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40 ΒΑΣΑΝΙΣΤΙΚΑ ΠΡΟΒΛΗΜΑΤΑ ΣΤΙΣ ΟΙΚΟΔΟΜΙΚΕΣ ΣΥΜΒΑΣΕΙΣ

ΕΝΔΟΕΠΙΧΕΙΡΗΣΙΑΚΟ ΣΕΜΙΝΑΡΙΟ

ΤΜΗΜΑ ΤΕΧΝΙΚΩΝ ΥΠΗΡΕΣΙΩΝ
ΠΑΝΕΠΙΣΤΗΜΙΟΥ ΚΥΠΡΟΥ

20 & 21 Μαρτίου 2008

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ΑΝΑΛΥΤΙΚΟ ΠΡΟΓΡΑΜΜΑ

Πέμπτη, 21 Μαρτίου 2008

08:30-10:30	Παράταση Χρόνου και Ειδοποιήσεις
10:30-11:00	Διάλειμμα
11:00-13:00	Αποζημιώσεις για καθυστερήσεις, Θέματα Προγραμματισμού
13:00-14:00	Γεύμα
14:00-16:30	Θέματα σχεδιασμού και ευθύνης
16:30-17:00	Διάλειμμα
17:00-18:30	Δικαιώματα, Θεραπείες, Κακοτεχνίες, Υποχρεώσεις

Παρασκευή, 21 Μαρτίου 2008

08:30-10:00	Τροποποιήσεις Μετατροπές
10:30-11:00	Διάλειμμα
11:00-13:30	Πληρωμές και Απαιτήσεις

THE LATEST 40 CONTRACTUAL NIGHTMARES

1. *In the event of a Contractor or Subcontractor failing to submit delay notices and supporting details, will the right to an extension of time be lost or is there a legal argument to the effect that an extension of time should nonetheless be granted.*
2. *Is a notice, which does not quote contract clause numbers, adequate or does the Contractor or Subcontractor risk losing his contractual rights where these references are omitted?*
3. *What is meant by "time at large"? How does it affect the Employer's entitlement to levy liquidated damages for late completion?*
4. *What is meant by a Contractor or Subcontractor having to "constantly use his best endeavours to prevent delay"?*
5. *What is meant by a Contractor or Subcontractor having to "proceed regularly and diligently with the works"?*
6. *If it is impossible to separate delays caused by an Employer from delays caused by a Contractor/Subcontractor and there is a genuine doubt as to where responsibility lies, who is given the benefit of the doubt.*
7. *Where a Contractor submits a programme which is accepted by the Architect/ Engineer, is he obliged to follow it or can he amend it at his own discretion?*
8. *Who owns float time in the Contractor's programme, the Architect or Engineer or the contractor?*
9. *Is a Subcontractor obliged to follow a Main Contractor's programme?*
10. *Where at the end of the defects liability/maintenance period the Architect/Engineer draws up a defects list but due to an oversight omits certain defects, and a second list is prepared after the defects on the first list have been completed, will the Contractor/Subcontractor be obliged to make them good?*
11. *Is a Contractor/Subcontractor absolved from any liability if the Employer refuses him access to make good defects because he chooses to make them good himself?*
12. *Can a Contractor/Subcontractor be forced to carry out a variation after practical completion?*
13. *May an Employer /Purchaser levy liquidated damages if in the final analysis he suffers no loss as a result of the contractor's late completion?*
14. *Can a contractor challenge the liquidated damages figure included in a contract as being a penalty and unenforceable after the contract is signed. If so, will it be a matter for the Employer /Purchaser to prove the figure to be a reasonable pre-estimate of anticipated loss?*
15. *Where an Architect or Engineer fails to grant an extension of time within any time scale or in accordance with any procedure laid down in the contract, or if the contract is silent, within a reasonable time, will this result in the Employer losing his rights to deduct liquidated damages.*

16. *Can a Subcontractor who finishes late passed down to him liquidated damages fixed under the main contract which are completely out of proportion to the subcontract value.*

17. *Where is the line to be drawn between an Architect or Engineer's duty to design the works or a system and a contractor or subcontractor's obligation to produce working shop or installation drawings?*

18. *Who is responsible for co-ordinating design? Can a main contractor be legitimately given this responsibility even though he has no design responsibility?*

19. *Can a contractor be held responsible for a design defect where the Employer appoints an Architect and no provision exists in the contract for the contractor to undertake any design responsibility?*

20. *Where a Contractor or Subcontractor's drawings have been "approved", "checked" or "inspected" by the Architect or Engineer and subsequently an error is discovered, who bears the cost, the Contractor or Subcontractor or Employer. If the Employer bears the cost can he recover the sum involved from the Architect/Engineer?*

21. *Are there any restrictions on an Architect/Engineer's powers where the specification calls for the work to be carried out to the Architect/Engineer's satisfaction?*

22. *Can a Contractor or Subcontractor legitimately walk off site if payment isn't made when due.*

23. *Where a Contractor or Subcontractor includes in error an unrealistically low rate in the Bills of Quantities, can he be held to the rate if the quantities substantially increase or is he entitled to have the rate amended.*

24. *Where defects come to light after the Architect or Engineer issues a final certificate, does the Contractor or Subcontractor still have a liability or can he argue that once the certificate has been issued the Employer loses any future rights.*

25. *When tendering should a contractor make provision for preliminaries associated with the expenditure of provisional sums or will they be paid for as an extra in the final account?*

26. *Where a Contractor or Subcontractor whose tender is successful receives a letter of intent, is he at risk in commencing work or ordering materials or design if the project is abandoned before a contract is signed. On the other hand, is he entitled to payment.*

27. *Can contractors enforce pay when paid clauses*

28. *Who is responsible if damage is caused to a subcontractor's work by person or persons unknown; the subcontractor; contractor or Employer.*

29. *Where a Contractor or Subcontractor receives a variation order and submits a quotation which is neither accepted nor rejected before commencing the work, is the Contractor/Subcontractor entitled to payment of the sum quoted or can he be*

forced to accept a price based on bill rates or a fair valuation which is less than the quotation.

30. *Where work is omitted from the contract by way of a V.O. can a contractor or subcontractor claim for loss of profit?*
31. *Where work is omitted by way of a VO and given to another contractor is there a liability to pay loss of profit?*
32. *If an Architect or Engineer issues a variation after the extended completion date has passed but before practical completion, can an extension of time be granted or will liquidated damages become unenforceable. If an extension of time is appropriate will additional time be allowed up to the date work on the variation is completed or should the net extra time taken to carry out the extra work be added to the existing completion date.*
33. *Where a Contractor or Subcontractor successfully levies a claim against an Employer for late issue of drawings can the sum paid out be recovered by the Employer from the defaulting Architect or Engineer.*
34. *Will a Contractor or Subcontractor who fails to serve a proper claims notice and supporting documentation lose his entitlement to additional payment.*
35. *Where a delay to completion for late issue of drawings has been recognised, is it correct for loss and expense or additional cost claims in respect of extended preliminaries to be evaluated using the rates and prices in the Bills of Quantities.*
36. *If a final certificate and payment is substantially in excess of earlier certificates and payments, is the Contractor/Subcontractor automatically entitled to interest on the outstanding balance? The argument being that some or all of the money included in the balance should have been certified and paid when the work was in progress.*
37. *When evaluating a claim for additional cost due to the late issues of instructions and/or drawings and the like, is it appropriate to assess delays against the contractor's programme or should the effect on progress be the yardstick?*
38. *When ascertaining claims on behalf of Employers how should consultants deal with claims for finance charges which form part of the calculation of the claims.*
39. *Can a contractor or subcontractor recover the cost of preparing a claim?*
40. *What methods of evaluating disruption have been accepted by the courts?*

1. **In the event of a Contractor or Subcontractor failing to submit delay notices and supporting details, will the right to an extension of time be lost or is there a legal argument to the effect that an extension of time should nonetheless be granted.**

The standard forms of main contract and subcontract require the contractor and subcontractor to give notice when delays occur to the progress of the works. A question often asked is whether in the absence of a notice the contractor or subcontractor loses his rights to have the completion date extended. In other words, is the service of notice a condition to the right to an extension of time?

This matter was considered by the House of Lords in the case of ***Bremer Handelsgesellschaft MBH -v- Vanden Avenne-Izegem [1978] 2 LLR 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 situation of lack of notice was examined in the decision in ***Stanley Hugh Leach -v- London Borough of Merton (1985) 32 BLR 51*** in relation to JCT 63 where Vinelott J. summarised the position as follows:

> "The case for Merton is that the Architect is under no duty to consider or form an opinion on the question whether completion of the works is likely to have been or has been delayed for any of the reasons set out in clause 23 unless and until the contractor has given notice of the cause of a delay that has become "reasonably apparent" or, as it has been put in argument, that the giving of notice by the contractor is a condition precedent which must be satisfied before there is any duty on the part of the Architect to consider and form an opinion on these matters. The arbitrator's answer to this question was that "a written notice from the contractor is not a condition precedent to the granting of an extension of time under clause 23."

I think the answer to Merton's contention is to be found in a comparison of the circumstances in which a contractor is required to give notice on the one hand and the circumstances in which the Architect is required to form an opinion on the other hand. The first part of clause 23 looks to a situation in which it is apparent to the contractor that the progress of the works is delayed, that is, to an event known to the contractor which has resulted or will inevitably result in delay. The second part looks to a situation in which the Architect has formed an opinion that completion is likely to be or has been delayed beyond the date for completion. It is possible that the Architect might know of events (in particular "delay on the part of artists, tradesmen or others engaged by the employer in executing work not forming part of this contract") which is likely to cause delay in completion but which has not caused an actual or prospective delay in the progress of the work which is apparent to the contractor. If the Architect is of the opinion that because of an event falling within sub-paragraphs (a) to (k) progress of the work is likely to be delayed beyond the original or any substituted completion date he must estimate the delay and make an appropriate extension to the date for completion. He owes that duty not only to the contractor but also to the building owner. It is pointed out in a passage from ***Keating on Building Contracts (4th Edition)*** **at p 346**, which is cited by the arbitrator, that if the Architect wrongly assumes that a notice by the contractor is a condition precedent to the performance of the duty of the Architect to form an opinion and take appropriate steps:

> '... and in consequence refuses to perform such duties the employer loses his right to liquidated damages. It may therefore be against the employer's interests for an Architect not to consider a cause of delay of which late notice is given or of which he has knowledge despite lack of notice.'"

In ***Maidenhead Electrical Services –v- Johnson Controls (1996)*** the terms of the contract laid down that any claim for an extension of time had to be made within 10 days of the event for which the claim arises. It was held that a failure to comply with the notice provisions did not render a claim invalid.

The GC/Works/1 contract is somewhat out of line with the other standard forms of main contract in that it refers in clause 28 to the contractor's written notice being a condition precedent to a right to an extension of time unless otherwise directed by the Authority. GC/Works/1 (1998) Form however does not provide for the delay notice under condition 36 to be a condition precedent.

JCT 1998 makes it clear under clause 25.3.3.1 that the Architect's duties with regard to extending the completion date are not dependent upon service of notice by the contractor.

Clause 44 of FIDIC 4th Edition 1987 places the responsibility for determining the amount of extension of time on the Engineer.

Clause 44 of the ICE 5th edition is similarly worded.

The interpretation of the various subcontracts run in parallel with the main contracts. An exception is the FCEC blue subcontract form for use with the ICE main contract and as frequently used in the Middle East in conjunction with FIDIC and similarly worded main contracts. Clause 6(2) stipulates that it is a condition precedent to the subcontractor's rights to an extension of time for a notice to be served within 14 days of a delay first occurring for which the subcontractor considers himself entitled to extra time.

A recent Australian case ***Turner Corporation Ltd. (Receiver and Manager Appointed) –v- Austotal Pty Ltd. (1998)*** dealt with the situation of a delay caused by the Employer where the conditions of contract required a written delay notice as a condition precedent. The lack of notice lost the contractor the right to an extension of time.

"if the Builder, having a right to claim an extension of time fails to do so, it cannot claim that the act of prevention which would have entitled it to an extension of time for Practical Completion resulted in its inability to complete by that time. A party to a contract cannot rely on preventing conduct of the other party where it failed to exercise a contractual right which would have negated the effect of that preventing conduct".

The MF/1 and I Chem E conditions make no reference to a delay notice being a condition precedent to an extension of time.

SUMMARY

Where a contractor or subcontractor fails to serve a proper delay notice this will not result in the loss of rights to an extension of time unless the contract expressly states that the service of a notice is a condition precedent to the right to an extension of time.

2. Is a notice, which does not quote contract clause numbers, adequate or does the Contractor or Subcontractor risk losing his contractual rights where these references are omitted?

It is essential if contractors and subcontractors are to avoid the risk of losing their rights, to ensure that such written notices as are required by the contract are served in a correct and timeous manner. The wording of the clause with regard to what details must be included in the notice may be sufficiently clear to avoid uncertainty. However, frequently it is a little vague as to what is required in the way of notice.

Often disputes arise where a contractor or subcontractor serves what he considers to be an adequate notice to obtain a right under a particular clause. Sometime later when denying the rights an Employer may wish to plead inadequate notice. This can create serious problems for contractors and subcontractors, where the notice is to be served within a fixed timescale, if a purported notice proves to be defective.

In ***Monmouthshire County Council -v- Costello and Kemple Ltd. (1965) 5 BLR 83***, an argument arose as to whether under the ICE Fourth Edition a letter from the contractor to the Engineer was adequate notice necessary to commence arbitration proceedings. A similar situation arose with regard to an arbitration notice in ***Blackpool Borough Council -v- F Parkinson Ltd. (1991) 58 BLR 85***.

The contractual requirement with regard to notice was again an issue in the case of ***Rees and Kirby Ltd. -v- Swansea City Council (1983) 25 BLR 129***.

In the case of ***London Borough of Merton -v- Stanley Hugh Leach Ltd. (1985) 32 BLR 51***, the Court had to decide what constituted good notice under JCT 63. Mr. Justice Vinelott had this to say:

"But in considering whether the contractor has acted reasonably and with reasonable expedition it must be borne in mind that the Architect is not a stranger to the work and may in some cases have a very detailed knowledge of the progress of the work and of the contractor's planning. Moreover, it is always open to the Architect to call for further information either before or in the course of investigating a claim. It is possible to imagine circumstances where the briefest and most uninformative notification of a claim would suffice: a case, for instance, where the Architect was well aware of the contractor's plans and of a delay in progress caused by a requirement that works be opened up for inspection but where a dispute whether the contractor had suffered direct loss or expense in consequence of the delay had already emerged. In such case the contractor might give a purely formal notice solely in order to ensure that the issue would in due course be determined by an arbitrator when the discretion would be exercised by the arbitrator in the place of the Architect".

Keatings 4th Edition gives helpful guidance on notice:

"Contents of the application: A consideration of the effect of the Minter case raises some questions about what an application should contain in order to be valid under clause 11(6). No form is required, but it must, it is submitted, be expressed in such a way, or made in such circumstances, as to show that the Architect is being asked to form the opinion referred to in the sub-clause and identify the variation or provisional sum work relied on. It is thought that great particularity is not contemplated by the sub-clause. The Architect must know the variation of work relied on; he must also either be told in the application, or must be taken to know from his knowledge of the circumstances, sufficient to enable him to form the opinion that the contractor has been involved in direct loss and/or expense for which he would not be reimbursed under sub-clause (4). He does not have to have at the stage of forming his opinion sufficient details to ascertain the amount; it is sufficient if he has enough to form the view that there must be some loss. Thus, it is thought, providing the principles just suggested are met, an application is valid to found a claim at the ascertainment stage that interest should be included even though the application itself did not expressly refer to interest."

There appears to be no legal decision however, which places an obligation upon the contractor and subcontractor to include in a notice reference to the clause number under which the notice is given. It is in the interest of clarity however that reference to the clause number should be given.

SUMMARY

There is no legal requirement for reference to be given in a contractual notice to the clause number under which it is given. In the interests of clarity however the reference should be provided.

3. What is meant by "time at large"? How does it affect the Employer's entitlement to levy liquidated damages for late completion?

"Time at large" means there is no time fixed for completion or a time for completion no longer applies.

Agreements for work to be carried out are often entered into without a completion period being stated. Letters of intent often contain instructions to commence work without a completion date being agreed. In these cases time is said to be 'at large'.

Contractors who find themselves trapped into contracts where the time allowed for completion is too short, and the amount of money to which they are entitled is insufficient to meet their additional costs, are turning to alternative means of rectifying the situation other than the normal claims for extensions of time and additional payment.

For some time contractors have used the "time at large" argument in an attempt to avoid paying liquidated damages. Their normal approach is to say that the contract period has either never been established or that due to delays caused by the employer for which there is no express provision in the contract for extending the completion date, time becomes at large. This being the case, the contractor's obligation is merely to finish within a reasonable time.

The contractor successfully used this argument in the case of ***Peak Construction (Liverpool) Ltd. -v- McKinney Foundations Ltd.*** heard before the Court of Appeal in 1970. It was held that as delays on the part of the City Council in approving remedial works to the piling were not catered for in the extension of time provisions, the right to liquidated and ascertained damages was lost, leaving the Corporation with an entitlement to claim such common law damages as it was able to prove.

The more recent case of ***Rapid Building Group -v- Ealing Family Housing*** heard before the Court of Appeal in 1984, involved a contract let using JCT 63. Unfortunately due to the presence of squatters the housing association was unable to give possession of the site to the contractor on the due date. There is no provision in JCT 63 for extensions of time for late possession. The contractor was therefore able to successfully argue that time became at large. His obligation was altered to completing within a reasonable time and the Employer lost his rights to levy liquidated and ascertained damages.

