"Gone Are Those Good Old Days After Adopting the Proposed New Private Form of Building Contract 4th Draft 4th Sub-Draft July 2002?"

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The current Hong Kong private forms of building contract are based on the English JCT 63 forms of contract, the interpretation of which has been the subject of many court decisions.

It is fair to say that at least at some stage during the drafting of the proposed New Private Form of Building Contract, it was drafted in such a manner so as to avoid these cases and was completely biased in favour of the Employer.

The current draft of the New Private Form of Building Contract (4th sub-draft of the 4th draft) ("the current draft") has perhaps as a result of industry negotiations adopted a less bias approach.

This is the first part of an article on the current draft. In this part, three aspects, viz checking of drawings, extension of time and liquidated damages, will be considered.

Checking of Drawings

In London Borough of Merton v Stanley Hugh Leach Ltd (1985) 32BLR 51, the court ruled inter alia that under the JCT 63 forms:

• There was an implied term that the Employer would not hinder or prevent the contractor from carrying out its obligations in accordance with the terms of the contract and from executing the work in a regular and orderly manner.

• The implied undertaking by the building owner extended to those things which the Architect had to do to enable the contractor to carry out the work and the building owner would be liable for any breach of this duty on the part of the Architect.

• An implied term that the Architect would provide correct information concerning the work was a particular application of the more general term of the first aforementioned item.

Per curiam: Clause 3(4) [of the JCT Form]; imposed on the Architect an obligation to furnish the contractor with drawings and details as and when necessary; that it must have been in the contemplation of the parties that the Architect would act with reasonable diligence and would use reasonable care and skill in providing the information; and that the contract does not impose a duty on a contractor to check the drawings to see if there are discrepancies or divergencies.

• The first part of the implied term alleged was no more than a re-statement or particular application of the Employer's contractual undertaking that there would be a person answering the definition of "the Architect" and that the Architect would be reasonably competent and would use that degree of diligence, skill and care in carrying out the duties assigned to him under the contract.

Clause 2.3 of the current draft maintains this position (although previous drafts made it the contractor's obligation to check contract documents for discrepancies and divergencies).

However, Clause 6.2(1) of the current draft requires the Contractor to notify the Architect if he finds when carrying out the works or an instruction requiring a variation, will infringe any statutory requirement.

This appears to be appalling as the Architect as a professional in the field should know better

on these sorts of matters than the Contractor. Whilst JCT 80 contains a similar requirement, adopting an apparently appalling clause from another contract does not make it less appalling.

Moreover, interesting results may arise when applying Clause 6.2(1) of the current draft, for example, if the Architect issues a variation without having amended drawings incorporating the variation approved by the Building Authority and/or if consent has yet to be given by the Building Authority to carry out such varied work, the Contractor cannot proceed with the varied work as it is illegal to do so, amounting to an infringement of statutory requirements. If the Contractor notifies the Architect accordingly under Clause 6.2(1), it will be interesting to know whether the Architect would instruct the Contractor to stop work.

The Employer's consultants are supposed to produce contract documents which are in line with a design which meets statutory requirements. This is what they are employed and paid to do by the Employer. Contractors merely have to assist these professionals to do what they are paid to do, if the contractors finds any discrepancy, divergency or infringement.

Extension of Time

Merton v Leach (supra) held inter alia that under JCT 63 forms:

• If the Architect is of the opinion that because of an event falling within Clause 23(a)-(k) progress of the work is likely to be delayed beyond the completion date, he must estimate the delay and make an appropriate extension to the date of completion. He owes that duty not only to the contractor but also to the building owner.

• The giving of notice by the contractor under Clause 23 was not therefore a condition precedent, before the Architect was due under a duty to consider any possible extension of time.

• A document could be considered a proper notice even if it did not specify a cause of delay with sufficient detail for the Architect to form an opinion as to whether the cause fell within Clause 23(a)-(k), because of the different criteria which apply to the notice and to the opinion. The intention of the contractor's notice is simply to warn the Architect of the current situation regarding current progress. It is then up to the Architect to monitor the position in order to form his opinion.

• The Architect was not relieved of his duty by the failure of the contractor to give notice or give notice promptly.

