Clause 4: Nasty Shock!

Focus on Legal by **Peter Rumgay**

The contract conditions which tend to exercise us the most in the construction industry are the time and money clauses, I think it fair to say that we would all agree with that.

In our or Hong Kong Standard form of Building Contract these would be clauses 11, 23 and 24.

Most of the other clauses more often than not just seem to be included to pad out the schedule of conditions and tend not to come into play.

From time to time however one or other of these "also ran" clauses comes under the spotlight as one of the parties (or their consultants) tries either to extricate itself from some mess or to put a sort of contractual half nelson (wrestling grip of formidable impact) on the other.

Just such a thing happened recently on a project where clause 4 was brought to bear.

Clause 4 concerns statutory obligations, notices, fees and charges.

The pertinent part of clause 4(1) to which this narration relates reads as follows:

"*The Main Contractor shall comply with and give all notices required by any... Ordinance... regulation or byelaw... The Main Contractor before making any variation from the Contract Drawings... or the Contract Bills necessitated by such compliance shall give to the Architect a written notice specifying and giving the reason for such variation and the Architect may issue instructions in regard thereto. If within seven days... the Main Contractor does not receive any instructions... he shall proceed... and any variation thereby necessitated shall be deemed to be a variation required by the Architect.*"

In the present instance the Architect took the position that regardless of what he had shown on his drawings or had specified, it was for the Contractor to construct whatever was necessary or in such a manner as would comply with the regulations but if he had constructed what was drawn and or specified but then the statutory inspector came along and found it not to comply with the regulations and required alteration then pity help the contractor; he was to make the work compliant at his own cost and he would also be responsible for any delay caused thereby.

Not surprisingly this all came as a nasty shock to the contractor.

So who is right and who is wrong?

Well, the clause does say that "*the Main Contractor shall comply with*" and appears to be suggestive of an onus on the contractor to scrutinise the drawings and contract bills for statutory compliance and in the event of non-compliance to resolve what variation is required and to thereafter inform the Architect and in the absence of response from him to merely proceed with the variation.

Vincent Powell Smith's observation of the comparable clause in the UK version of this form of contract (JCT63) is that it is ambiguous and that by amendment in 1976 the ambiguity was rectified. It is to be noted that the rendition of the clause in the present day Hong Kong Standard Form equates with the pre 1976 wording of the UK form and that therefore our clause 4 is ambiguous. There is therefore a potential contra proferentem argument at the contractor's disposal.

Keating's 4th edition considered the implications of contravention of statute or bye-laws and is therefore instructive of how an arbitrator may view the contractor's responsibilities under clause 4.

At page 108 the general principle is announced whereby "*what is done in contravention of the provisions of an Act of Parliament cannot be made the subject-matter of action.*" But that is too bald a statement to be illuminative, for Keating then draws attention to the distinction between "*contracts illegal as formed and contracts illegal only as performed" and informs*

us that a "contractor cannot recover payment for carrying out work which on the face of the contract must contravene the statutory provision."

By way of illucidation on this point Keating then refers to the remarkable case of **Stevens v Gourley** where a contractor built a shop made from wood and resting on wooden foundations! The deliberate intention was to evade statutory provisions requiring that buildings should be made of incombustible material. Clearly the contract was illegal and the contractor could not therefore enforce an action for payment.

Keating then considers the situation where contravention only arose in the mode of carrying out the work and advises that according to the particular circumstances, the contractor may or may not be able to recover payment for the non-compliant work.

In illustration of the point Keating refers to the case of **Townsend (Builders) Ltd v Cinema News**. In that case the work specified did not contravene the relevant by-law and therefore there was no "*fundamental illegality pervading the whole work and the whole contract*" and so, upon regard having been had to certain matters, the contractor was entitled to recover payment even though the work as he had constructed it (failure, if memory serves correctly, to provide adequate separation between room used for human habitation and toilet) did contravene the by-law.

The matters considered were: the by-law in question; the contractor's ignorance until the work was far advanced that there would be a contravention; temporary waiver of the contravention by the local authority and the ease with which compliance could be secured by the insertion of a partition. Keating recounts these as special circumstances but for which the contractor would not have recovered payment.

It is to be noted that although the contractor won his right to payment for the work done the Employer won on a counterclaim for the cost of bringing the work into conformance on the basis of the contractor's breach of an express term to comply with the by-laws.