If time does become `at large', the contractor's obligation is to complete within a reasonable time. What is a reasonable time is a question of fact: ***Fisher -v- Ford (1840)***. Calculating a reasonable time is not an easy matter and, as Emden's `Building Contracts', 8th edition, vol.1, p. 177, puts it:

> "Where a reasonable time for completion becomes substituted for a time specified in the contract ..... then in order to ascertain what is a reasonable time, the whole circumstances must be taken into consideration and not merely those existing at the time of the making of the contract."

In ***Charles Rickards Ltd. -v- Oppenheim (1950)***, Rickards agreed to supply a Rolls Royce motor car chassis and to build a body on it within seven months. They failed to complete the work by the agreed delivery date, but Oppenheim waived the original delivery date and new dates were promised and accepted by him. Eventually, Oppenheim gave written notice to Rickards stating that unless he received the car by a firm date, four weeks away, he would not accept it. The car was not delivered within the time specified and was not completed until some months later when Oppenheim refused to accept it.

The Court of Appeal held that he was justified in doing so. After waiving the initial stipulation as to time, Oppenheim was entitled to give reasonable notice making time of the essence again, and on the facts the notice was reasonable.

Vincent Powell Smith in his book 'Problems In Construction Claims' has this to say concerning 'time at large':

> "In a building context it is clear that the same principles apply. If for some reason time under a building contract becomes 'at large', the employer can give the contractor reasonable notice to complete within a fixed reasonable time, thus making time of the essence again: ***Taylor -v- Brown (1839).*** However, if the contractor does not complete by the new date, the employer's right to liquidated damages does not revive, and he would be left to pursue his remedy of general damages at common law."

In the case of ***Inserco Ltd. -v- Honeywell Control Systems (1996)***, Inserco contracted to complete all work by 1 April 1991. Due to additional and revised work, and lack of proper access and information Inserco was prevented from completing by 1 April 1991. There was no provision in the contract for extending the completion date and time was held to be at large.

SUMMARY

Time is at large when a contract is entered into with no period of time fixed for completion. Where this occurs the contractor's obligation is to complete work within a reasonable time. There may be circumstances which arise rendering a completion period fixed by the contract as no longer operable, again rendering time at large. An example is where a delay is caused by the Employer and the terms of the contract make no provisions for extending the completion date due to delays by the Employer.

4. What is meant by a Contractor or Subcontractor having to "constantly use his best endeavours to prevent delay"?

Many contracts require a contractor or subcontractor to constantly use his best endeavours to prevent delay. For example in the U.K., JCT 80 clause 25.3 4 states:

> "the contractor shall use constantly his best endeavours to prevent delay in the progress of the Works."

Best endeavours means that all steps to achieve the objective must be taken

'Keating on Building Contracts' Fifth Edition as at page 575 with regard to the wording as it appears in the JCT forms of contract has this to say:

> "This proviso is an important qualification of the right to an extension of time. Thus, for example, in some cases it might be the contractor's duty to reprogramme the works either to prevent or to reduce delays. How far the contractor must take the other steps depends upon the circumstances of each case, but it is thought that the proviso does not contemplate the expenditure of substantial sums of money."

The wording of 1 Chem E Clause 14.3 is a little different where it states that the contractor shall at all times use his best endeavours to minimise any delay in the performance of his obligations under the contract.

GC/Works/1 (1998) as at condition 36(6) states that the contractor must endeavour to prevent delays and to minimise unavoidable delays.

In the case of ***IBM UK Ltd. -v- Rockware Glass Ltd. (1980) FSR 335***, Rockware agreed to sell IBM some land for development, and one of the conditions of sale was that IBM "will make an application for planning permission and use its best endeavours to obtain the same". The local authority refused planning permission. IBM did not appeal against that decision to the Secretary of State. The parties disagreed on whether, by not appealing, IBM had failed to use its best endeavours to obtain planning permission.

The project was a substantial one, in which the purchase price of the land alone was £6,250,000. It was accepted that making an appeal to the Secretary of State would cost a significant amount of money.

The court said that taking into account the background to the matter, and the amount of money involved, it was not likely that the parties would have considered a refusal of planning permission at a local level to be the end of the matter, but that they must have had in mind the prospect of an appeal to the Secretary of State. The test of best endeavours which was approved was that the purchasers of the land "are bound to take all those steps in their power which are capable of producing the desired results, namely the obtaining of planning permission, being steps which a prudent, determined and reasonable owner, acting in his own interests and desiring to achieve that result, would take". It was expressly stated that the criterion was not that of someone who was under a contractual obligation, but someone who was considering his own interests.

Whilst it seems clear a contractor or subcontractor may be required to expend some money to meet the obligation to constantly use his best endeavours to prevent delay, the intention is not to expend large sums particularly where the delay has been caused by the Engineer or Architect.

The IBM decision as it doesn't involve a contractual obligation is unlikely to be followed in a construction case.

In the case of *Victoria Stanley Hawkins –v- Pender Bros PTY Queensland (1994)* it was held that the term "Best Endeavours" should be construed objectively. The test as to whether it had been fulfilled would be that of prudence and reasonableness.

There is a difference between the meaning of best endeavours and reasonable endeavours. Reasonable endeavours involves considering all relevant circumstances the commercial and financial aspects.

SUMMARY

Where a contract requires the contractor to use his best endeavours to prevent delay he is expected to keep the effect of any matters which could cause delay down to a minimum or to eliminate them if possible. If the delay is the contractor's responsibility in the absence of an obligation to use best endeavours, the alternative may be to allow the work to overrun the contract period and to pay liquidated damages.

If the delay is the responsibility of the Architect or Engineer the contractor is not required to expend substantial amounts of his own money to reduce the delay.

5. What is meant by a Contractor or Subcontractor having to "proceed regularly and diligently with the works"?

The Employer under most standard forms of contract is entitled to determine the contractor's employment if it fails to proceed regularly and diligently with the works. A definition of the term "regularly and diligently" has been provided in the case of ***West Faulkner Associates -v- The London Borough of Newham (1992) CILL 794.***

An action was commenced by the Architect for the recovery of fees and damages for wrongful repudiation of their contract. By way of defence and counterclaim the Council alleged among other things, default by the Architect in not serving a default notice to Moss, the main contractor, under clause 25(1)(b) concerning a failure to proceed "regularly and diligently" with the works.

If such a notice were served it would give rise to the Council's entitlement to determine. A failure by the Architect to serve the notice left the local authority powerless to effect a determination. Instead they were obliged to pay a substantial sum to the contractor for him to leave the site. The Court had to decide the meaning of the words "regularly and diligently" and whether in fact the contractor had failed to proceed in that manner. Judge John Newey QC having listened to expert evidence and had his attention called to various precedents, declared:

> "In the light of the judgements, textbooks and expert evidence I conclude that regularly and diligently should be construed together and that in essence they mean simply that contractors must go about their work in such a way as to achieve their contractual obligations. This requires them to plan their work, to lead and to manage their work force to provide sufficient and proper materials and to employ competent tradesmen, so that the works are fully carried out to an acceptable standard and that at all time, sequence and other provisions of the contract are fulfilled."

Judge Newey concluded that Moss didn't plan their work properly, didn't provide efficient leadership or management and some at least of their trades people were not reasonably competent and therefore they had failed to proceed regularly and diligently with work. It was Judge Newey's opinion that Moss' failures were very extreme and the Architect should have realised that Moss were not proceeding regularly and diligently and therefore served the notice. As a direct result of the Architect's failure to serve Moss with the notice, the Council were prevented from terminating the contractor's employment under clause 25. The Council suffered loss by having to pay the new contractors more than they would have had to pay Moss. They also incurred additional costs in respect of site supervision, additional Quantity Surveyors' fees, payments to tenants and lost rent. All these losses Judge Newey considered flowed from the breach by the Architect.

Clause 46 of FIDIC 3rd and 4th Editions describes the Rate of Progress

Quote: "If for any reason, which does not entitle the Contractor to an extension of time, the rate of progress of the Works or any Section is at any time, in the opinion of the Engineer, too slow to comply with the Time for Completion, the Engineer shall so notify the Contractor who shall thereupon take such steps as are necessary, subject to the consent of the Engineer, to expedite progress so as to comply with the Time for Completion".

Unquote

Any default by the Contractor may result in costs being recovered from the Contractor by the Employer.

Any persistent or flagrant neglect to comply with obligations in this respect could lead to termination of employment of the Contractor through the procedures of Clause 63.1.

SUMMARY

Contractors who are required to carry out work regularly and diligently must go about their work in such a way as to achieve their contractual obligations. This requires them to plan their work, to lead and manage their workforce, to provide sufficient and proper materials and to employ competent tradesmen so that the works are fully carried out to an acceptable standard and that at all times sequence and other provisions are fulfilled.

6. If it is impossible to separate delays caused by an Employer from delays caused by a Contractor/Subcontractor and there is a genuine doubt as to where responsibility lies, who is given the benefit of the doubt.

Arguments as to a contractor or subcontractor's entitlements where two competing causes of delay occur which affect the completion date were given a new lease of life by the publication of Keating on Building Contracts 5th Edition. There are more theories on this subject than there are days of the week.

Keating offers a number of alternative solutions at page 193 including:

a. ***the Devlin approach***. "If a breach of contract is one of two causes of a loss, both causes co-operating and both of approximately equal efficacy, the breach is sufficient to carry judgement for the loss." This would apply where for example there were two competing causes of delay, which entitled a contractor to an extension of time, a neutral event such as excessively adverse weather and the other being a breach such as late issue of instructions by the Architect. Following the Devlin approach the contractor would be entitled to extra time and loss and expense due to the late issue of instructions.

b. ***the dominant cause approach***. "If there are two causes, one the contractual responsibility of the defendant and the other the contractual responsibility of the plaintiff, the plaintiff succeeds if he establishes that the cause for which the defendant is responsible is the effective, dominant cause. Which cause is dominant is a question of fact, which is not solved by the mere point of order in time, but is to be decided by applying common sense standards."

c. ***the burden*** **of** ***proof approach***. "If part of the damages is shown to be due to a breach of contract by the plaintiff, the claimant must show how much of the damage is caused otherwise than by his breach of contract, failing which he can recover nominal damages only." An example would be a delay caused by the contractor having to correct defective work running at the same time as a delay caused by the Employer. Little in the way of extra cost would be recoverable as it would be difficult for the contractor to demonstrate that his losses were due to the Employer's actions and not his own.

The dominant cause of delay theory was rejected by the court in the case of ***H. FairWeather and Co Ltd -v- London Borough of Wandsworth (1987). H. Fairweather and Co Ltd*** were the main contractors for the erection of 478 dwellings for the London Borough of Wandsworth employing JCT 1963 conditions. Long delays occurred and Liability for those delays was referred to arbitration.

With regard to the delays the Architect granted an extension of eighty-one weeks under condition 23(d) by reason of strikes and combination of workmen. The quantum of extension was not challenged but Fairweather contended before the arbitrator that eighteen of those eighty-one should be reallocated under clause 23(e) or (f). The reasoning behind the contention was that only if there was such a reallocation could Fairweather ever recover direct loss and expense under clause 11 (6) in respect of those weeks reallocated to clause 23(e) or clause 24(1)(a) in respect of those weeks reallocated to clause 23(f).

The arbitrator's reasons are to be found in sections 6.11 and 6.12 of his interim award:

"6.11 It is possible to envisage circumstances where an event occurs on site which causes delay to the completion of the works and which could be ascribed to more than one of the eleven specified reasons but there is no mechanism in the conditions for allocating an extension between different heads so the extension must be granted in respect of the dominant reason.

I accept the respondent's contention that faced with the events of this contract, nobody would say that the delays which occurred in 1978 and 1979 were caused by reason of the Architect's instructions given in 1975 to 1977. I hold that the dominant cause of the de/ay was the strikes and combination of workmen and accordingly the Architect was correct in granting his extension under condition 23(d)."

In 6.14 he said:

"For the sake of clarity I declare that this extension does not carry with it any right to claim direct loss and/or expense."

The arbitrator's award was the subject of an appeal. The judge in the case disagreed with the arbitrator's ruling that the extension of time should relate to the dominant cause of delay. He said in his judgement:

" 'Dominant' has a number of meanings: 'Ruling, prevailing, most influential'. on the assumption that condition 23 is not solely concerned with liquidated or ascertained damages but also triggers and conditions a right for a contractor to recover direct loss and expense where applicable under condition 24 then an Architect and in his turn an arbitrator has the task of allocating, when the facts require it, the extension of time to the various heads. I do not consider that the dominant test is correct. But I have held earlier in this judgement that that assumption is false. I think the proper course here is to order that this part of the interim award should be remitted to Mr Alexander for his reconsideration and that Mr Alexander should within six months or such further period as the court may direct make his interim award on this part."

This decision places doubt upon Keating's "Dominant Cause" theory.

There is another rule, which is applicable to concurrent delays. Where an Employer delays the contractor he will not be entitled to deduct liquidated damages even though the contractor is also in default. ***(Wells -v- Army and Navy Co-operative Society (1903).***

With this in mind Keith Pickavance in his book "Delay and Disruption in Construction Contracts" as at page 352 states:

"Lastly, and this is a legal conceptual problem, the rules which apply to recovery of actual damages for delay, are not the same rules that apply to the relief of liquidated damages for delay. If C's progress on the critical path has been interfered with by D's act of prevention, then C must be given sufficient time to accommodate the effects of that and be relieved for LADs for a commensurate period.

On the other hand if, during the period of disruption to progress or prolongation for which an EOT has been granted, the predominant cause of C's loss and expense is disruption, or prolongation caused by a neutral event or his own malfeasance (for which he bears the risk), then he will not be able to recover damages for the compassable event unless he can separate those costs flowing from the compassable event from those costs which are at his own risk."

In other words if two delays are running in parallel one cause being the contractor's default the other a breach by the Employer, an extension of time should be awarded to the contractor but no monetary reimbursement.

The courts in the USA have also address this problem and applied the legal maxim that a party cannot benefit from its own errors. An Employer who deducts liquidated damages during an overrun period when the delay is being caused by both late issue of information and correcting defective work running concurrently could fall into this category. The USA court have taken the line that where this type of situation arises the Employer will not be entitled to deduct liquidated damages and for the same reason the contractor will not be entitled to payment of additional cost.

A simplistic approach sometimes taken is the "first past the post" approach. This adopts the logic that where delays are running in parallel the cause of delay, which occurs first in terms of time, will be used for adjustment of the contract period. Other causes *of* delay will be ignored unless they affect the completion date and continue on after the "first past the post" cause has ceased to have any delaying affect. In which case only the latter part of the cause of delay which was not first past the post will be relevant to the calculation of an extension of time.

There is no hard and fast rule concerning which delay takes precedence where a number of delays affect the completion date. Each case has to be judged on its own merits.

In the *Malmaison* case, Mr Justice Dyson (as he then was) determined an appeal relating to a dispute on the pleadings in an arbitration as to the extent of the inquiry which the arbitrator was entitled to undertake to resolve one of the contractor's extension of time claims. In the introductory paragraphs of his judgment, the judge recorded without dissent certain matters of common ground which had been agreed between the parties before him. They included the following:

It is agreed that if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event. Thus, to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour.

The approach there identified involves a recognition that anyone delay or period of delay may properly, as a matter of causation, be attributed to more than one delaying event. The suggestion is that it will be sufficient for the contractor to succeed on his monetary claim if one of the delaying events is such as to afford grounds for claiming financial recompense. Likewise, it will be sufficient to afford the architect a discretionary power to grant an extension of time if one of the delaying events affords grounds for extension of time.

The rationale advanced for this approach is that it does no more than reflect the allocation of risk agreed upon by the parties when they entered into their contract. In advancing that argument, reliance is commonly placed upon the respected observations of Judge Edgar Fay concerning the allocation of risk under the JCT Standard Form 1963 in *Henry Boot Construction Ltd v Central Lancashire New Town Development Corporation*.

The suggestion is that, in allocating risks as between themselves, the parties may be taken, firstly, to have recognised that anyone delay or period of delay might well be attributable to more than one cause but, secondly, to have agreed nevertheless that provided one of those causes affords grounds for relief under the contract, then the contractor should have his relief.

More recently, in *Royal Brompton Hospital NHS Trust v Hammond and Others (No 7)* further support for the *Malmaison* approach was afforded by Judge Seymour. In that case Taylor Woodrow had undertaken substantial hospital refurbishment works pursuant to a contract incorporating the JCT 1980 Standard Form. The ensuing litigation included a claim against the architect for negligence in granting extensions of time. Of the disputed extensions, one related to what was known as 'the commissioning ground', in respect of which the architect had granted an extension of 8 weeks. The judge dismissed the claim against the architect on this ground on the facts. However, by way of alternative finding, he said:

However, if Taylor Woodrow was delayed in completing the works both by matters for which it bore the contractual risk and by relevant events, within the meaning of that term in the Standard form, in the light of the authorities to which

I have referred, it would be entitled to extensions of time by reason of the occurrence of the relevant events notwithstanding its own defaults.

It is understood that subsequently, in dismissing an application for permission to appeal, the Court of Appeal described the judgment as 'exemplary'.

Although it has been described and considered in the two recent cases referred to, it is not to be thought that the *Malmaison* approach is new. Indeed, in the 1970s, few would have contended for any other approach. It was, for example, the approach adopted by the successful contractors in the *Fairweather* case.