Where a contractor has reached the contractual date for completion but has not achieved practical completion, he enters a period of culpable delay during which he is liable to pay liquidated damages. Before the Employer can deduct liquidated damages it is a condition precedent under the current HKIA/HKIS Conditions of Contract (which are based on the JCT 63 forms) that the Architect must issue a certificate of non-completion. Once this certificate is issued the Employer can then take liquidated damages. However if during this period an event happens which is not the contractor's responsibility and falls within the confines of Clause 23 for which the Architect would grant an extension of time, the question at issue is whether under the contract the Architect has the power at this stage to issue an extension of time.

If the answer is yes and the delay is one for which the Employer is responsible, the Architect simply grants an extension of time and the Employer maintains his rights to liquidated damages. If the delay is not caused by the Employer but is one which falls into the neutral category, the Architect decides whether to grant an extension of time on the circumstances. If, however, the answer is no and the Employer is responsible for the delay then this falls under the doctrine of prevention, time will become at large and the liquidated damages clause will become unenforceable.

There are two major arguments in support of the latter view, ie that the Architect does not have the power to grant an extension of time.

Firstly, a strict reading of Clause 23 for extensions of time, indicates that the delay must of itself delay the works beyond the date for completion. If the date for completion has already passed this clearly cannot happen.

Secondly, the wording of Clause 22 for liquidated damages makes it unclear whether the Architect can issue more than one certificate of non-completion. Indeed, if it was intended that the Architect could issue more than one certificate it is suggested that the clause would specifically say so, and give instructions as to matters such as the repayment of liquidated damages already taken from the contractor.

Duncan-Wallace in the *1979 Supplement to Hudson's Building and Engineering Contracts* at

page 653 (10th Edition) states that (at the time when he wrote these works) no standard form of contract in the UK contains a provision which allows an Architect to extend time in a period of contractor's culpable delay, and in *Construction Contracts: Principles and Policies in Tort and Contract* at page 641; the provision in the Singapore Institute of Architects Conditions of Contract is stated as being the first time in any standard form which permits the granting of extension of time in periods of contractor's culpable delay.

Powell-Smith and Sims in *Building Contract Claims* (1st Edition) at page 25 states that the wording of the clause suggests that if a delay occurs after the date for completion the Architect is under no obligation to grant an extension of time, and in all probability cannot do so if the delay is the 'fault' of the Employer in law.

Keating in the second supplement to *Building Contracts* (4th Edition) does not address the issue directly but considers it unclear as to whether the Architect has the power to grant more than one certificate of non-completion.

[The reason for referring to these old editions of textbooks is because their current editions are not quite relevant to JCT 63 forms.]

To these one should also bear in mind the maxim that in the event of ambiguity the extension of time clause and the liquidated damages clause will be construed strictly contra proferentem (Peak v McKinney (1970) 1 BLR 111), though standard contracts which are negotiated amongst potential users may not be subject to such rule unless the Employer makes substantial amendments to the printed text making it no longer a "negotiated document" but his own contract (*Building Contract Dictionary*, 3rd Edition by Chappell, Marshall, Powell-Smith and Cavender).

The arguments which support the opposite view that the Architect does have the power to grant extensions of time in such circumstances are based primarily upon what would be considered a reasonable and commercial interpretation of the contract.

Clause 25 of the current draft governs the issue of extension of time. Whilst it provides numerous grounds for extensions of time, it requires the contractor to give two notices, substantiations, interim and final particulars. (In the previous versions of the same, if the contractor fails to submit the second notice or sufficient detail, the Architect shall consider the extension of time only to the extent that he is able to on the available information).

Clause 25(3)(5) of the current draft expressly empowers the Architect to grant extension of time for delays occuring during the contractors culpable delay.

Notwithstanding the ruling in Merton v Leach (supra), very often architects consider themselves as assuming the role of a judge or arbitrator who can simply sit back and only need to consider and to rule upon "substantiations" submitted to them rather than (as the Architect) taking a positive initiative (as required by Clause 23 and upheld in the above case) to discharge their duties under Clause 23.

Clause 25 of the current draft encourages such an attitude as the Architect is only obliged to respond to the issue of extension of time after the contractor's second notice of delay which needs to include substantiations and particulars. Whilst the clause sets a time limit for the Architect to decide (see Clause 25.3(2)), he can be evasive by putting the contractor off (which is not uncommon) by arguing that the substantiations or particulars are not satisfactory and therefore does not trigger the time running against the Architect.

