something is tantamount to saying that all the criteria have to be met to enforce it, that there will not be liberality in favor of the party seeking to assert this clause.)

D. No-damages-for-delay clauses apply to situations where the delay caused an idle workforce. Such was not the case as to Central's work at this project.

E. The 'total cost' method looks for the difference between the amount bid for the work and the actual cost of the work.

F. The Court attributed to a finding of design defects that over 500 RFI's had been submitted to the architect over the life of the project with 200 from Central alone. The architect issued over 200 ASIs. And, "The volume of RFIs and ASIs was not only unusual for a project of this size, but of any size."

G. The Appeals Court stated that no previous Massachusetts appellate court appears to have addressed the use of the total cost method.

IV. LESSONS TO BE LEARNED FROM THIS DECISION AND TO BE DEVELOPED IN SUBSEQUENT DECISIONS.

A. Inasmuch as the *Farina* case holds that a subcontractor can recover delay-like damages even in the presence of a no damage for delay clause when time extension requests are wrongfully denied, it's of great importance for general contractors and owners to give time extensions when appropriate to avoid this potential liability. The Court seems to consider a factor in imposing the damages in this case that Suffolk had an incentive to not grant time extensions, so that it could benefit from the 200k on time completion bonus.

B. While this decision is in favor of a subcontractor against a general contractor, the finding that the 'total cost' method of damages can be awarded probably greatly favors general contractors over subcontractors in the long run. This is because it is less usual for a subcontractor to pursue this type of claim than it is for a general contractor to pursue this kind of claim. The subcontractor's interest is only for its own trade whereas the general contractor is responsible for all of the trades. As such, the numbers at the general contractor level upon which a total cost type of claim can be filed will be usually much higher than any particular subcontractor's claim is going to be. Practically speaking, general contractors are more likely to include an attorneys' fee element in their annual budgets, which facilitates pursuing legal remedies as compared with subcontractors, many of whom make no provision for attorneys' fees as an element of overhead. Although it takes some time for the lessons of this decision to percolate, in the long run, this is probably a very favorable decision for general contractors because of the impact it is likely to have on their own claims of this nature against owners.

C. If the general contractor going forward will have some liability for design defects, this would seem the appropriate subject matter of more third party (pass-through) claims by general contractors against owners who will, in some cases, file fourth party claims against design professionals. Therefore, the general contractor will have to be very up on what the

claims and disputes clauses and procedures are in its general contract, being sure to get such claims in to the owner in time to meet their requirements.

D. Since this decision is an appellate decision, it can be cited for the elements of its holding as 'mandatory authority' meaning that other Massachusetts courts in future cases with similar claims will have to apply this decision to those facts and claims. Superior court decisions are not '*mandatory* authority' but are, at best, '*persuasive* authority'. That means that while another court might *consider* the logic and holding of a prior superior court case, the other court doesn't have to necessarily apply the holding of that case to its own case.

E. Delays necessarily lead to 'acceleration', meaning the subcontractor or general contractor has to throw additional workers and crews at a job to try to regain the schedule. So, in cases where the estimated hours for a job are being greatly exceeded, this generally suggests one of two possible results. The first is that the contractor blew the bid and there is no judicial remedy that can apply to this situation. But, where the hours are being greatly exceeded and the estimate seems sound, the very presence of sufficiently greater hours indicates either a delay or the necessary acceleration necessary to overcome the delay. Put another way, it is incumbent on project management to track the hours carefully during the course of a job so that claims for delay or acceleration are filed *earlier* rather than *later*. Whether the claims are ultimately compensable claims or not, the fact that the owner is aware that such a claim is likely to be filed might cause the owner to change its conduct of the job and/or the design professional's conduct of the job to minimize further losses down the road. This lessens the damage a party suffers from that point forward, an immediate boon to the bottom line.

F. My experience has been that owners rarely pursue architects for design defects. Or, at least, they pursue such claims less aggressively than the facts and the law might suggest. With general contractors now apparently having some liability for design defects, more pass-through-type claims are going to be received by owners. This might (should) make owners more interested in receiving claims from the general contractor in the nature of design errors earlier in the job. Much as a general contractor would always like to have a larger amount of subcontract balances against which to assert backcharges, there is no reason that this doesn't make equal sense as to the relationship between owners and architects. This might also cause owners to make sure design professionals have sufficient errors and omissions insurance, with lower deductibles and lower self-inserted retention.[7]

G. One would think that this decision will have some impact on the evaluation of change orders at the owner-architect level as they arise. Namely, is a particular change order the result of a true changed condition or an actual differing site condition at the project? Or, does it result from a design defect?

H. While elements of this decision had Suffolk being responsible for design defects, other grounds for the decision included claimed errors and mistakes in Suffolk's performance, including: not coordinating the steel erector and the window installer; failure to provide for timely and coordinated delivery of the hollow metal door frames; failing to ensure that the buildings were weather tight and properly heated; failing to establish a proper flow to the job, so

Central didn't have to keep going back to areas where it had already performed some work; 'stacking of the trades' due to some of these former errors.

V. CONCLUSION.

Can this case be further appealed? The answer to this is probably 'no'. As mentioned earlier, dissatisfied litigants can seek 'further appellate review' from the Supreme Judicial Court when they are not happy with the Appeals Court result. There is, however, no *right* to have that review. I've seen statistics that suggest that the SJC grants further appellate review only in about five percent of the cases in which it is sought.