SUMMARY

Of the various approaches discussed above, the main contenders, are the dominant cause approach and the *Malmaison* approach. It is thought that the latter is to be preferred.

7. **Where a Contractor submits a programme which is accepted by the Architect/ Engineer, is he obliged to follow it or can he amend it at his own discretion?**

The programme is usually intended to be a flexible document. If the contractor gets behind say due to the insolvency of a subcontractor he would normally expect to revise the programme in an attempt to make up lost time. For this reason programmes are rarely listed as contract documents. It is the requirement of most contracts that obligations provided for in contract documents must be carried out to the letter. With a programme containing some hundred or more activities, compliance with the start and finish date for each without the possibility of revision would be impractical. For this reason programmes should not be contract documents.

Some forms of contract will not permit the contractor to amend its programme once accepted without approval. For example, GC/Works 1/Edition 3 condition 33(3) states:

> "the contractor may at any time submit for the PM's agreement proposals for the amendment of the programme."

MF/1 clause 14.4 is worded along similar lines to the effect that the Engineer's consent is required before the contractor can make any material change to the programme.

Clause 14(4) of the ICE 6th edition empowers the Engineer to require the contractor to produce a revised programme if progress of the work does not conform with the accepted programme. The revised programme must show the modifications to the accepted programme to ensure completion on time. That apart there is no restriction placed upon the contractor who wishes to revise his accepted programme.

NEC2 calls on the contractor to revise and reissue his programme where delays occur to show:

- the actual progress achieved on each operation;
- the effect of progress upon the timing of the remaining work;
- the effects of implemented compensation events;
- the effects of notified early-warning matters;
- the contractor's proposals for dealing with any delays
- the contractor's proposals for correcting notified defects; and
- any other changes the contractor proposes to make to the accepted programme.

NEC2 requires the contractor to show on each revised programme:

- the actual progress achieved on each operation and its effect upon the timing of the remaining work;
- the effects of implemented compensation events and of notified early-warning matters;
  and
- how the contractor plans to deal with any delays and to correct notified defects and any other changes which he proposes to make to the programme.

Under NEC2, the contractor can revise his programme at any time but he must do so in accordance with the periods set down in the contract data and whenever instructed to do so. And, if instructed to do so, he must submit his revised programme within the period for reply.

Other forms of contract, for example JCT 80, do not expressly require the contractor to seek approval to the amendment of his programme. If amendment were made without approval the Architect may however feel under no obligation to issue drawings to meet the revised programme.

FIDIC clause 14.2 which relates to the Contractor's Revised Programme requires that the Contractor " ..... shall produce, at the request of the Engineer, a revised programme ....." but does not specifically require the Engineer to approve this revised programme. However it should be implied that the Engineer's consent is required on this revised programme as per clause 14.1 relating to the original programme.

SUMMARY

Some forms of contract require the contractor to seek approval before amending his programme, for example GC/Works 1/Edition 3 and MF/1.

In the absence of an express requirement to seek approval to amend, the contractor can revise his programme. An Architect or Engineer who has not been asked to approve an amended programme may feel under no obligation to issue drawings in good time to enable the contractor to comply with the revised programme.

8. Who owns float time in the Contractor's programme, the Architect or Engineer or the contractor?

Most prudent contractors will allow some form of contingency in their programme. Risk analysis is becoming a frontline science in construction projects. More of the risk and hence uncertainty is being placed upon contractors. If the full extent of the work in terms of the ability to properly project accurately at tender stage the amount of work in terms of time involvement for plant and labour the contractor will be foolish not to make provision for the unforeseen in his programme. Bad ground, strikes, weather conditions, shortages of labour and materials are now regularly allocated in the contract as a contractor's risk. Contractors and their subcontractors often make mistakes which have to be corrected.

A prudent contractor will always include some element of float in his programme to accommodate these variables.

The question however is this. If the contractor has clearly programmed an activity to take longer than it will in fact take to complete can the Employer take advantage of the float time free of cost. This might prove useful if the Architect or Engineer is late issuing drawings or delays have been caused by the Employer himself.

It may be argued that float will not be on the critical path and therefore its use by the Employer will not cause any delay or disruption and hence the contractor will not become entitled to compensation.

Keith Pickavance in his book "Delay and Disruption in Construction Contracts" as at page 335 makes reference to a case heard before the Armed Services Board of Contract Appeals in the USA (Heat Exchanges ASBCA No. 8705 63-1 BCA (CCH) para. 3881 (1963)) where it was held that the contractors original cushion of time (which was not necessary for performance) should still be preserved when granting an extension of time for Employer caused design delays. In an earlier case the Army Corporation of Engineer's Board of Contract Appeals recognised the contractor's right to reprogramme, thereby giving him the benefit of the float. American courts also took the line on a management dispute that

> "total float may be used to programme jobs for all contractors; free float belongs to one contractor for programming any one activity and that
>
> "neither total float nor free float is to be used for changes". ***(Natken and Co -v- George A Fuller and Co* 334 F Siepp 17 (WD Mo 1972)**.

It would seem that in this country it is unlikely for an arbitrator to award an extension of time if the Employer's delay did not affect the completion date. However, most arbitrators would take a sympathetic view to a contractor who reprogrammes to overcome a delay in the early part of the contract due to his own

errors or risk items and in so doing uses up the float in the latter part of the programme.

Float which the Employer may wish to have taken advantage of has thus disappeared.

SUMMARY

There is no hard and fast rule but it would seem that as a contractor will normally include float in his programme to accommodate his risk items which cannot be accurately predetermined in terms of time involvement, and also to provide time for correcting mistakes, then the float belongs to him.

9. Is a Subcontractor obliged to follow a Main Contractor's programme?

Most standard forms of contract provide for the contractor to produce a programme. A failure on the part of the contractor to produce the programme amounts to a breach of contract. It is not usual however for a contract to expressly state that a contractor must follow the programme. An exception is GC/Works 1/Edition 3 which states in condition 34(1) that the contractor shall .....

> "forthwith commence the execution of the Works and proceed with diligence and in accordance with the programme or as may be instructed by the PM."

It is unusual for a programme to be classified in a contract as a contract document. If it were so then contractors would be required to carry out work strictly in accordance with the programme. This could prove very exacting and in many instances impossible.

The situation with subcontractors is similar to that of a main contractor. An example of the obligation of a subcontractor with regard to a main contractors programme occurred in ***Piggott Foundations -v- Shepherd Construction*** **(1994)**.

It was decided in this case that where DOM/1 conditions apply a subcontractor is not required to comply with the main contractor's programme.

Piggott was employed as a domestic subcontractor to design and construct bored piling on a new fourteen storey office block at Chapel Street for Equity and Law Life Assurance. The main contract was JCT80, subcontract DOM/1, and Shepherd Construction the main contractor.

Piggott's subcontract provided for work to be carried out in 8 weeks. Piling work commenced on 26 June 1989. The bulk of the work however was not finished until 20 October 1989. Piggott then left site and returned in April 1990 to carry out the remaining nine piles.

After commencement, piling work proceeded at a slow pace with only one pile completed in the first week. Further difficulties arose due to piling work which was alleged to be defective. It was not clear whether this was due to faulty design or workmanship. Piggott claimed that the difficulties arose as a result of ground conditions. A solution to the problem was reached which involved installing additional piles.

If there exists an obligation for a subcontractor to carry out work to suit a main contractor's programme it can be a two edged sword for the main contractor. Such a requirement would place an obligation upon the main contractor to provide access to enable the subcontractor to carry out the subcontract work in accordance with the main contractor's programme. Contractors often experience difficulties in this

respect as happened in the case of ***Kitson Sheet Metal Ltd. -v- Matthew Hall Mechanical and Electrical Engineers Ltd.*** **(1989)**.

The Court had to decide whether Kitsons were entitled under the contract to work to a programme and whether any written order requiring departure from it constituted a variation. It was held that the parties must have recognised the likelihood of delays and of trades getting in each other's way and that the prospects of working to programme were small. Provided Matthew Hall did their best to make areas available for work they were not in breach of contract even if Kitsons were brought to a complete stop. Kitsons were therefore unable to recover the additional cost due to a substantial overrun on the contractor's programme.

A similar situation occurred in the case of ***Martin Grant and Co Ltd. -v- Sir Lindsay Parkinson and Co Ltd.*** **(1984)**. Again the Court held that there was no entitlement for the subcontractor to claim extra due to delays to the main contract programme.

These cases lay down a general principle that if the subcontractor is required to carry out work in accordance with a main contractor's programme it should be clearly stated to this effect in the subcontract.

SUMMARY

A subcontractor is not required to follow a main contractor's programme unless provided for expressly in the terms of the subcontract.

10. Where at the end of the defects liability/maintenance period the Architect/Engineer draws up a defects list but due to an oversight omits certain defects, and a second list is prepared after the defects on the first list have been completed, will the Contractor/Subcontractor be obliged to make them good?

FIDIC 4th Edition, JCT 80 and other JCT forms, ICE 5th and 6th Editions and GC/Works 1/Edition s 2 and 3 all include a defects liability or maintenance period. The purpose of these defects or maintenance periods is to allow the contractor an opportunity of making good his own defects. Whilst it may not be obvious to many contractors and subcontractors these clauses bestow a benefit upon them. In this context ***'Keating On Building Contracts'*** 5th Edition as at page 247 states:

> "The contractor's liability in damages is not removed by the existence of a defects clause except by clear words, so that in the absence of such clear words the clause confers an additional right and does not operate to exclude the contractor's liability for breach of contract ..... But it is thought that most defects liability clauses will be construed to give the contractor the right as well as to impose the obligation to remedy defects which come within this clause."

In other words defects in construction work amount to a breach of contract entitling the Employer to claim damages ***H.W. Neville (Sunblest) -v- William Press and Son (1981)***. In the absence of a defects clause and where defects in the work appear after practical completion the Employer would be within his rights to employ others to make good the defects and to charge the contractor with the cost. The presence of a defects clause gives the contractor the right to remedy his own defects the cost of which should be less than would be the case if others carried out the work.

Hudsons ***'Building and Engineering Contracts'*** 10th Edition as at page 394 says:

> "Since maintenance work can be carried out much more cheaply by the original contractor than by some outside contractor brought in by the building owner, defects clauses in practice confer substantial advantages on both parties to the contract."

The JCT 80 under clause 17.2 requires the Architect to prepare a schedule of defects not later than 14 days after the end of the defects liability period. No specific reference is made in either the ICE or GC/Works/1 condition to a defects list but it is nonetheless common practice.

A question often raised is whether a contractor is obliged to make good defects if under a JCT 80 contract the Architect produces the defects schedule outside the 14 day period or alternatively whether having issued a schedule with which the contractor has complied produces a second schedule which lists more defects. When answering the question the comments made earlier should be borne in mind. Defects in the contractor's works amount to breaches of contract for which the Employer is entitled to damages and is not excluded by the defects clause. All the defects clause does is to give the contractor the right to make good defects.

SUMMARY

It would seem that a failure by the Architect/Engineer to issue a defects schedule on time or to issue a second one would not amount to a waiver of the Employer 's rights. The contractor may have some rights to claim the additional cost of making two visits if the Architect issued two defects schedules.

11. Is a Contractor/Subcontractor absolved from any liability if the Employer refuses him access to make good defects because he chooses to make them good himself?

The standard forms of contract provide for contractors to make good defects following practical or substantial completion during the defects period.

Clause 17.3 of JCT 80 provides for the Architect to give instructions to the contractor that certain or all defects are not to be made good. This being the case the clause goes on to provide that an appropriate deduction is to be made from the contract sum. No assistance is given in the clause as to how the amount of deduction is to be calculated. Many of the other standard forms make no provision for making good defects being omitted.

The decision in ***William Tomkinson and Sons Ltd. -v- The Parochial Church Council of St Michael and Others (1990)*** Construction Law Journal, Vol. 6 No. 4, aptly deals with this point.

William Tomkinson, the contractors, were employed by the Church Council to carry out restoration works at a parish church in Liverpool. The contract was let using the JCT Minor Works (1980 edition) Standard Form of Contract.

On 23 August 1985 the Architect certified that practical completion had been achieved on 13 June 1985.

A dispute arose concerning certain defects and damage to the works including damage to plasterwork caused by hammering, damage to woodblock flooring, plasterwork, rooflights and their flashings, a ceiling, a public address system, an oak dado, pews, columns plus many more. The contractor's defence was that either the damage wasn't of their making or alternatively they were protected by the provisions of clause 2.5 of the conditions of contract.

This clause makes the contractor liable for any defects, excessive shrinkage or other faults which appear within three months of the date of practical completion due to materials or workmanship not in accordance with the contract.

The defects and damage which formed the basis of the Church Council's case had been discovered and remedied by other contractors on instruction of the Church Council prior to practical completion.

Both parties agreed that for clause 2.5 to be effective, notice of the defects must be given to the contractor. It was also common ground that some but not all items of defect or damage resulted from defective workmanship by the contractor.

The dispute between the contractor and the Church Council arose prior to practical completion due to a refusal on the part of the Church Council to honour an Architect's certificate of payment. A writ was issued by the contractor on 13 February 1985. By way of counterclaim the Architect drew up a schedule which included all defective and damaged work irrespective of whether or not it was attributable to defective workmanship by the contractor.

The first schedule was dated 4 March 1985 and updated on 14 March 1985. These documents were not prepared for the purposes of clause 2.5 and neither were served on the contractor although used in the proceedings to form the counterclaim. Following practical completion a further schedule was prepared by the Architect for the purposes of clause 2.5 and dated 24 June 1985. The defects in this schedule were not corrected by the main contractor and the Church Council instructed the work to be undertaken by other contractors. Prior to instructing other contractors to carry out the work, no warning was given to the contractor.

It was argued on behalf of the contractor that the Church Council, in arranging for having defective work corrected by others, prevented the contractor from exercising his rights to correct defects and therefore they had no liability.

The Court in arriving at a decision was influenced by the wording in ***Hudson's Building and Engineering Contracts*** (10th Edition) at pages 394-7:

> "It is important to understand the precise nature of the maintenance or defects obligations. It is quite different from the Employer 's right to damages for defective work, under which he will be able to recover the financial cost of putting right work either by himself or another contractor. Since maintenance (defects) can usually be carried out much more cheaply by the original contractor than some outside contractor .... so the contractor not only has the obligation but also in most cases it is submitted the right to make good as its own cost any defects."

The Court went on to consider that workmanship which falls short of the standard required by the contract and which the Employer remedies prior to practical completion still constitutes a breach of contract.

It was held, in finding in favour of the Church Council, that their entitlement was to recover damages from the contractor subject to proof that they were attributable to workmanship or materials which fell below the contractual standard. The amount of damages which the Church Council would be entitled to recover however, was not their outlay in remedying the damage, but the cost which the contractors would have incurred in remedying it if they had been required to do so; a sum anticipated to be much less than the actual remedial costs.

The answer to the question therefore is that a contractor is not absolved from liability if he is refused access. Damages recoverable by the Employer however are

limited to the amount it would have cost the contractor had he been given an opportunity to make good the defects.

SUMMARY

JCT 80 under clause 17.3 gives the Architect power to instruct the contractor not to make good defects in which case an appropriate deduction will be made from the contract sum. Most of the other standard contracts make no such provision.

If defects are not made good by the contractor but the Employer arranges for the work to be carried out by others the Employer will only be entitled to recover from the contractor what it would have cost the contractor had he in fact made good the defects. Agreement as to what those costs might have been could be difficult to achieve.

12. Can a Contractor/Subcontractor be forced to carry out a variation after practical completion?

This question requires a short answer. Once practical completion has been achieved the contractor has no obligation to carry out varied work instructed by the Architect/Engineer. An exception would be where the contract expressly provides for the possibility of variations being issued post practical completion.

Hudsons '***Building and Engineering Contracts***' 10th Edition as at page 326 states:

> "..... it is submitted that under most sophisticated contracts variations cannot be ordered after practical completion in the absence of express provision, unless of course the contractor is willing to carry them out."

'***Keating on Building Contracts***' 5th Edition as at page 92, deals with the situation where a variation of this type is issued and the work carried out where it states:

> "Extra work may be of the kind contemplated by clauses of the contract which provide for the ordering of extras or it may be so peculiar and so different that it is outside the contract. It may be work outside the contract if it is carried out after completion of the original contract work. Extra work outside the contract is not governed by the terms of the contract, and need not therefore be ordered in writing. The Employer is liable to pay a reasonable price for such work carried out at his request, but may exceptionally not be so liable if the original contract is not expressly or by implication replaced by a new contract and if there is no other basis for liability as, e.g. an implied promise to pay. "In order to make a person liable on a ***quantum meruit*** there has to be a necessary implication that the person liable is agreeing to pay." It is unlikely to be sufficient for a contractor to claim after the works are completed that extra work is outside the terms of the contract."

SUMMARY

The contractor is not obliged to carry out variations where the instruction is issued after practical completion unless there is a clause in the contract which gives the Architect/Engineer power to issue an instruction of this nature.

13. May an Employer /Purchaser levy liquidated damages if in the final analysis he suffers no loss as a result of the contractor's late completion?

The essence of liquidated damages is a genuine covenanted pre-estimate of damage [***Clydebank Engineering and Shipbuilding Co -v- Don José Yzquierdo & Castaneda (1905)***].