The form of contract in question was a forerunner to JCT 63 and contained a comparable clause to clause 4.

At pages 210 and 211 Keating observes that the architect has a duty to know the general rules of the law contained in "*all statutes and by-laws affecting the building, the main principles of town and country planning law, and private rights likely to affect the works." Keating therefore concludes that "if his working drawings, plans or directions result in a building which contravenes the by-laws or building regulations which apply to it, this is some, but not conclusive, evidence of breach of duty*."

It is arguable that in such circumstances the architect is in breach of the implied term that he will provide the contractor with correct information concerning the works in such a manner, and at such times as is reasonably necessary for the contractor to have, in order for him to fulfil his obligations under the contract.

If that were the case then it would seem to follow that the contractor would have a good argument that he is entitled to payment for work done (subject to there being no fundamental illegality) which contravened the law and that the employer could not mount a counterclaim for the cost of rectification as the contravention was brought about by his architect in breach of an implied term of the contract.

Duncan Wallace (in his commentary on the JCT 63 standard form) sees clause 4 as giving the contractor design responsibility however unintended that may have been by the drafters of the standard form.

He sees the contractor having an increased liability by virtue of clause 4 for the design and effectiveness of the final result. He gives as an example that if the intended function was the provision of strength and stability (in compliance with building regulations) then a failure in strength due to design or workmanship would also be a breach of clause 4 and the contractor would be liable.

In Hudson's 10th edition he considers that the contractor would be liable for the cost of bringing work to conformity but that the architect could in certain circumstances be liable to the contractor in tort.

But what of the apparent onus on the contractor to scour the drawings and specification for non-conformities and to then propose appropriate variations.

The matter came before the court in **EDAC v Moss (QBD 1983-84) 2 Con LR 1**. The case concerned liability for leaking curtain walling. The contract was in the JCT 63 form (materially the same as the Hong Kong Standard Form). One of the questions to be answered was "*Were Moss in breach of any and, if so, which contractual duties in respect of curtain walling defects?*"

Clauses 1, 2, 4, 6, 8, 27 and 28 were cited (at page 29). The judge considered that Moss had failed to comply with clause 4 and referred to Townsend's case even although he recognised that such a decision was harsh when Moss were totally unaware of the breach.

However he did not leave it there (page 35). He recognised that in breaching clause 4 they were acting in accordance with clause 1. "*It was Alpine's drawings issued by Morgan as architects under the head contract which caused Moss to act in breach of condition 4(1).*"

The judge noted that the architects under the head contract were the agents of the employer and that therefore Moss would be entitled to an indemnity from the employer. In those circumstances and where the contractor did not actually know or ought not to have known of the non-compliance then the judge found that "*the doctrine of circuity must apply to defeat EDAC's claim.*"

On the question of whether or not Moss ought to have known of the non-conformity the judge determined (page 31) that as "*an architect with experience of curtain walling spent a day and a half examining the drawings without detecting defects, I cannot possibly conclude that they were so obvious that moss must necessarily have come to know of them.*"

As to the contractor's obligation to determine what variation may be required so as to make the work compliant the judge merely (page 36) considered that upon becoming "*aware of the design defect which necessarily involved a breach of the regulations they should have given notice of it in accordance with the condition.*"

He did not consider that the contractor had to determine an appropriate variation but merely had to give notice to the architect of the design defect.

It would therefore seem to be open as to whether or not the contractor must determine the appropriate variation and put it to the architect and faced with silence from the architect to thereafter carry it out as a variation. On the bare wording of the clause it would seem that he is thus obligated.

However, against this position is the judge's consideration that the architects were found lacking by their failure to instruct a resolution, "*Instead of grappling with the situation, Morgan simply allowed Alpine to make repeated attempts to stop the leaks by external applications of mastics, without even issuing instructions authorising them under condition 11 of the head contract.*"

This raises the alternative proposition that the contractor could request an instruction from the architect to resolve the non-conformance and that failure by the architect to supply such an instruction within an appropriate time could entitle the contractor to remedies.

And of course the disclaimer:

Where, which is denied, I have been emboldened sufficiently so as to make definitive statements or conclusions I should be grateful if you would read these as being deemed to be couched in a suitable degree of circumspection upon which deeming provision I shall rely lest this article be cast up against me in the event of any future apparently incongruous position I reserve the right to take depending on which way the wind is blowing. There how's that.

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