The SJC reviews cases at the Appeals Court level and sometimes decides to take direct appellate review of certain cases to the SJC from the Appeals Court before the Appeals Court renders a decision. Where the holdings in this case could have enormous impact upon public policy concerns – increasing construction costs to pay for these types of claims - it's surprising that this did not occur here. As many lawyers, subcontractors and general contractors have found by trying construction cases, there is not a tremendous amount of judicial expertise with pure construction law subjects. Had this case been pitched more towards the competitive bid statutes and the anticipated increases in public construction which will surely result from this decision, a different result might have been reached.

I think that this decision is one of the most important appellate decisions that has come down in the last several years. Because general contractors will pursue pass-through claims for design defects, hopefully, this decision will lead to better quality bid/contract documents. In a sense, the best claims are the ones that never happen.

I think that general contractors should be excited about this decision. This does not exactly square with the 'economic loss doctrine' and offers potential relief from that claim-killing principle of law. Under the 'economic loss doctrine', a party can not recover for claims for negligence unless there is either property damage or personal injury. And, for reasons that have never made sense to me, the courts have held that a ' mere loss of money' is not property damage. There are a number of exceptions to this rule but the rule still applies in a majority of cases. This is because the owner might have *contractual* liability to general contractors for design defects affecting contractors. And, the economic loss doctrine, which applies to *negligence* claims, is a completely different thing.

I am sure that we will be reading about other 'total cost' cases in Massachusetts over the next several years. Of particular interest is how the courts will distinguish the recoverability of 'total cost' damages where there have been design defects from claims that can't be brought for design damages because of the 'economic loss doctrine.'

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[1] A 'squib' is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a 'squib' as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an

overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

[2] Note that under Massachusetts law, even when there is valid pay-when-paid language, there is a judicial decision that says that this defense – pay-when-paid – can't be raised by the general contractor's surety, even when that same defense can be raised by the general contractor. It's unclear from these decisions whether or not the Court applied this principle of law to the surety and gave a judgment against the surety. The case establishing this is a superior court case, not an appellate case. The decision also was dated July 12, 2004. It's unclear when the Central-Suffolk project began. If it began before July 12, 2004, there would be an argument that this didn't represent the law as of the time the project commenced work. Usually, the law applicable to any given situation is what the law was at the time the situation arose. Possibly, the July 12, 2004 decision was later than when this project began. This is impossible to determine from the record.

[3] Note that this job was supposed to be substantially complete by July 1, 2005. The trial court issued a judgment on December 19, 2013. The Appeals Court then issued *its* decision on March 29, 2017. So, the more recent decision was issued nearly twelve years after the job was supposed to be substantially complete. And, the litigation may still not be over if one of the parties seeks further appellate review from the Supreme Judicial Court (something that is granted, however, in only about 5% of the cases in which it is sought.) A couple of things to keep in mind. Massachusetts contract cases accrue interest at the rate of 12% per year a case is pending. This case has earned a tremendous amount of interest. And, the case might still not be over yet. But, the real point of this endnote is this: cases get tried years and years down the road. How many of your current employees were working for you twelve years ago? Most of them have left, right? And, even for those who remain, how is anyone going to remember in any detail what happened twelve years ago? To better protect yourself, you need to do two things. The first is to take a lot of dated pictures and videos. In litigation, a good picture is worth greatly in excess of one thousand words, particularly when you are dealing with issues involving claimed delays. And, secondly, insist upon your supers giving you excellent, detailed daily reports. This is a different thing altogether from 'foremen's logs'. If the daily reports are prepared properly, every single statement contained within them goes into evidence as evidence, because these documents are considered to be business records, which are an exception to the hearsay evidence rule. With these records, your case will go into evidence much more quickly and accurately. Your present employees may remember little about such an old job. And, as for your former employees, many of them, for one reason or another, may simply no longer be available to you. And, for those who left on bad terms, you might not *want* them to be available, whether for you or for the other side.

[4] I am not exactly sure what this means but it comes directly from the decision.

[5] Here's a practice point. A lot of pro-subcontractor decisions come out of cases on public projects against general contractor payment bonds. The first Massachusetts case recognizing the 'Eichleay' formula (for general and administrative overhead delay damages) was such a case, a case in which the subcontractor prevailed. In another such case, there is an appellate decision holding that attorneys' fees can be awarded which exceed the actual amount of a judgment, in a case in which the subcontractor prevailed. And, of course, there is this decision. The case law interpreting these types of claims – against general contractor payment bonds on public work - hold that the statute governing such claims is remedial legislation, which should be liberally and broadly interpreted to accomplish the legislative goal of getting subcontractors paid. So, for subcontractors, on a case with a difficult issue, there is some slight advantage for the subcontractor. And, for general contractors and their sureties, on a case with a difficult issue, there may be (at least) a slight disadvantage for the general contractor. In the litigation game – along with many other things in this life – knowing when and where to pick your battles has its advantages. One of the issues on appeal in this case is the $471,682 attorneys' fee awarded Central by the trial court., which is approximately 150k higher than the amount of damages awarded to the subcontractor. Central had actually requested $622,300 in attorneys' fees and $24, 628.94 in disbursements. The judge cut the fees by a quarter and awarded no disbursements. Attorneys' fees are an element of an award under the general contractor public payment bond statute, C. 149, s. 29. In most other litigation, generally speaking with some small exceptions, each side bears its own attorneys' fees, win or lose. This suggests that challenging issues in such a case can only help the plaintiff – because of the potential for attorneys' fees award – and can only hurt the defendant general contractor and its surety, who have to pay such awards when a plaintiff wins but who, themselves, don't get such an award when they win.

[6] How often does it happen with a difficult job that each side doesn't bear at least some responsibility for delays?

[7] For readers interested in some potential ways to pursue design professionals, see an older article that I wrote as contained under the 'Construction law articles' button on my website, the title of which article is "Architect Liability To Contractors For Errors In The Plans And Specifications And Otherwise".

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