It was said by Lord Woolf in the Hong Kong case of ***Philips Hong Kong Ltd. -v- The Attorney General of Hong Kong (1993)***:

> "Since it is to their (the parties) advantage that they should be able to know with a reasonable degree of certainty the extent of their liability and the risk which they run as a result of entering into the contract. This is particularly true in the case of building and Engineering contracts. In the case of those contracts provision for liquidated damages should enable the Employer to know the extent to which he is protected in the event of the contractor failing to perform his obligations."

Liquidated damages are therefore a reasonable pre-estimate of the loss the Employer anticipates he will suffer if the contractor completes late. Its advantage is that the parties know in advance the extent of risks they are taking.

In the case of ***BFI Group of Companies Ltd. -v- DCB Integration Systems Ltd. (1987)*** a contract had been let using the JCT Minor Works Form to alter and refurbish offices and workshops. A dispute arose concerning liquidated damages and was referred to arbitration. The arbitrator held that there had been a delay in completion but declined to award liquidated damages on the grounds that the Employer had suffered no resulting loss.

An appeal was lodged against the arbitrator's award. His Honour Judge John Davies QC who instinctively disliked provisions for liquidated damages heard the appeal. He decided that the liquidated damages clause automatically came into play when the contractor without a contractual justification completed late and the Employer was not required to demonstrate that he had suffered loss. The arbitrator was wrong in law in refusing to award payment of liquidated damages.

In the case of ***Bovis Construction -v- Whatling (1995)*** it was held that a clause, such as a liquidated damages clause which limits liability, should state clearly and unambiguously, the scope of the limitation and should be construed with a degree of strictness.

SUMMARY

Following the decision in ***BFI Group of Companies -v- DCB Integration Systems Ltd. (1987)*** an Employer may, where provision is made in the contract, deduct liquidated damages even though in the event he has suffered no loss.

14. Can a contractor challenge the liquidated damages figure included in a contract as being a penalty and unenforceable after the contract is signed. If so, will it be a matter for the Employer /Purchaser to prove the figure to be a reasonable pre-estimate of anticipated loss?

Two recent cases have brought the question of liquidated and ascertained damages and their enforceability into focus. The cases in question are:

Philips Hong Kong -v- AG of Hong Kong (1993) 61 BLR 41
J Finnegan Ltd. - Community Housing Association (1993) 61 BLR 103

In both cases the parties entered into contracts which included a clause relating to liquidated and ascertained damages. In the ***Finnegan*** case liquidated damages were stated to be £2,500 per week or part thereof. The ***Philips*** case involved a contract in which the liquidated damages varied between HK$ 60,655 per day and HK$ 77,818 per day.

The parties in both cases entered into the contracts without the contractors challenging the sums included as liquidated damages.

The ***Finnegan*** case involved a Housing Association who let a contract to construct eighteen flats. The contract was based upon the JCT Standard Form of Building Contract 1980 Private Edition with Quantities. The contractual date for completion was 1 March 1988 and the liquidated and ascertained damages were fixed at £2,500 per week or part thereof.

The contractor failed to complete the works by the contractual date for completion and on 9 March 1988 the Architect issued a certificate pursuant to clause 24 stating that the works ought to have been completed by 1 March 1988. On 5 September 1988 the Architect certified practical completion as having been achieved on 13 August 1988. Interim certificate No.17 was issued on 6 September 1988 stating the sum due to the contractor of £61,518. On 23 September the Architect wrote to say that they would be awarding an extension of time of five weeks under the contract. On 28 September 1998 the Housing Association sent to the contractor a remittance advice in the following terms:

"Cert 17	£61,518
L & A damages	£47,500
	£14,018"

The contractor then challenged the liquidated damages as being a penalty and unenforceable. It was at no time suggested that the contractor was unable to challenge the liquidated damages amount on the ground of having signed the contract.

The court held that the figure was a genuine pre-estimate of loss and therefore enforceable.

In the ***Philips*** case the contractor again made a late challenge to the liquidated damages figure on the grounds that it was a penalty. Again there was no difficulty in leaving it until the end of the day. The contractor in like manner to Finnegan however, was unable to demonstrate that the liquidated damages was a penalty.

In arriving at a decision in the ***Philips*** case the court was influenced by ***Robophone Facilities Ltd. -v- Blank (1966) 1 WLR 1428*** where Diplock L.J. stated at page 1447:

> "The onus of showing that a stipulation is a penalty clause lies upon the party who is sued upon it ....."

In other words the contractor facing a claim for liquidated damages which he challenges as being a penalty is put to proof that his allegation is correct. It is not for the Employer to prove that the liquidated damages amount is a reasonable pre-estimate of loss.

SUMMARY

A contractor who enters into a contract which contains a liquidated damages figure can at a later stage challenge the figure as being a penalty and unenforceable. Where however he makes such a challenge it is up to him to demonstrate that the amount is a penalty and not a reasonable pre-estimate of the Employer 's loss.

It is worth noting that, notwithstanding the statement contained in FIDIC 4th Edition clause 47.1 that:

"... the Contractor shall pay to the Employer the relevant sum stated in the Appendix to Tender as liquidated damages for such default and not as a penalty ..."

this provision would not deny the contractor his right to challenge the liquidated damages figure as being a penalty and unenforceable.

15. Where an Architect or Engineer fails to grant an extension of time within any time scale or in accordance with any procedure laid down in the contract, or if the contract is silent, within a reasonable time, will this result in the Employer losing his rights to deduct liquidated damages.

Many modern contracts such as JCT 1998 and ICE 7th Edition lay down timescales within which extension of time awards are to be decided.

For example under clause 25.3.1 of JCT 1998 the Architect if it is reasonably practicable having regard to the sufficiency of information submitted by the contractor must make a decision within 12 weeks of the receipt of that information.

The ICE 7th edition requires the Engineer under clauses 44(5) to make decisions concerning extensions of time within 28 days of the issue of the Certificate of Substantial Completion.

The question of the timing of an extension of time award has been discussed in the following legal cases:

(i) ***Miller -v- London County Council (1934)*** **50 TLR 479**. In this case the expressed wording of the contract included:

"it shall be lawful for the Engineer, if he thinks fit, to grant from time to time, and at any time or times, by writing under his hand such extension of time for completion of the work and that either prospectively or retrospectively and to assign such other time or times for completion as to him may seem reasonable."

It was held that the words 'either prospectively or retrospectively' did not give the Engineer power to fix a new date for completion after the completion of the works.

(ii) ***Amalgamated Building Contractors Ltd. -v- Waltham Holy Cross Urban District Council [1952] 2 All ER 452***. The wording in the contract which was the then current RIBA contract provided in clause 18:

"the Architect shall make a fair and reasonable extension of time for completion of the works."

Lord Denning with regard to the time within which the Architect would be required to make a decision had this to say:

"The contractors say that the words in clause 18 mean that the Architect must give the contractors a date at which they can aim in the future, and that he cannot give a date which has passed, I do not agree with this contention."

Lord Denning distinguished the decision in ***Miller -v- LCC*** in the following terms:

"These practical illustrations show that the parties must have intended that the architect should be able to give a certificate which is retrospective, even after the works are completed ..... ***Miller -v- London County Council (1934)*** is distinguishable. I regard that case as turning on the very special wording of the clause which enable the engineer 'to assign such other time or times for completion as to him may seem reasonable'. Those words, as du Parcq J said, were not apt to refer to the fixing of a new date for completion ex post facto. I would also observe that on principle there is a distinction between cases where the cause of delay is due to some act or default of the building owner, such as not giving possession of the site in due time, or ordering extras, or something of that kind. When such things happen the contract time may well cease to bind the contractors, because the building owner cannot insist on a condition if it is his own fault that the condition has not been fulfilled."

(iii) ***Temloc Ltd. -v- Errill Properties Ltd. (1987) 39 BLR 34***. This case arose out of a contract let using JCT 80. The Architect is required by the terms of the contract to make decisions concerning extensions of time within a time scale. With regard to the effect on the Employer's entitlements should the Architect fail to give his decision within the timescale, Croom-Johnson in the Court of Appeal had this to say:

"He says that that means that the certificate by the architect fixing the later completion date shall be given not later than the expiry of twelve weeks from the date of practical completion.

In this case that period of twelve weeks was exceeded. Mr. Machin therefore submits that it was a condition precedent to the operation of clause 24.2 which was not complied with. But the certificate referred to in clause 24.1 and 24.2.1 is not the certificate which fixes the later completion date. It is a certificate which tells the contractor that his liability to pay liquidated damages at the agreed rate has begun.

In my view, even if the provision of clause 25.3.3 is applicable, it is directory only as to time and is not something which would invalidate the calculation and payment of liquidated damages. The whole right of recovery of liquidated damages under clause 24 does not depend on whether the architect, over whom the contractor has no control, has given his certificate by the stipulated day."

A similar matter was the subject of the decision in ***Aoki Corp –v- Lippoland (Singapore)Pte. Ltd. (1994).***

Clause 23.2 of the SIA Conditions of Contract makes it a condition precedent that he contractor notifies the Architect of any event, direction or instruction which the contractor considers entitles him to an extension of time. The Architect is then required to respond in writing within one month indicating whether or not in principle the contractor is entitled to an extension of time. As soon as possible after the delay has ceased to operate and it is possible to decide the length of the extension the Architect will notify the contractor of his award.
If the contractor fails to complete the work by the completion date or extended completion date, the Architect must issue a delay certificate as soon as the latest date for completion has passed.

The contractor notified the Architect of delays but the Architect failed to notify the contractor of whether in principle an entitlement to an extension of time existed. Eventually, the Architect, without giving his decision in principle, refused all requests for extension except one for which he allowed 15 days.

The Employer deducted 1,080,581 Singapore dollars in liquidated damages.

It was held:

A decision by the Architect on the principle of the contractor's right to an extension was not a condition precedent to a valid determination of the contractor's entitlement.

The contractor however could claim damages as a result of the Architect's failure to make a decision. This may include the cost of increasing the labour force.

There is no rule that delay in the issue of the delay certificate after the date for completion or the latest extended date for completion, renders the delay certificate invalid.

SUMMARY

Unfortunately contracts such as JCT 1998 which provide a timescale within which the Architect must grant an extension of time do not state what effect a failure to comply with the timescales will have upon the Employer's rights to deduct liquidated and ascertained damages. The decisions in ***Temloc –v- Errill Properties Ltd.*** and ***Aoki Corp –v- Lippoland*** suggest that provided a proper decision is made by the Architect concerning extensions of time, a failure to meet the deadline will not affect the Employer's right.

16. Can a Subcontractor who finishes late have passed down to him liquidated damages fixed under the main contract which are completely out of proportion to the subcontract value?

This question presumes that the subcontractor has a contractual obligation to finish within a timescale and is in breach of the obligation if he completes late. Where a subcontractor is in breach he will have a liability to pay damages to the main contractor.

The general principles covering damages for breach of contract are explained in *Hadley -v- Baxendale (1854)* and later fully considered in ***Victoria Laundry (Windsor) Ltd. -v- Newman Industries (1949).***

Briefly the injured party is entitled to recover any loss likely to arise in the usual course of things from the breach, plus also such loss outside the usual course of things as was in the contemplation of the parties at the time of the contract and which is likely to result from the breach.

The contractor, as injured party, is entitled to levy a claim for damages against a subcontractor who completes late. These damages should include only those losses which under normal circumstances are likely to arise and are within the contemplation of both parties. In all probability a Court would hold that the contractor's claim should include his own additional costs plus any legitimate claims received from the Employer and other subcontractors who have suffered financially as a result of the subcontractor's late completion. If the normal standard forms of contract are employed the Employer will levy a claim for liquidated damages against the main contractor if the main contract completion is delayed due to a default on the part of a subcontractor. Under normal circumstances these liquidated damages will form a part of the main contractor's claim against the defaulting subcontractor irrespective of the value of the subcontract works.

This rule will apply in all cases except where the subcontractor is nominated and the terms of the main contract provide the main contractor with an entitlement to an extension of time where delays are caused by a nominated subcontractor's default. Delays by the nominated subcontractor would result in an extension of time being granted to the main contractor and hence no claim from the Employer for liquidated damages.

Where the sum for liquidated damages under the main contract could be classed as out of the ordinary and therefore not within the contemplation of the subcontractor, it may be argued that the subcontractor is obliged to reimburse the main contractor only that element of the Employer's liquidated damages which is normal and usual. Two problems arise out of this type of argument. Firstly, what do we mean as normal and usual and secondly, if the sum for liquidated damages is so out of the ordinary it may be regarded as a penalty and unenforceable.

Usually main contractors will send to subcontractors, with the tender enquiry, details of the main contract including the sum for liquidated damages. This procedure prevents subcontractors from arguing that the sum was outside their contemplation when they entered into the subcontract.

One way out of the dilemma is to include in the subcontract an amount for liquidated damages which provides a cap on the subcontractor's liabilities.

In ***M J Gleeson plc –v- Taylor Woodrow Construction Ltd. (1989)*** Taylor Woodrow were management contractors for work at the Imperial War Museum and entered into a subcontract with Gleeson. The management contract provided for liquidated damages at £400 per day and clause 32 of the subcontract provided for liquidated damages at the same rate. Clause 11 (2) of the subcontract also provided that if the subcontractor failed to complete on time the subcontractor should pay:

> '... a sum equivalent to any direct loss or damage or expense suffered or incurred by (the management contractor) and caused by the failure of the subcontractor. Such loss or damage shall be deemed for the purpose of this condition to include for any loss or damage suffered or incurred by the authority for which the management contractor is or may be liable under the management contract or any loss or damage suffered or incurred by any other subcontractor for which the management contractor is or may be liable under the relevant subcontract.'

Gleeson finished late and they received from Taylor Woodrow a letter as follows:

> 'We formally give you notice of our intention under clause 41 to recover monies due to ourselves caused by your failure to complete the works on time and disruption caused to the following subcontractors. The following sums of money are calculated in accordance with clause 11(2) for actual costs we have incurred or may be liable under the management contract.'

Then followed a summary of account showing deductions of £36,400 for liquidated damages, being £400 per day from 31 May 1987 to 31 August 1987, and £95,360 in respect of 'set-off' claims from ten other subcontractors.

Gleeson applied for summary judgement under Order 14 in respect of the sum of £95,360 and were successful. Judge Davies found that Taylor Woodrow had no defence:

> 'On the evidence before me, therefore, TWL's course of action against Gleeson in respect of set-offs is for delay in completion. It follows that it is included in the set-off for liquidated damages, and to allow it to stand would result in what can be metaphorically described as a double deduction.

SUMMARY

Subcontractors who, in breach of their subcontract, complete late will be liable to pay the resultant damages incurred by the contractor. These damages will include any liability the main contractor has to pay liquidated damages to the Employer which result from the delay. This procedure will apply irrespective of the value of the subcontract works.

It is open to the subcontractor to argue that if the main contract liquidated damages are extremely high, the sum involved was outside his contemplation at the time the contract was entered into. Main contractors, usually with the tender enquiry documents, set out details of the main contract including the sum included for liquidated damages and thus forestall this type of argument.

Where the subcontractor is nominated and the main contract provides for an extension of time where work is delayed by the subcontractor no claim from the Employer will arise.

17. Where is the line to be drawn between an Architect or Engineer's duty to design the works or a system and a contractor or subcontractor's obligation to produce working shop or installation drawings?

Where a contract such as JCT 80, ICE 6th Edition, MF/1 or the GEC Conditions are employed, the duty to design the works rests with the Architect or Engineer. Provision is made in these contracts for some of the design work to be prepared by the contractor. Many bespoke Engineering contracts require the contractor to be responsible for the detailed design of the plant and of the works in accordance with the Specification. Specifications are often written to the effect that specialist Engineering subcontractors will be obliged to produce shop or working drawings. There is no hard and fast rule as to where the Engineer's obligations cease and the contractor or Engineering subcontractor's begins. It will be a matter for decision in each and every case.

In the case of ***H. Fairweather and Co -v- London Borough of Wandsworth (1987) 39 BLR 106***, a subcontract was let using the now out of date NFBTE/FASS nominated subcontract often referred to as the Green Form.

The description of the works set out in the appendix to that form was:

> "carry out the installation and testing of the underground heat distribution system as described in ..... [the specification]"

The specification had two provisions (set out in full in the judgement at pp 114-5). Clause 1.15 made it the subcontractor's responsibility to provide the installation drawings and it was also "responsible for providing all installation drawings in good time to meet the agreed programme for the works". Section 3(b) of the technical specification also required detailed drawings to be prepared and supplied by the subcontractor. Before entering into the nominated subcontract Fairweathers had written to the Architect in an endeavour to disclaim "any responsibility for the design work that may be undertaken by your Nominated Subcontractor". They also asked for "a suitable indemnity against defects in design work carried out by the Nominated Subcontractor". The Architect's reply drew attention to the provisions of clause 1.15 and pointed out that they did not "require them to assume responsibility for the design of the system ....." Fairweathers did not take the matter further and entered into the subcontract.

The arbitrator found that the installation drawings were not design drawings. The judge agreed with him although he had not seen the drawings. It does not appear that there was any dispute about responsibility for the content of the installation drawings and it would seem from this case that one cannot deduce that "installation drawings" in general do not embody any "design". The Architect had made it clear that the installation drawings were to be provided so as to meet the requirements of

the programme and that the subcontractors were not responsible for the design of the system.

However, in the course of preparing a detailed design for the installation of a system decisions are taken of a design nature by the person responsible for the preparation of the drawings which in the absence of a clear contrary indication the responsible contractor, subcontractor or supplier will be held liable in law.