It is submitted that under Clause 25 of the current draft, contractor's notice of delay is not a condition to its right to an extension of time.

The issue of condition precedent was considered by the House of Lords in the case of Bremer Handelsgesellschaft MBH v Vanden Avenne-Izegem [1978] 2 Lloyd's Rep 109, which arose out of a dispute over the sale of soya bean meal. Lord Salmon referring to how the rights of the parties were affected by the lack of a proper notice had this to say:

"In the event of shipment proving impossible during the contract period, the second sentence of clause 21 requires the seller to advise the buyers without delay of the impossibility and the reasons for it. It has been argued by the buyers that this is a condition precedent to the sellers' rights under that clause. I do not accept this argument. Had it been a condition precedent, I should have expected the clause to state the precise time within which the notice was to be served and to have made plain by express language that unless the notice was served within the time, the sellers would lose their rights under the clause."

From what Lord Salmon has said it seems clear that for a notice to be a condition precedent to a right for more time, the wording of the clause would need to be such that a failure to serve notice would result in loss of rights.

The worst to contractors under the current draft perhaps is Clause 33 which in effect gives the Architect unlimited power to instruct acceleration, under which, notwithstanding there is a Contract completion date, the Architect can instruct works to be completed earlier than the Contract completion date without any agreement with the contractor on the price for the acceleration.

Liquidated Damages

Under JCT forms of contract, Clause 23 only empowers the Architect to grant extension to the whole of the Works but not to individual sections. If there is any delay caused by the Employer to a section, this constitutes an act of prevention and the time for completion for individual sections will be set at large such that no liquidated damages are chargeable for the sections.

While the Contract Conditions may be amended to contemplate completion dates for sections of works, Clauses 21 and 22 of the Contract Conditions only envisage completion of the whole of the works, with liquidated damages chargeable only for failure in completing the whole of the Works (but not failure to complete individual sections) with a "sliding scale" under Clause 16 to reduce liquidated damages if part of the works is taken possession of by the Employer.

In such cases, the provisions for liquidated damages are probably void due to uncertainty/ discrepancy in calculating sectional damages by using the liquidated damages rates in the Contract (if any) on one hand and by applying Clause 16 on the other hand. If a particular section is delayed, it is not known whether the corresponding liquidated damages rate (if any) stated in the Appendix to the Contract Conditions for that section or that calculated under Clause 16 (this can be calculated on a "sliding scale" using the liquidated damages rate stated in the Appendix to the Contract Conditions for that section as the denominator or on a "sliding scale" using the total of the liquidated damages rates stated in the Appendix to the Contract Conditions for all sections as the denominator) is the genuine pre-estimate of the loss to the Employer due to such delay.

Keating at page 330 of *Building Contracts*, 4th Edition acknowledged this problem which is now dealt with in the proposed new standard private form of contract.

Clause 24.1(2) of the current draft now makes it clear that more than one certificate of non-completion can be issued and thus removes the problem. Such certificate is a condition precedent to the Employer's right to deduct liquidated damages for delay in completion.

Just like the situation under JCT 63 forms, it is up to the Employer to decide whether liquidated damages should be deducted from payment due to a contractor and the Architect should not make such deduction in the payment certificate. In Lubenham v South Pembrokeshire District Council (1986) 33 BLR 39, the Architect did so and the court ruled that "*they were doing their incompetent best*".

As said above, under JCT 63 forms, a valid certificate from the Architect under Clause 22 is a condition precedent to the Employer's right to liquidated damages. A certificate issued by the Architect under Clause 24.1 of the current draft is still a condition precedent to the right of liquidated damages but its nature is fundamentally changed. Clause 22 of the JCT 63 forms requires the Architect's certificate that "*in his opinion [the Works] ought reasonably... to have been completed*" by the completion date as extended. This requires a judgment and opinion. Clause 24.1 of the current draft on the other hand requires only a statement that the Contractor has failed to complete by the completion date. Such a statement is quite unnecessary for whether the Contractor has failed to complete by the completion date is a matter of fact which does not require any certification or statement to say the obvious.

Under the current draft, in addition to the Architect's certificate under Clause 24.1, the Employer's right to liquidated damages also depends on its written notice issued not later than the Final Certificate requiring payment for liquidated damages.

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