It is not always obvious where the line is to be drawn between design or conceptual design and shop or working drawings. What is the purpose of the shop or working drawings? Some may argue that the intention is that the contractor or subcontractor's duty is to fill in the gaps left in the design or conceptual design drawings. Others may argue that the purpose of shop or working is to convert design information into a format to enable the materials to be manufactured and fixed.

It is essential if a Specified or Nominated Subcontractor is to produce shop or working drawings for the main contract to stipulate in clear terms to what extent liability for this work will rest on the main contractor.

Employers will be well advised to seek a design warranty from subcontractors who are required to produce drawings.

SUMMARY

It would seem that it is impossible to produce a dividing line to differentiate between design drawings and working shop or installation drawings. Each case would have to be judged on its merits.

18. Who is responsible for co-ordinating design? Can a main contractor be legitimately given this responsibility even though he has no design responsibility?

In general terms when an Employer appoints an Architect or Engineer to design a building or work of a civil engineering nature, he is entitled to expect the Architect or Engineer to be responsible for all design work.

This basic principle was established in the case of ***Moresk Cleaners Ltd. -v- Thomas Henwood Hicks*** **(1966) 4 BLR 50**.

The plaintiffs were launderers and dry cleaners who appointed the defendant Architect to undertake the design work of an extension of their laundry. Instead of designing all the work himself, the Architect arranged for the contractor to design the structure and the Employer brought an action against the Architect who argued that his terms of engagement entitled him to delegate the design of the structure to the contractor.

It was held that an Architect has no power whatever to delegate his duty to anybody else. His Honour Sir Walter Carter QC had this to say:

> "Mr. Stockdale, in a very powerful argument, asks me to say alternatively that the Architect had implied authority to act as agent for the building owner to employ the contractor to design the structure and to find that he did just this. I am quite unable to accept that submission. In my opinion he had no implied authority to employ the contractor to design the building. If he wished to take that course, it was essential that he should obtain the permission of the building owner before that was done."

This being the case, the Architect or Engineer will also be responsible for co-ordinating design again unless there is an express term in the contract to the contrary.

The RIBA, in their Appointment of an Architect (SFA/92) clause 4.2.1 gives the Architect authority to nominate a specialist to be employed by the client or via the contractor to undertake design of a part of the works. Clause 4.2.4 goes on to state:

> "The client shall give the authority to the Architect to co-ordinate and integrate the services of all specialists into the overall design and the Architect shall be responsible for such co-ordination and integration".

Specifications for mechanical and electrical work and other specialist disciplines often refer to the subcontractor being responsible for design co-ordination. This will not absolve the Architect from his responsibilities as set out under clause 3.8. If the specification which refers to a subcontractor being responsible for design co-

ordination becomes a main contract document then the Employer may bring an action against the Architect or main contractor for any loss or damage resulting from poor design co-ordination.

Alternatively, design co-ordination may be specifically referred to in a design warranty entered into by the subcontractor in which case the Employer may commence an action via the warranty against the subcontractor for faulty co-ordination. It is however for an Architect or Engineer to word out the obligation to co-ordinate in his or her conditions of engagement with the Employer.

The main contractor's responsibility for design co-ordination will be dependent upon the terms of the contract. Design by contractors, either employing a full design and construct procedure or a partial design and construct is on the increase. Even without a design responsibility the terms of the main contract may impose a responsibility upon the main contractor to undertake design co-ordination. However, it is unlikely that in the absence of express terms in a main contract or subcontract, an obligation to co-ordinate design will rest on the main contractor or subcontractor.

For example Clause 8.2 of the FIDIC 4th Edition conditions provides that:

> ***"…. Where the Contract expressly provides that part of the Permanent Works shall be designed by the Contractor, he shall be fully responsible for that part of such Works, notwithstanding any approval by the Engineer."***

Where there is no reference to a design obligation in the main contract, it is unlikely that the main contractor will become liable for any defective design by a subcontractor: ***Norta -v- Sisk (1971)*** 14 BLR 49.

SUMMARY

The Architect or Engineer will normally be responsible for design co-ordination except where the contractor is appointed on a design and construct basis. It is possible for an Architect to word out the responsibility for design co-ordination in his conditions of engagement with the Employer and place the burden upon the contractor's shoulders.

19. Can a contractor be held responsible for a design defect where the Employer appoints an Architect and no provision exists in the contract for the contractor to undertake any design responsibility?

It is commonplace for a contractor to have placed upon him by the terms of contract a full design responsibility. Some contracts provide for parts only of the work to be designed by the contractor. If under the contract the Employer appoints an Architect whose duty it is to prepare all the drawings with no reference being made to a contractor's design responsibility, can a situation ever arise where the contractor finds himself liable for a design fault?

In the case of ***Edward Lindenberg -v- Joe Canning, Jerome Contracting Ltd. (1992) 9-CLD-05-21***.

The plaintiff engaged the defendant builder for some conversion work on a block of flats. During the work which was carried out by Jerome Contracting, load bearing walls in the cellar were demolished which caused damage in the flat above. The plaintiff sued the defendants for breach of contract and/or negligence, seeking repayment of the sums he was forced to pay the building owners under an indemnity. The disputes with Jerome and the Architect were settled, leaving the case against Canning to proceed.

The plaintiff alleged that Canning was in breach of an implied term that he would proceed in a good and workmanlike manner, and that he had negligently demolished the load bearing walls without providing temporary or permanent support. The plaintiff sought damages of £401,078 plus repayment of an advance made to Canning of £7,000.

It was held:

1. As there was no express agreement between the parties, Canning was entitled to be paid on a quantum meruit basis for labour and materials.

2. There was an implied term that the defendant would undertake the work in a good and workmanlike manner and exercise the care expected of a competent builder. He had been supplied with plans, prepared by the plaintiff's surveyor, which supposedly indicated which walls were non load bearing. However, as a builder, he should have known that as they were nine inch walls they were in fact load bearing. As he took "much less care than was to be expected of an ordinary competent builder" he was in breach of contract but not liable in negligence.

3. The plaintiff was entitled to recover £7,484 representing the amount he had to reimburse the building owner plus professional fees, less any sum for contributory negligence.

4. The plaintiff had been guilty of contributory negligence through his agents in that Canning had been given plans which wrongly showed which walls were non load bearing, oral instruction had been given to demolish walls and no instructions had been given regarding the provision of supports. The liability was attributed at 75% to the plaintiff and 25% to the defendant. The plaintiff's damages were reduced accordingly to £1,871.

5. Canning was entitled to a quantum meruit payment, assessed at £4,893. As this was less than the £7,000 which the plaintiff had advanced to him, Canning was liable to repay the difference.

Recently the Court of Appeal considered the situation where the Contractor knew that the design (of temporary works) was inadequate in ***Plant Construction Plc v Clive Adams Associates. [2000] BLR 137***

In 1993, Ford Motor Company Ltd wanted to install two engine mount rigs in pits at their research and engineering center. Time was short because the rigs were soon to be delivered from America and Ford's senior Civil Engineer, Mr. Furley, was unable to prepare full in-house design.

The Contract was let to Plant construction Plc. They subcontracted the substructure works to the JMH Construction Services Ltd. Plant also engaged Clive Adams Associates as consulting structural engineer to design and monitor the substructure works.

Work began on 26 November 1993. One of the pits to be excavated involved the removal of part of the concrete base to an existing steel column, J11. Temporary support was required for column J11 and the roof. On 8th December 1993 Mr. Furley, of Ford, instructed JMH to support the roof trusses by means of four Acrow props. This was properly regarded as temporary works.

The Acrow propping was in fact inadequate. The propping directed by Mr. Furley and installed should have been recognized as inadequate by any competent engineer or contractor and indeed was so recognized by Mr. Adams of Adams and by Mr. Cleave JMH's site Agent. Mr. Adams and Mr. Cleave discussed the problem with each other and with Mr. Smith of plant on more than one occasion.

Excavation work proceeded and work ceased for the New Year Holiday on 31 December 1993. Early on 2 January 1994 the whole roof in the area collapsed.

Plant settled Ford's claim against it by paying Ford £1.310.031. Plant sued Adams & JMH for that sum plus Plants own remedial works costs of £615.000.

Court found that JMH were liable to plant on the basis that JMH had not discharged their duty to use due care and skill to advise and warn Plant of the

inadequacy of the propping. Damages were reduced by 80 per cent to reflect contributory negligence of Plant and Adams as its agent.

JMH appealed

Held by Court of Appeal.
20 December 1999

1. JMH was contractually obliged to carry out the temporary works of supporting the roof in the way in which and to the design by which they were so instructed by Ford.
2. Depending on all the relevant circumstances there will be an implied term that a contractor will perform his contract with the skill and care of an ordinary competent contractor.
3. Given crucially that the temporary roof support works were obviously dangerous and were known by JMH to be dangerous, JMH's implied obligations to perform with skill and care carried with it an obligation to warn of the danger, which they perceived.
4. The facts that the design and details of the temporary works were imposed by Ford, that Plant had Adams as their Consulting Engineer, that others were responsible or at fault, or that JMH were contractually obliged to do what Ford instructed did not negative or reduce the extent of the performance of the implied terms.
5. JMH's duty extended to giving proper warnings about the risk.
6. The case was remitted to the trial judge for further express findings of fact on he question of what would have happened if JMH had protested sufficiently vigorously so as to fulfil their implied obligation.

"The facts that the design and details of the temporary works had been imposed by Ford and that Plant had Mr Adams as their consulting engineer do not, in my view, negative or reduce the extent of performance which the implied term required in this case. The fact that other people were responsible and at fault does not mean, in my judgment, that on the facts of this case JMH were not contractually obliged to warn of a danger. Nor in this case is the extent of performance negated by the fact that JMH were expressly obliged by contract to do what Mr Furley instructed. JMH, with others, had a duty to guard against the risk of personal injury to a potentially large number of people. The duty extended to giving proper warnings about the risk. It was not itself a contractual duty owed to Plant, but it is a relevant circumstance in determining the extent of performance which JMH's implied duty of skill and care required. In my judgment, the judge in this case came to the correct conclusion about JMH's implied contractual duty and I would reject Mr Stow's first submission."

Held by QBD (TCC) (HHJ: JOHN HICKS QC)[1]
31 March 2000

- JMH should have pressed its objections on safety grounds. The objections said the judged "could and should have been progressively more formal and insistent if not met – for example by being put in writing if oral representations were ignored, by going to successively higher levels of management in Plant and Ford if lower levels did not respond – and they could have been accompanied by the threat or actuality of report to regulatory authorities. The crucial question is whether JMH could and should, in the last resort, have refused to continue to work if the safety of workmen was at risk, as it had done in the case of the ring main. I am clear that it could and should have done so."
- On the balance of probabilities, if JMH had pressed its objections, either there would have been a new safe design or JMH would have declined to execute what it believed to be an unsafe scheme, in which case there would have been no collapse. JMH's breach caused the collapse.

SUMMARY

The Employer engaged an Architect who wrongly showed load bearing walls as non load bearing on his drawings. Joe Canning, the builder, accepted the information on face value and as a result did not provide adequate supports which resulted in damage during demolition work. The builder was held to be liable for 25% of the reinstatement costs.

More recently a subcontractor was instructed to do work, which he recognised to be inadequate for the purpose and raised it with the designers, however he did not object vigorously enough.

The subcontractor was held to be liable for 87% of the damages incurred i.e. £1.675.031,00.

[1] (2000) BLR 205

20. Where a Contractor or Subcontractor's drawings have been "approved", "checked" or "inspected" by the Architect or Engineer and subsequently an error is discovered, who bears the cost, the Contractor or Subcontractor or Employer. If the Employer bears the cost can he recover the sum involved from the Architect/Engineer?

In general terms when an Employer appoints an Architect or Engineer to design a building or work of a civil engineering nature, he is entitled to expect the Architect or Engineer to be responsible for all design work.

This basic principle was established in the case of ***Moresk Cleaners Ltd. -v- Thomas Henwood Hicks (1966) 4 BLR 50.***

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It was held that an Architect has no power whatever to delegate his duty to anybody else. His Honour Sir Walter Carter QC had this to say:

> "Mr. Stockdale, in a very powerful argument, asks me to say alternatively that the architect had implied authority to act as agent for the building owner to employ the contractor to design the structure and to find that he did just this. I am quite unable to accept that submission. In my opinion he had no implied authority to employ the contractor to design the building. If he wished to take that course, it was essential that he should obtain the permission of the building owner before that was done."

The Architect or Engineer in his terms of engagement may include a term which permits him to use a specialist contractor, subcontractor or supplier to design any part of the works, leaving the Architect or Engineer with no responsibility if the design work undertaken by others contains a fault.

The RIBA in their Architect's Appointment Part 3 clause 3.8 incorporates such a provision in the following terms:

"A specialist contractor, sub-contractor or supplier who is to be employed by the client to design any part of the works may be nominated by either the architect or the client, subject to acceptance by each party. The client will hold such contractor, sub-contractor or supplier, and not the architect, responsible for the competence, proper execution and performance of the work thereby entrusted to that contractor, sub-contractor or supplier. The architect will have the authority to co-ordinate and integrate such work into the overall design."

Where a part of the design work is carried out by a subcontractor or supplier in accordance with an express term in the Architect's or Engineer's conditions of appointment it is in the Employer's interests to obtain some form of design warranty from the subcontractor or supplier along the line of a specialist Nominated Sub-Contract form such as NSC/2 for use where a nominated subcontractor undertakes design work under a JCT contract. The Employer would then be able to seek the recovery of any loss or damage resulting from design faults by the subcontractor or supplier through the agency of the warranty.

If however an Architect or Engineer, having excluded his responsibility for a subcontractor's design in the terms of his appointment, approves, checks or inspects a subcontractor's drawing, does he then take on any responsibility for any failure of the design?

- It is essential for the Architect or Engineer to make it clear to both Employer and subcontractor exactly what he is doing with the drawings if not checking the design. If he is checking the design carried out be the subcontractor or supplier he may find that even though the terms of his appointment exclude responsibility he may have adopted a post contract amendment to the conditions and at the same time cloaked himself with responsibility. The Employer will be left to bring an action against either the Architect or Engineer or the subcontractor who carried out the design.

- An unfortunate aspect of English law is that both may be held to be jointly and severally liable. In other words the Employer can extract the full amount of his loss or damage from either party. This can be useful to the Employer if a subcontractor carried out the design and subsequently became insolvent, leaving a well insured Architect who had checked the design to stand the full amount of the loss. Alternatively the Employer may decide to sue both, leaving the court to allocate the Employer's loss or damage between the joint defendants.

- If the Architect or Engineer isn't checking the design then he must make it very clear what he is doing. Ideally it should be set out in the Architect's or Engineer's terms of appointment as to what his duties are with regard to design work undertaken by a contractor, subcontractor or supplier.

- Should the Employer seek to commence an action against the Architect or Engineer alone, then for example under the Civil Liability (Contribution) Act 1978 in the U.K. a contribution may be sought from the contractor, subcontractor or supplier whose design was faulty. In the event of the Employer deciding to sue the contractor, subcontractor or supplier alone they, in turn, may seek a contribution from the Architect or Engineer.

The fact that an Engineer receives drawings does not in itself imply that he or she has any liability for errors in design. In ***J Sainsbury plc –v- Broadway Malyan (1998)*** a claim for defective design was settled out of court. The problem related to the design of a wall between a store area and retail area. Due to the low level of fire protection fire spread and caused substantial damage. The Architect attempted to off load some of the liability upon an Engineer to whom the drawings had been sent for comment.
It was held that if the Architect wanted to get the structural engineers advice on fire protection he needed to say so. Simply to transmit the drawings for comment without specifying any area in which comment was requested was not sufficient to improve any obligation.

A different slant was placed upon acceptance of drawings by the Engineer in the case of ***Shanks and McEwan (Contractors) Ltd. –v- Strathclyde Regional Council (1994)*** which arose out of the construction of a tunnel for a sewer. A method of construction was employed using compressed air to minimise water seepage. The tunnel and shaft segments in compliance with the specification were designed by a supplier to the main contractor who was to be responsible for the adequacy of the design insofar as it was relevant to his operations. It was also a requirement of the specification that design calculations were to be submitted to the Engineer. In the course of construction fine cracks appeared in the prefabricated tunnel segments due to a design fault. The Engineer was prepared to accept the work subject to the segments being made reasonably watertight and confirmed the same in a letter to the contractor dated 21 September 1990. Clause 8(2) of the ICE 5th Edition which governed the contract states that the contractor shall not be responsible for the design of the permanent works. There seemed to be a conflict between clause 8 (2) and the specification which placed responsibility for the design of the tunnel segments onto the contractor.

The contractor levied a claim for the cost of the repair work. It was the view of the Court of Session in Scotland that following acceptance by the Engineer of the design of the segments, the contractor was entitled to expect that the approved design would not crack. The letter from the Engineer dated 21 September 1990 which accepted repair work to the segments was held to be a variation and therefore the contractor won the day.

The Employer's ability to recover any costs incurred due to design error on the part of the contractor or subcontractor from the Engineer will depend upon a number of factors. If the design faults lay with the contractor or subcontractor it is to those who caused the error that the Employer would normally address his claim. If the Employer is enabled to recover from the contractor or subcontractor due to, for example insolvency, he may wish to turn his attentions to the Engineer. The ability of the Employer to recover from the

Engineer costs incurred through faulty design by the contractor or subcontractor will depend upon the terms of the Engineer's appointment. If the matter is referred to court all involved in the design process will normally be joined into the action.

In ***London Undergound –v- Kenchington ford (1998)*** the design of a diaphragm wall at the Jubilee Line station of Canning Town became the subject of a dispute. The diaphragm wall was designed by Cementation Bachy. London Underground argued that Kenchington Ford had failed to realise that there had been a mistake in computation made by Cementation Bachy and consequently the diaphragm wall was designed too deep and hence over expensive. The error had resulted from Cementation Bachy misinterpreting the load shown on the drawing. The contract stated that Cementation Bachy would be responsible for design errors whether approved by the engineer or not. Kenchington Ford were under a duty to London Underground to provide services which included the correction of any errors, ambiguities or omissions. The judge concluded that Kenchington Ford should have checked and discovered the error, and as they had not this constituted a breach of duty.

In ***George Fischer (GB) Ltd. –v- Multi Design Consultants Roofdec Ltd. Severfield Reece and Davis Langdon and Everest (1998)*** an Employer's Representative was held to be liable in respect of the design error. The Employer's Representative's conditions of appointment obliged him to approve all working drawings.

In the FIDIC Conditions of Contract for Electrical and Mechanical Works 3rd Edition 1987 the Contractor shall submit drawings for approval to the Engineer in accordance with Clause 6.1. Any Contractors Drawings which the Engineer disapproves shall be forthwith modified to meet the requirements of the Engineer and shall be re-submitted as per Clause 6.2. Approved Contractors drawings shall not be departed from as except as provided in Clause 31 (Variations), as per Clause 6.3.

Under Clause 7.1 the Contractor shall be responsible for any errors or omissions in the Contractor's Drawings unless they are due to incorrect Employer's Drawings or other written information supplied by the Employer or the Engineer. Approval by the Engineer of the Contractor's Drawings shall not relieve the Contractor from any responsibility under this Sub-Clause.

However, under Clause 7.2 the Employer shall be responsible for the Employer's Drawings and for other written information supplied by the Employer or the Engineer and for the details of special work specified by either of them. If such Employer's Drawings, information or details are incorrect and necessitate alterations of the work, the Employer shall pay the Contractor the cost of the alterations together with profit as certified by the Engineer.

The FIDIC Client/Consultant Model Services Agreement issued in 1990 incorporates the following: -

Clause 5 - Obligations of the Consultant

- Duty of Care and Exercise of Authority

(i) The Consultant shall exercise reasonable skill, care and diligence in the performance of his obligations under the Agreement.

The Association of Consulting Engineers (ACE) Conditions of Engagement are similarly worded.

Clause 12 - Obligations of the Client

- Services of Others

Quote "The Client shall at his cost arrange for the provision of services from others as described in Appendix B, and the Consultant shall co-operate with the suppliers of such services but shall not be responsible for them or their performance".

SUMMARY

The approval of a contractor or subcontractor's drawings by the Architect or Engineer will not usually relieve the contractor or subcontractor from liability. Employers who incur costs due to this type of error will normally commence an action jointly against the contractor or subcontractor who prepared the drawings and the Architect or Engineer who gave his approval. The court will decide on the apportionment of blame.

In ***Shanks and McEwan –v- Strathclyde Regional Council*** the contractor's design which proved faulty was approved by the Engineer. The contractor was held to be entitled to recover from the Employer the cost of remedial works. This case seems to cut across the accepted legal principle that one cannot benefit from one's own errors.

Where the Employer incurs cost due to errors in the contractor or subcontractor's design, these costs may be recovered from the Engineer or Architect if a duty to check the drawing was expressly or impliedly provided for in the conditions of appointment and the errors result from a failure to carry out the checking properly.

21. Are there any restrictions on an Architect/Engineer's powers where the specification calls for the work to be carried out to the Architect/Engineer's satisfaction?

The standard forms in general use require the contractor to carry out the work to the reasonable satisfaction of the Architect, Engineer or S.O. For example, JCT 80 clause 2.1:

> " .... the quality of materials or of the standard of workmanship is a matter for the opinion of the Architect, such quality and standards shall be to the reasonable satisfaction of the Architect."

Vincent Powell Smith in a commentary on JCT 63 had this to say on the matter:

> "There is no definition of what is meant by reasonable satisfaction anywhere in the contract. Clause 6(1) states that the standard of materials, goods and workmanship 'shall so far as procurable be of the respective kinds and standards described in' the Contract Bills; the Architect cannot require a higher standard than that there described. 'Reasonable satisfaction' might appear to suggest that the test is an objective one, but in truth the test is the subjective standards of the particular Architect, and there is a strong element of personal judgement in that opinion. It is reviewable in arbitration under clause 34 and the expression of satisfaction or otherwise by the Architect can be challenged by both the Employer and the contractor, provided a written request to concur in the appointment of an arbitrator is given by either party before the issue of the final certificate or by the contractor within 14 days of its issue: see clause 30(7)."

The manner in which an Architect exercises his duties was examined in the case of ***Sutcliffe -v- Thackrah (1974) 25 BLR 147.*** In this case it was stated that the Employer and the contractor make their contract on the understanding that in all matters where the Architect has to apply his professional skill he will act in a fair and unbiased manner.

It would seem that under a JCT contract where the term reasonable satisfaction of the Architect is used then the Architect when exercising his powers cannot demand standards which exceed those specifically referred to in the specification. Further, he must act in a fair and unbiased manner. Should the contractor or subcontractor be dissatisfied with the Architect's decision then the remedy lies in a reference to an arbitrator who is given express powers under the arbitration clause to:

"open up, review and revise any certificate opinion decision ..... of the Architect".

The ICE conditions include slightly varied words in clause 13(1) which state:

> "The contractor shall complete and construct complete and maintain the Works in strict accordance with the contract to the satisfaction of the Engineer."

Similarly the FIDIC 4th Edition conditions under clause 13.1 state:

> ***"... the Contractor shall execute and complete the Works and remedy any defects therein in strict accordance with the Contract and to the satisfaction of the Engineer."***

There is no reference to "reasonable satisfaction". Does this mean that the Engineer has a greater discretion under the ICE conditions than that of an Architect under JCT conditions. In all probability a court would hold that the contract contained an implied clause that the Engineer in exercising his powers must act reasonably. A previous reference has been made to the decision in ***Sutcliffe -v- Thackrah*** when it was held that an Architect is obliged to act in a fair and unbiased manner. The same would apply to an Engineer. It is submitted that in practical terms there is little difference between a contractor or subcontractor's obligation to carry out work to the "satisfaction" or "reasonable satisfaction" of Architect or Engineer. In like manner to an arbitrator appointed under a JCT form of contract the arbitrator appointed under the ICE conditions has power to

> "open up review and revise any decision opinion instruction direction certificate or valuation of the Engineer."

SUMMARY

There is no definition as to what is meant by reasonable satisfaction. It might appear to suggest that the test is an objective one, but in truth the test is the subjective standards of the particular Architect or Engineer. If the contractor is not satisfied his recourse is to refer the matter to arbitration.

22. Can a Contractor or Subcontractor legitimately walk off site if payment isn't made when due.

This matter was examined in the case of ***Channel Tunnel Group Ltd. and Trans Manche SA -v- Balfour Beatty Construction and Others (1993) 1 All ER 664***

It was originally considered that the Channel Tunnel wouldn't require a cooling system. However, as an afterthought a variation order was issued on 29 April 1988 in accordance with clause 51(1) for a cooling system to be installed. There was no disagreement as to the obligation of the contractors to carry out the work. What was at issue was the price for the variation. On 6 December 1988 the contractors proposed a figure of £120 million, rising later to £133.84 million. These sums didn't include the costs of delay and disruption. Eurotunnel on the other hand suggested a payment of £86.93M inclusive of delay and disruption costs. No agreement was reached and the contractor suggested that payments on account should be made on a cost plus basis subject to final agreement. This was accepted by the Employer and payment made accordingly. It was alleged by Eurotunnel that the contractors didn't appear to wish to settle the price of the variation and they wrote a letter on 26 November 1990 to the effect that in future payments were to be on the basis of their £86.93 million valuation. Up to September 1991 the contractor had applied to be paid £58 million but had received only £41 million. At this stage the contractors decided to take matters into their own hands. In a letter dated 3 October 1991 they threatened to suspend work on the cooling system unless their requirements concerning payment were met. On 14 October 1991 Eurotunnel issued a writ seeking an injunction restraining the contractors from suspending work. By way of response the contractors applied to have the action stayed and the dispute referred to arbitration.

The action provides a kaleidoscope of legal matters sufficient to overheat the average legal brain. Clause 61 of the contract provides for settlement of disputes. In the first instance disputes or differences were to be referred to a panel of three persons acting as independent experts but not as arbitrators who would state their decision in writing. If either party was dissatisfied with the decision of the panel, the matter would be settled by ICC Arbitration in Brussels. The parties chose to ignore the clause. TML preferred to threaten to suspend work even though there was no suspension of work clause in the contract, whilst Eurotunnel opted for an application for an injunction.

Under the ICC rules the parties are free to determine the law to be applied by the arbitrator. Clause 68 of the contract with regard to the law to be applied, stipulated that in all respects the construction, validity and performance of the contract was to be governed in accordance with the principles common to both French law and English law. In the absence of common principles the clause went on to say general principles of international trade law as have been applied by national and international tribunals would take effect. The almost unbelievable lack of precision in this clause has a potential for lawyers to chew on the bone for decades.

To progress the story, the contractors accused Eurotunnel of failing to negotiate in good faith as required by international trade law. The court considered that Eurotunnel at some stage would level a similar complaint against the contractors. In addition, the contractors said that Eurotunnel were in breach of contract by abandoning the agreement to make on account payments on a cost plus basis. Eurotunnel's answer was that the contract provided for them to fix the price of variations if agreement could not be reached.

With regard to the threat to suspend work on the cooling system the contractors argued that they had an entitlement to such a remedy, due to Eurotunnel's breach. No such right in the absence of an express clause in the contract exists under English law. However, due to the loose nature of the clause relating to the applicable law, the contractors were able to argue that authority exists under Commonwealth laws.

Evans J took the view that there was no breach of contract by Eurotunnel. If there had been a breach he considered it could not justify the total suspension of the cooling system work.

He considered that in principle an interim injunction could be issued even though the disputes clause directed any arbitration would take place in Brussels. However, upon the contractors undertaking not to suspend work on the cooling system without giving Eurotunnel 14 days notice he made no order in respect of the injunction.

The application to stay proceedings for matters to be referred to arbitration was also rejected by the judge. His reasoning was that neither party had referred the matter to the panel. Such reference being a condition precedent to any right to have the matter referred to arbitration.

The contractor appealed against the judge's decision. With regard to the application to stay proceedings whilst the dispute was referred to arbitration, the Court of Appeal was influenced by the recent decision in ***Enco Civil Engineering Ltd. -v- Zeus International Development Ltd. (1992).*** In this case the court granted a stay in relation to a contract let using the ICE conditions. The provision of clause 66 of the ICE conditions requires the engineer to give a decision before a disputed matter can be referred to arbitration. A stay in that case was ordered notwithstanding the fact that at the date of the order no Engineer's clause 66 decision had been given. In view of this decision the Court of Appeal reversed the lower court's decision and ordered a stay.

With regard to the injunction, again due to the imprecise wording in the clause dealing with the applicable law, the Court of Appeal were not prepared to order that the contractor had no right to suspend work on the cooling system. This was a matter to be dealt with by a different tribunal. In any event it was considered that some of the companies who make up TML were French and they had agreed to arbitrate not in England but in Brussels. It could not therefore be considered as a domestic arbitration to be dealt with in Section 1(4) of the Arbitration Act 1975.

The Court of Appeal held that they did not have jurisdiction to grant an injunction under 12(6) of the Arbitration Act 1950. Under that section the court has no jurisdiction in a case where the parties have chosen to have the arbitration heard in Brussels. This is likely to be only the beginning of litigation and arbitration which has every chance of a longer run than 'The Mousetrap'.

SUMMARY

In the absence of an express right in the contract, a contractor or subcontractor has no entitlement to suspend work if payment isn't made in accordance with the terms of the contract.

In the absence of the sort of wording included in the U.K. Domestic for of Sub-Contract DOM/1 which gives a subcontractor an entitlement, subject to proper written notice, to suspend work in the event of the contractor not making proper payment, the subcontractor may not suspend work for non-payment. His entitlement may be to determine if there is provision in the contract if not, his rights of determination will be common law rights.

23. Where a Contractor or Subcontractor includes in error an unrealistically low rate in the Bills of Quantities, can he be held to the rate if the quantities substantially increase or is he entitled to have the rate amended.

Most Quantity Surveyors and Engineers if convinced that the contractor or subcontractor has included an unrealistically low rate in the Bill of Quantities will insist upon the rate applying up to the quantity in the Bill. Any excess in quantities over and above the Bill quantity to be paid for at a fair and reasonable rate.

In the case of ***Dudley Corporation -v- Parsons and Morris Ltd. (1959)***: -

> "A contract for the building of a school was in the RIBA 1939 Form, with quantities. The contract terms in issue were essentially the same as those of JCT 63 and JCT 80. The contractors priced an item for excavating 750 cu. yds.. in rock at £75, i.e. two shillings a cube. This was a gross underestimate, although it was not known whether rock would be met. In carrying out the excavations described in the drawings and bills, the contractors excavated a total of 2230 cu. yds. of rock. The Architect valued the work at two shillings a cube for 750 cu. yds., and the balance at £2 a cube. £2 was not unreasonable if no other price applied. The employer disputed this amount. The arbitrator found 'no sufficient evidence ... that the price of two shillings per yard cube ... was a mistake."

The Pearce J. in Court of Appeal when deciding a matter related to the case said: -

> "In my view, the actual financial result should not affect one's view of the construction of the words. Naturally, one sympathises with the contractor in the circumstances, but one must assume that the chose to take the risk of greatly under-pricing an item which might not arise, whereby he lowered the tender by £1,425. He may well have thought it worth while to take that risk in order to increase his chances of securing the contract."

This cause merely flirted with the problem of a low rate inserted in error, it didn't provide the answer to the question.

'Keating on Building Contracts', Fifth Edition, attempts the answer as at page 95: -

> "Effect of pricing errors

> When the contractor has made an error in his pricing of the tender for a lump sum contract and there are no grounds for rectification and the contract provides for payment of variations at rates shown in the tender, a difficult question can arise when pricing variations and the error is apparent. Should any, and if any, what, adjustment be made in the rate shown in the tender arrive at the new rate for pricing variations? Many surveyors in practice claim to make an adjustment. It is thought that there is no generally accepted custom and that the question must always be one of construction. The matter can conveniently be dealt with by an express term."

Keating appears to dodge the question.

Many Quantity Surveyors and Engineers hold the contractor to the rate in the Bill of Quantities and then allow a fair and reasonable rate for all quantities in excess. The method however seemed not to find favour with the judge in the Dudley Corporation case.

It appears to be one of those questions with no ready answer.

In ***Henry Boot Construction –v- Alstom Combined Cycles (1998)*** the contractor included in his Bills of Quantities a lump sum for piling work. The conditions of contract were ICE 6th Edition. Additional sheet piling was required and Henry Boot submitted a claim derived from the lump sum price. The price in the Bill of Quantities was excessively high due to a pricing error on the part of Henry Boot. It was held by the court that the contractor was entitled to use the rate as

> "The basic consideration is that the contractor has agreed to do all work within the contract, original and varied on the basis of the bill rates."

Perhaps it may be worth stating that where a priced Bill of Quantities has been vetted by a Quantity Surveyor or Engineer any errors which are discovered should be drawn to the contractor's attention. Any failure to do so could result in the contractor becoming entitled to an adjustment of the rate.

SUMMARY

There is little authority of what should happen where an unrealistically low rate is included in a Bill of Quantities and the Billed quantity is the subject of a substantial increase. In ***Dudley Corporation –v- Parsons and Morrin*** the contractor was not entitled to an enhanced rate where the quantity became the subject of a substantial increase. However in ***Henry Boot Construction –v- Alstom Combined Cycles*** the court held that an unrealistically high rate could be used where a substantial increase in work occurred.

24. Where defects come to light after the Architect or Engineer issues a final certificate, does the Contractor or Subcontractor still have a liability or can he argue that once the certificate has been issued the Employer loses any future rights.

The limitation acts were passed in some countries to prevent claimants pursuing stale claims. In the U.K. under The Limitation Act 1980 actions must be commenced within 6 years of the date the breach occurred, 12 years if the contract is a deed. These limitation rules apply unless there is a clause written into the contract under which they are varied.

In ***Colbart Ltd. -v- H. Kumar (1992) 59 BLR 89***, Judge Thayne Forbes QC had to consider the effect of a Final Certificate given by an Architect under the terms of the JCT Intermediate Form of Contract, 1984 Edition. Clause 1.1 of the contract provided that:

> "1.1 The contractor shall carry out and complete the works in accordance with the contract documents ... provided that where and to the extent that approval of the quality and materials or of the standard of workmanship is a matter for the opinion of the Architect ... such quality and standard shall be to the reasonable satisfaction of the Architect ... "

Clause 4.7 provided that:

> "4.7 The final certificate for payment shall be conclusive, except for any matter which is the subject of proceedings commenced before or within 21 days after the date of the Final Certificate for payment, that the quality of materials or the standard of workmanship is, where proviso to clause 1.1 applies, to the reasonable satisfaction of the Architect ... that any necessary effect has been given to all the terms of the contract that require additions or adjustments or deductions from the contract sum, save in regard to an accidental inclusion or exclusion of any item or any arithmetical error in any computation."

Judge Forbes held that the wording of clause 1.1 was not sufficiently explicit to limit the conclusive effect of a certificate under 4.7 to materials and workmanship which the parties had stipulated should be of a quality and standard to the reasonable satisfaction of the Architect. He decided that the quality of materials and standards of workmanship involved in matters which were the subject of complaint had not been stipulated as having to be to the Architect's satisfaction and were inherent matters for the opinion of the Architect and that the certificate applied to them.

In other words, the Architect's Certificate was conclusive. Any attempt by the Employer to subsequently commence an action outside the expiry date of 21 days after the issue of the Final Certificate for faulty workmanship or materials where approval of quality is inherently a matter for the Architect would fail.

In ***Darlington Borough Council -v- Wiltshire Northern Ltd.*** the court had to decide upon the effect of a Final Certificate issued under JCT 63 (July 1977 revision). The court decided, unlike the *Kumar* case, that the Final Certificate was not final and conclusive. The wording of JCT 63 (July 1977 revision) clause 30(7)(a) is as follows:

> "Except as provided in paragraphs (b) and (c) of the sub-clause (and save in respect of fraud) the Final Certificate shall have effect in any proceedings arising out of or in connection with the Contract .... as
>
> (i) conclusive evidence that where the quality of materials or the standards of workmanship are to be to the reasonable satisfaction of the Architect the same are to his satisfaction."

In the opinion of the Judge in the *Darlington* case, clause 30(7)(a) makes it clear that a final certificate under the clause applies to materials and workmanship expressly stipulated in the contract to be to the Architect's reasonable satisfaction and by implication to none other.

In my opinion, therefore, the Final Certificates issued by the Architect would not provide Wiltshier, the contractor, with a defence to the Employer's claims.

The wording of JCT 80 is almost identical to JCT 63 and therefore would be conclusive only to the extent of workmanship and materials expressly stipulated in the contract to be to the Architect's reasonable satisfaction.

An attempt was made by the contractor in the case of ***National Coal Board -v- William Neill and Sons (St Helens) Ltd. (1983) 26 BLR 81*** to escape liability for the collapse of a section of a gantry on the basis that the Engineer had issued a Final Payment Certificate. The conditions of contract were the Standard BEHMA RC Conditions which in clauses 4(1) and 18(v) state:

> "All plant to be supplied and all work to be done under the contract shall be manufactured and executed in the manner set out in the specification, if any, and to the reasonable satisfaction of the Engineer .... "

The contractor's argument was that his obligation was to execute the work to the reasonable satisfaction of the Engineer. This they had done as was evidenced by the Final Payment Certificate.

It was held by the court that the contractor had a twofold obligation viz. to execute the work in the manner set out in the Specification and, in addition, to execute the work to the reasonable satisfaction of the Engineer.

In the event the contractor had complied with only one of his twofold obligations and was therefore liable to the National Coal Board for the cost of the remedial works.

Neither the ICE or GC/Works/1 conditions give any finality to the Final Payment Certificate.

In FIDIC Clause 62.2 covers Unfulfilled Obligations: -

> "Notwithstanding the issue of the Defect Liability Certificate the Contractor and the Employer shall remain liable for the fulfilment of any obligation incurred under the provisions of the Contract prior to the issue of the Defects Liability Certificate which remains unperformed at the time such Defects Liability Certificate is issued and, for the purposes of determining the nature and extent of any such obligation, the Contract shall be deemed to remain in force between the parties to the Contract".

SUMMARY

The effect of the issue of the Final Certificate on the liability of the contractor will be dependent upon the wording of the contract. In the case of IFC 84 there is a high level of finality associated with the issue of the Final Certificate. There is no finality attached by the FIDIC, ICE and GC/Works/1 conditions to the issue of the Final Certificate and a limited element of finality with JCT 63 and JCT 80.

25. When tendering should a contractor make provision for preliminaries associated with the expenditure of provisional sums or will they be paid for as an extra in the final account?

Expenditure of provisional sums included in a contract by the Employer or his consultants often causes arguments when they are expended. The problems do not usually arise out of the measurement of quantities or agreement of rates but the effect of the work included in the provisional sum on progress and completion. Engineers, Architects and Quantity Surveyors usually consider that the contractor should have made provision in the programme and contract price for the preliminaries associated with the provisional sums. Contractors contend that no such allowances need be made and the work should be treated as an extra.

The decision in ***St Modwen Developments Ltd. -v- Bowmer and Kirkland Ltd.*** **(1996)** provides assistance.

Bowmer & Kirkland undertook to construct an office block for the plaintiffs, St Modwen Developments under a JCT 80 form of contract. Bowmer & Kirkland supplied St Modwen Developments with a fully priced bill of quantities. Bill no. 7 related to provisional sums to be carried out by domestic subcontractors, and stated:

"The following provisional sums are for work to be undertaken by the subcontractors who are employed as domestic subcontractors. The contractor is to include any profit on the costs of any attendances as described in the Preliminary Section of these Bills of Quantities."

A dispute arose as to whether the contractor was to include extra in his price for profit and costs of attendance on the subcontractors. The word "inc" was inserted in the Bills of Quantities alongside the item and the contractor contended that 'inc' meant that the profit and costs of attendance was included in the provisional sum. If the contractor was correct he would be entitled to be paid the amount of the subcontractors final account plus profit and costs to be set against the amount of the provisional sum. In the event of the contractor being wrong only the subcontractors final account would be set against the provisional sum as the profit and costs would be deemed included elsewhere in his price.

The matter was referred to arbitration where the contractor was successful. An appeal against the arbitrator's award was heard in the High Court. The judge who supported the arbitrator said:

> "A vital finding is contained in the second sentence in paragraph 398, which I should repeat namely:

> 'Therefore, in the same way that a contractor would not be in a position to know and therefore price for the 'preliminaries' of the type referred to in SMM6 in respect of a provisional sum for, say, contingencies, BK in these circumstances are not deemed to have allowed for such 'preliminaries' [sic] items in their tender."

> "I approach the construction of Bill 7 on the basis that it is proper to have regard to the priced Bill 7 at the first tender stage and the letter stating that the preliminaries were firm."

In paragraph 398 of the interim award, Mr. Crowter stated:

> "For the avoidance of doubt, I find that because SMD, through Warrington Martin identified this work as provisional sums in the contract bills, the contractual provision is that all work covered by these provisional sums for domestic subcontractors, was 'provided for work or for costs cannot be entirely foreseen, defined or detailed at the time the tendering documents are issued'. Therefore, in the same way that a contractor would not be in a position to know, and, therefore, price for the 'preliminaries' of the type referred to in SMM6 in respect of a provisional sum for, say, contingencies, BK in these circumstances are not deemed to have allowed for such 'preliminaries' items in their tender."

> "I am left in no doubt that the conclusion reached by Mr Crowter in the second sentence of paragraph 398 is correct. It follows that 'inc' meant included in the provisional sum a figure which could only be known once the work the subject matter of the provisional sum had been carried out and could then be valued."

SMM 7 used with JCT 80 deals with the problem head on in that it differentiates between provisional sums for undefined work where the contractor will be deemed not to have made any allowance for programming, planning and pricing preliminaries and provisional sums for defined work where the contractor will be deemed to have made due allowance for programming, planning and pricing preliminaries.

General rule 10.3 of SMM 7 states:

A Provisional Sum for defined work is a sum provided for work which is not completely designed but for which the following information shall be provided:

a) The nature and construction of the work.
b) A statement of how and where the work is fixed to the building and what other work is to be fixed thereto.
c) A quantity or quantities which indicate the scope and extent of the work.
d) Any specific limitations and the like identified in Section A35.

SUMMARY

Where a JCT contract is used provisional sums are categorised as either defined provisional sums or undefined provisional sums. Where a defined provisional sum is used the contractor is deemed to have made due allowance for programming, planning and pricing preliminaries.

The only legal case which deals with the principle is ***St Modwen Developments Ltd -v- Bowmer and Kirkland*** where it was held that the contractor was not deemed to have included for preliminaries in his price.

26. Where a Contractor or Subcontractor whose tender is successful receives a letter of intent, is he at risk in commencing work or ordering materials or design if the project is abandoned before a contract is signed. On the other hand, is he entitled to payment.

To establish a contract not only requires agreement by the parties on all the terms they consider essential, but also sufficient certainty in their dealings to satisfy the requirement of completeness. An intention to create a legally binding relationship must also be present. Letters of intent traditionally fail on both since they are usually incomplete statements preparatory to a formal contract. Under normal circumstances therefore, a letter of intent is binding upon neither party ***Turiff Construction Ltd. –v- Regalia Knitting Mills Ltd. (1971).***

Fast track construction methods often leave in their wake the procedure for drawing up the contract which in many instances lacks the necessary urgency it merits.

This has lead to an increase in the use of letters of intent, the original purpose of which is little more than a method of informing the contractor or subcontractor that his tender is successful and that a contract is to be entered into at some stage in the future.

The original purpose of the letter of intent has changed in recent times. It is now common practice to include in a letter of intent an instruction to commence design, order materials, fabricate and event start construction on site in anticipation of a contract being entered into.

Arguments often arise as to whether the letter of intent itself constitutes a contract and if not, whether the negotiations which follow result in a concluded contract. If it is held that there was never a contract entered into, further disputes can arise as to the basis on which payment is due for the work carried out in accordance with the instruction contained in the letter of intent.

In ***British Steel Corporation -v- Cleveland Bridge Ltd. [1984] 1 All ER 504***, the Court had to deal with the question as to whether a particular letter of intent created a contract. In the context of the case the judge, Robert Goff, said:

> "Now the question is whether in a case as the present, any contract has come into existence must depend on a true construction of the relevant communications which have passed between the parties and the effect (if any) of their action pursuant to those communications. There can be no hard and fast answer to the question whether a letter of intent will give rise to a binding agreement; everything must depend on the circumstances of the particular case."

Robert Goff went on to say that if work is done pursuant to a request contained in a letter of intent, it will not matter whether a contract did or did not come into existence because, if the party who has acted on the request is simply claiming payment, his claim will usually be based on a quantum meruit. Unfortunately, it seems Robert Goff took a rather simplistic view as there is no hard and fast rule as to what constitutes a quantum meruit payment.

It is of little advantage to a contractor or subcontractor to learn that he is entitled to a payment if there is no agreement as to how much the payment will be.

In the recent case of ***Kitsons Insulation Contractors Ltd. -v- Balfour Beatty Buildings Ltd. (1989)*** the court had to decide whether a letter of intent sent by the main contractor to a subcontractor created a contract.

Balfour Beatty was appointed main contractor for Phase 1 of the White City Development for the BBC. Kitson submitted a tender to Balfour Beatty on the 28 October 1987 in the sum of £1,109,303.00 for the design, manufacture, supply and installation of modular toilet units and accessories. In the period which followed, a large number of variations were made by Balfour Beatty to the details of the work required by them and as a result Kitson revised their tender to £1,179,379.00.

Balfour Beatty sent a letter of intent to Kitsons dated 23 March 1988. The general gist of the letter was that Balfour Beatty intended to enter into a subcontract with Kitsons using the standard subcontract DOM/2 1981 edition amended to suit Balfour Beatty's particular requirements which was to be forwarded in due course.

The approximate subcontract amount was £1,162,451.00 less 2½% discount on a fixed price lump sum basis.

Finally, the letter of intent requested Kitsons to accept the letter as authority to proceed with the subcontract works.

Kitsons, as requested, signed and returned the letter as acknowledgement of receipt and then commenced work.

It was not until 22 August 1988 that Balfour Beatty drew up and submitted a formal subcontract to Kitsons. Accompanying the subcontract was a letter indicating an acceptance of Kitsons' offer. The letter went on to say that payment was not to be made until the subcontract had been signed by Kitsons and returned.

Kitsons did not sign and return the subcontract. Their stated reasons being twofold. Firstly, the amount in the subcontract received for signing from Balfour Beatty included a number of variations not provided for in the price. Secondly, the main item of cost related to off site fabrication and to safeguard their cash flow, Kitsons had included with their tender an Activity Schedule for interim valuations and payments. No provision had been made for including this Schedule in the subcontract.

Following commencement of the work by Kitson payments totalling £992,767.00 were made to them by Balfour Beatty during the period October 1988 to January 1989. These payments were based upon the subcontract conditions DOM/2 with amendments which Balfour Beatty considered applied. Kitson claimed that no binding subcontract had been concluded by the parties and claimed to be entitled to be paid on a quantum meruit basis. In other words, a reasonable sum for the work. It was Kitsons' opinion that the amount paid by Balfour Beatty fell £660,000.00 short of what constituted a reasonable amount.

Kitsons commenced an action against Balfour Beatty and the Court had to decide a preliminary point as to whether Balfour Beatty in sending a letter of intent to Kitsons dated 23 March 1988 created a contract.

The Court held that no contract had been concluded as the parties had not arrived at the stage where it could be said that full agreement had been reached between them. It was considered that the matters outstanding, in particular the method of payment, were too significant for a contract to come into place.

Whilst this decision settled the question of whether a contract had come into being, it left unanswered how much Kitsons were entitled to be paid.

In ***C.J. Sims Ltd. -v- Shaftesbury Plc [1991]*** **25 Con.LR. 72**, the plaintiff contractors sought payment of more than £1m which they alleged was reasonable remuneration for undertaking work on the erection of an office building for the defendants or, alternatively, damages. They applied for summary judgement and an interim payment under rules of the Supreme Court Order Nos. 14 and 29. Shaftesbury maintained that Sims had failed to comply with a condition precedent to the contract. Whether such a condition precedent existed was tried as a preliminary issue. Sims had tendered for the work under a standard JCT 80 contract and, in response to their tender, was sent a letter of intent. Although the standard contract was not signed, Sims was asked to commence work immediately. The letter of intent provided that Sims would be reimbursed for reasonable costs, including loss of profit and overheads, incurred in the event of the contract not proceeding, all of which was to be substantiated in full to the reasonable satisfaction of the Quantity Surveyor.

Work commenced and whilst negotiations continued as to the precise terms of the contract, no agreement was ever reached. Sims claimed for what it considered to be "reasonable costs to 31 July" and its probable future costs, arguing that the statement in the letter of intent gave them an unqualified right to such payment. Shaftesbury disagreed with this interpretation of the phrase "all of which must be substantiated in full to the reasonable satisfaction of our quantity surveyor" in the letter of intent. They maintained that the last part of the statement obviously applied to everything that had preceded it, and created a condition precedent which had to be complied with before Sims could recover any costs. Further, it was only commonsense that any claim should be itemised. The Court considered various items of case law concerning when a term should be classed as a condition and decided that the wording had to be considered in its context and the circumstances of the contract and its object.

The circumstances here were that the plaintiff had been engaged to erect an office block, and it was common practice in the construction industry for contractors to submit claims. It was expected that the letter of intent would be replaced by a JCT 80 contract which made provision for the submission of claims. The purpose of the last part of the statement in the letter of intent was to make sure that a detailed claim was submitted supported by documentation for consideration, and this last part applied to the whole of the statement. "All" meant the "all of the plaintiff's claims" and "all of their reasonable costs". A condition precedent was created by this since the words used were mandatory and taking account of construction industry standard practice.

In ***Sir Robert McAlpine Management Contractors Ltd. –v- London Demolition UK Ltd. (1991)*** the defendants commenced work although there were still some items in the contract which needed settling between the parties, including the issue of a complete set of works package documentation. It was held that it was clear from the correspondence that neither party considered themselves to be in a contractual relationship and that the execution of an employer's agreement was the condition precedent to the conclusion of a contract. The Court therefore held that there had been no contract concluded. It was held that it was a condition precedent to an unenforceable contract that it should be under seal. In addition it was held that the parties did not intend there to be a contractual relationship until the formal documents were executed.

In Monk Building and Civil Engineering Ltd. –v- Norwich Union Life Assurance Society (CA) (1993) it was held that no contract had been concluded since inter-alia several of the contract terms including the liquidated damages provisions had not been resolved. It was held that even if the liquidated damages provisions had been agreed Monk considered certain of the items had to be agreed before the contract could be finalised.. Both parties considered it essential that the final contract should be under seal. The fact that Monk had commenced work, relying on the contract provisions, was not relevant. It was considered that there may be cases were a Letter of Intent provides a satisfactory basis for an "if" contract and that it may sometimes be possible to imply terms which are missing from the Letter of intent Itself. However an "if" contract must contain necessary terms. It was held that it must be clear that the "if" contract is to apply to the main contract work as opposed to preparatory work, if formal agreement is ever reached.

Mitsui Babcock –v- John Brown (1996) is a good example of a letter of intent which referred to conditions where it was held that there was sufficient certainty to form a contract.

The moral of both these cases is clear. Parties to a contract should make sure that all the terms are agreed before work commences. If this isn't possible, any letter of intent should be adequately worded as to the precise method of payment in respect of any work requested to be carried out.

SUMMARY

The effect of a letter of intent is dependent upon the wording. If the contractor or subcontractor is instructed to commence design, order materials, or commence work and complies with the instruction he is entitled to receive fair and reasonable payment. If subsequently a contract is entered into the instruction will normally merge into the contract and payment will be made in accordance with the terms of the contract.

27. Can contractors enforce pay when paid clauses

Contractors ever ready to pass risk down the line to subcontractors when employing non-standard conditions usually include a clause making payment to themselves a condition precedent to payment to the subcontractors. This type of clause is often referred to as "pay when paid".

The law concerning pay when paid clauses has been subject to statutory control as a result of the Housing Grants. Construction and Regeneration Act 1996 which came into effect on 1 May 1998. The act only applies to contracts entered into after 1 May 1998. The wording of Section113(1) of the Act seeks to outlaw pay when paid except in respect of insolvency on the part of the original paying party.

The wording of the Act which could have been drafted with phraseology of a more digestible nature states:

> "A provision purporting to make payment under a construction contract conditional on the payer receiving payment from a third party is void, unless that third person, or any other person payment by whom is under the contract (directly or indirectly), a condition of payment by that third party is insolvent."

The majority of standard forms of subcontract provide for payment to the subcontractor in accordance with the terms of the subcontract regardless of whether the main contractor has received payment from the Employer. For example the nominated subcontract form NSC/4 (now NSC/C) for use with JCT 80 (now JCT 1998) provides for the main contractor to pay the subcontractor within 17 days of the date of issue of an interim certificate. DOM/1 the domestic subcontract for use with JCT 80 under clause 21.2 includes for interim payments at monthly intervals.

The exception is the FCEC Blue Form of subcontract for use with the ICE conditions. Clause 15(3) (a) of these conditions entitles the subcontractor to be paid within 35 days of the Specified Date as set out in the First Schedule. The main contractor however is entitled to withhold payment where the Engineer hasn't certified in full the quantities included in the subcontractor's application or, if the Engineer has certified in accordance with the subcontractor's application, the Employer has neglected to make payment. This has been amended to comply with The Housing Grants Act and limits the contractor's rights to withhold payment due to non-payment by the Employer to cases of insolvency.

Following the implementation of the Housing Grants Act contractors pay when paid clauses will be limited in their effect to situations where the Employer has become insolvent. Some contractors may decide to amend their payment provisions to make it clear that pay when paid only applies when the Employer is insolvent. Others may retain their pay when paid clauses leaving subcontractors to complain if that the wording of the payment provision does not comply with the Act.

It may be appropriate in respect of contracts let before 1 May 1998 and those let subsequent to 1 May 1998 to examine the legal cases which have tried to unravel the meaning of pay when paid clauses.

In ***Schindler Lifts (Hong Kong) Ltd. –v- Shui On Construction Co Ltd. (1984) 29 BLR 95*** the plaintiffs were nominated subcontractors to the defendants who as main contractors had undertaken to build a commercial building in Kowloon, Hong Kong. The main contract was in the standard Hong Kong form which is in the same terms as the 1963 JCT form. The architect issued a non completion certificate for delay and consequently the Employer withheld monies due under two interim certificates the value of which included amounts which would otherwise have been due to the plaintiffs of $1,353,000 and $598,000 respectively. The plaintiffs were not responsible for late completion of the work.

Clause 11(b) of the subcontract provided that:

> "Within fourteen days of receipt by the Main Contractor of payment from the Employer against any certificate from the Architect the Main Contractor shall notify and pay to the Sub-contractor the total value certified therein in respect of the Sub-Contract Works and in respect of any authorised variations thereof and in respect of any amounts ascertained under clause 8(c) hereof less [retention money and amounts previously paid]."

The Plaintiffs issued a writ claiming the amounts included in the two certificates and applied for judgment under Order 14. Power, J gave judgment for $1,951,000 and dismissed the defendants' application for a stay of the proceedings under section 6 of the Arbitration Ordinance. The defendants appealed.

The Hong Kong Court of Appeal allowed the appeal for the following reasons:

1. The case was not appropriate for decision under Order 14. The complexity of the chains of contract binding the employers, subcontractors and main contractor made the questions not fit for determination under Order 14 proceedings, even though the resolution of them depended upon the legal interpretation of the contractual documents.

2. The general effect of current decisions was in favour of holding parties to their agreements to arbitrate. ***Per curiam*** it is well established under modern conditions a skilled arbitrator, familiar with standard forms of contract, may well be the best tribunal for dealing with question of law and of fact.

A similar situation arose in the Singapore case of ***Brightside Mechanical and Electrical Services Group Ltd. and Another –v- Hyundai Engineering and Construction (1988)*** 41 BLR 110.

The plaintiffs were nominated subcontractors to the defendants. Clause 11(b) of the subcontract provided that:

> "Within 5 days of the receipt by the contractor of the sum included in any certificate of the architect the contractor shall notify and pay to the subcontractor the total value certified therein.....less: Any sum to which the contractor may be entitled in respect of delay and completion of the sub-contract works or any section thereof."

On 12 March 1987 the Architect issued Certificate S.59 for $5,063,173 which included $1,698,297 in respect of the plaintiffs' sub-contract works. By their Certificate No. 52 dated 20 March 1987 the defendants certified to the plaintiffs that after deduction of retention money, "contra-charges", etc, the amount due to the plaintiffs was $924,711 but the defendants did not pay that sum as they had not been paid.

On the plaintiffs' application for summary judgment and the defendants' application for a stay under section 7 of the Arbitration Act the Assistant Registrar allowed the defendants' application and made no order on the plaintiffs' application. The plaintiffs appealed.

The sum claimed had not been received by the defendants since on 2 February 1987 the Architect had issued a non completion certificate under the main contract upon which the employer had acted and had not paid any money in respect of Certificate No S59 claiming liquidated damages of approximately $62,000.000 The contractor claimed that the subcontractor had completed late but hadn't obtained an Architect's non completion certificate which cited the subcontractor as being responsible.

The Court of appeal dismissed the appeal as provisionally clause 11(b) of the subcontract contemplated the actual receipt by the main contractor of the sum included in the certificate so that the defendants were not obliged to pay the sum certified by them which was therefore not indisputably due and payable to the plaintiffs.

These two decisions related to applications for summary judgment which did not succeed as the Court preferred the matter to be referred to arbitration. It seems however, that from what was said by the judges in the appeal Courts they took the view that pay when paid meant what it said.

Subcontractors may however gain heart from two American cases:

In ***Aesco Steel Incorporated –v- J.A. Jones Construction Company and Fidelity and Deposit Company of Maryland (1988) 4 Const. LJ 310,*** Aesco entered into a subcontract with Jones to supply structural steel and metal decking for an Amphitheatre. Payment was not due to be made to the subcontractor until after the owner had paid J.A. Jones. A balance of US$80,320 remained unpaid to Aesco and J.A. Jones argued that as payment for this amount hadn't been received from the owner no payment was due to Aesco. It was held by the Court that Aesco was entitled to be paid within a reasonable time even though the owner still hadn't paid J.A. Jones.

A slightly different situation arose in ***Nicolas Acoustics and Speciality Company –v- H and M Construction [1984] 1 ICLR 193.*** The main contract provided that the main contractor would make monthly progress payments subject to 10% retention. This retention was expressed as not being due for release until completion of the work and evidence that subcontractors had been paid. The terms of the subcontract allowed the main contractor to withhold 10% of sums due to the subcontractor until payment had been received from the owner.

Delays were encountered during the construction of the work, the owner sued the main contractor for delays and refused to pay the retention. The subcontractor sued the main contractor. Construing the payment provisions of the prime contract and subcontract together, the court said that a literal reading would result in a Catch-22 situation whereby the owner would never be required to pay until the subcontractors were paid, who in turn would not be paid until the main contractor was paid by the owner. It was held that the main contractor was obliged to pay the subcontractor within a reasonable time after completion of the work.

The best advice to be offered to subcontractors when presented with a subcontract which includes a pay when paid provision is to ask the contractor to clarify the following:

- if the Employer refuses to pay the main contractor due to default by the main contractor or other subcontractors, will payment be withheld?
- Should the answer be "no, payment will not be made" then entering into the subcontract could spell financial ruin. If the answer is "yes, payment will be made" then suggest a slight amendment to the wording of the subcontract to clarify the situation.

The New Zealand case of ***Smith and Smith Glass Ltd. –v- Winstone Architectural Cladding Systems Ltd. (1991)*** throws new light on the problem.

The appropriate wording in the sub-subcontract was:

> "We will endeavour (this is not to be considered as a guarantee) to pay these claims within 5 days after payment to Winstone Architectural Ltd. of monies claimed on behalf of the subcontractor."

The court drew a distinction between an 'if' clause, i.e. if we are not paid you will not receive payment, and a 'when' clause, i.e. we will pay you when we have been paid. An 'if' clause makes it plain that payment will only be made after payment has been received.

The 'when' clause was considered by the courts to indicate the time for payment only and that payment up the line was not a condition of payment down the line. In the case in question the payment clause was considered by the court to be a 'when' clause and therefore non-payment by Angus was no excuse for non-payment of Smith and Smith by Winstone.

Master Towle, the judge, however considered that unless the clause spells out in clear and precise terms that payment will not be made until payment is received, the clause does no more than indicate the time for payment.

A dispute over the interpretation of a pay when paid clause arose in another Hong Kong case of ***Wohing Engineering Ltd. v Pekko Engineers Ltd.*** The clause in the subcontract which was the subject of dispute was expressed as follows: -

> "This contract is based on back to back basis including payment terms".

The contractor who was the defendant in this case argued that the wording of this clause meant that payment was not due to the subcontractor until after payment had been made to the contractor under the main contract. The court disagreed, they followed the reasoning in the New Zealand case of ***Smith and Smith v Winstone (1992)*** where the judge explained how an effective pay when paid clause should be worded in the following terms.

> "While I accept that in certain cases it may be possible for persons contracting with each other in relation to a major building contract to include in their agreement clear and unambiguous conditions which have to be fulfilled before a subcontractor has the right to be paid, any such agreement would have to make it clear beyond doubt that the arrangement was to be conditional and not to be merely governing the time for payment. I believe that the contra proferentem principle would apply to such clauses and that he who seeks to rely upon such a clause to show that there was a condition precedent before liability to pay arose at all should show that the clause relied upon contain no ambiguity".

The court therefore held that the wording in the subcontract was not sufficiently robust to allow the main contractor to withhold payment from the subcontractor on the grounds that money had not been received from the employer.

SUMMARY

The law concerning pay when paid is far from certain. In the UK there appears to be no reported cases dealing with the problem. Cases which have been heard in the Far East seem to indicate that pay when paid appears to mean what it says. The contractor is not obliged to pay the subcontractor until he receives the money from the Employer.

In the USA the courts seem to favour subcontractors by obliging contractors to pay within a reasonable time. Finally, in New Zealand the courts differentiated between pay when paid clauses referred to as "if" clauses from those termed "when" clauses. A "when" clause seems to indicate the time for payment whereas an "if" clause makes it plain that payment will only be made after payment has been received.

The Housing Grants, Construction and Regeneration Act 1996 outlaws pay when paid clauses, except in the event of insolvency of the Employer.

28. Who is responsible if damage is caused to a subcontractor's work by person or persons unknown; the subcontractor; contractor or Employer.

Contractors normally like to pass down to subcontractors the risk of damage to the subcontract works. Non-standard subcontracts are often worded in such a manner that the subcontractor is expressly required to protect the subcontract works to prevent damage.

Courts will be obliged where a dispute arises to place an interpretation on such wording.

In the case of ***W S Harvey (Decorators) Ltd. –v- H L Smith Construction Ltd. (1997)*** the terms of the subcontract required the subcontractor to provide

> "all necessary and proper protection".

The court held that all necessary protection means such protection as is necessary to prevent damage to the works from whatever cause. Further the clause stated that the subcontractor

> "will be held responsible for the adequacy of the protection afforded and shall make good or re-execute any damaged work at his own expense."

The judge in the case said that the wording imposed the obligation of protecting the works firmly and squarely upon the subcontractor.

A great deal of debate has taken place with regard to the liability for damage to subcontractor's work during the period when the subcontract works are under construction and the other standard form of subcontract for use with the standard forms of building contract. Damage may be categorised under three headings where the standard subcontract forms for use with JCT 80 AND 1998 apply, for example: -

1. Caused by the Specified Perils e.g. Fire, storm, tempest etc; a matter for which the contractor or Employer will be liable by clause 8C.2.1. of DOM/1 to insure the risk.
2. Caused by any negligence, omission or default of the contractor, his servants or agents or any other subcontractor which will be the responsibility of the main contractor under clause 8C.2.1. of DOM/1.
3. Where materials or goods have been fully, finally and properly incorporated into the Works but before practical completion of the subcontract works for which the contractor will be responsible under clause 8C.2.2. of DOM/1.

Some difficulties have been experienced in deciding when the main contractor becomes liable under 3 above. In particular an interpretation of the wording "fully, finally and properly incorporated into the Works" is required.

It has been argued by some main contractors that this stage cannot be achieved until all the subcontract works have been completed and accepted on behalf of the Employer. This cannot be correct as clause 8.3.2 refers to materials or goods having been fully, finally and properly incorporated into the Works ***before practical completion of the subcontract works.***

The wording obviously contemplates the stage being reached before practical completion of the subcontract and hence this argument does not hold good. The essence is therefore the wording "fully, finally and properly incorporated into the Works".

The Works are defined in DOM/1 as "the main contract works including the subcontract works".

In the Concise Oxford Dictionary the remainder of the words are defined as:

Fully	-	completely – without deficiency
Finally	-	coming last
Properly	-	suitably, rightly

A reasonable interpretation would therefore be the materials or goods without deficiency, in their final position and suitable in respect of the contract requirements.

With regard to materials manufactured off site, for example ceiling tiles or wall tiles, when they are fixed in position with nothing further to be done to them and comply with the requirements of the contract then they are fully, finally and properly incorporated into the Works.

Where wet trades are involved such as plaster, paint or asphalt, once the wet material has been applied or laid and dried off then the materials or goods are fully finally and properly incorporated into the Works.

The purpose behind the wording would seem to be that as the subcontract works progress and parts of the work are completed, the subcontractor will move on leaving the completed parts behind. These completed parts become the responsibility of the main contractor as he and his following trades will by then be working in those completed areas.

Other subcontract forms for use with a JCT form such as NSC/4, NAM/SC, IN/SC and the like are worded in similar fashion to DOM/1.

The FCEC Blue Form for use with ICE main form is worded along different lines. Clause 14 provides for insurance to be taken out in accordance with the requirements of the Fifth Schedule for the risks set out therein. The wording of Clause 14(2) states:

> "The Contractor shall maintain in force until such time as the Main Works have been substantially completed or ceased to be at his risk under the Main Contract, the policy of insurance specified in part II of the fifth Schedule hereto. In the event of the Sub-Contract Works, or any Sub-Contractor's Equipment, Temporary Works, materials or other things belonging to the Sub-Contractor being destroyed or damaged during such period in such circumstances that a claim is established in respect thereof under the said policy, then the Sub-Contractor shall be paid the amount of such claim, or the amount of his loss, whichever is the less, and shall apply such sum in replacing or repairing that which was destroyed or damaged."

It will be necessary for the subcontractor to make sure that Part II of the Fifth Schedule fully covers damage from all causes to the subcontractor's materials and equipment.

In the absence of adequate wording in the Fifth Schedule clause 14(2) places the risk on the subcontractor's shoulders in the following terms:

> "Save as aforesaid the Sub-Contract Works shall be at the risk of the Sub-Contractor until the Main Works have been substantially completed under the Main Contract, or if the Main Works are to be completed by sections, until the last of the sections in which the Sub-Contract Works are comprised has been substantially completed, and the Sub-Contractor shall make good all loss of or damage occurring to the Sub-Contract Works prior thereto at his own expense."

SUMMARY

Main contractors where non-standard forms are used like to include claims which place the risk of damage to the subcontract works onto the subcontractor.

Where the standard forms of subcontract conditions for use with the JCT main conditions apply the subcontractor is liable for damage to goods until such time as they are fully, finally and properly incorporated into the works unless the damage has been caused by the clause 22 perils (fire, storm, tempest, etc.) or due to negligence by the main contractor or other subcontractors.

In the case of the FCEC Blue Form of Subcontract the subcontractor is at risk until the main contract works have been substantially completed unless Part II of the Fifth Schedule states the contrary.

29. Where a Contractor or Subcontractor receives a variation order and submits a quotation which is neither accepted nor rejected before commencing the work, is the Contractor/Subcontractor entitled to payment of the sum quoted or can he be forced to accept a price based on bill rates or a fair valuation which is less than the quotation.

Most standard forms of contract give the Architect or Engineer power to issue instructions to vary the works. Usually what constitutes a variation to the works is the subject of an express definition within the conditions. Further the clause dealing with variations will stipulate how they are to be evaluated. For example, JCT 80 With Quantities indicates that variations will be priced at rates in the Bills of Quantities where work in the variation is of a similar character executed under similar conditions and does not significantly change the quantities set out in the contract bills.

In FIDIC, The Engineer shall make any variation which in his opinion is necessary. Such variation may include increase or decrease in the quantities; omissions, change in character or quality, change of levels, lines, positions or dimensions, and execution of additional work of any kind necessary for the completion of the work.

The value of extra or additional work shall be ascertained at the rates in the Bills of Quantities if in the Engineer's opinion they are applicable. If there are not rates applicable, suitable rates shall be agreed between the Engineer and Contractor. If the Engineer and Contractor are unable to agree, the Engineer will fix a rate which in his opinion is reasonable and proper. Clause 52(1)

If due to the nature or amount of any omission or addition relative to the nature or amount of the whole of the work or any part thereof, an in the opinion of the Engineer any rate or price in the Bill of Quantities is rendered unreasonable or inapplicable, then a suitable rate shall be agreed by the Engineer and Contractor. If no agreement is reached the Engineer will fix a rate or price which in his opinion in all the circumstances he considers reasonable and proper. Clause 52(2)

Most of the standard forms of contract make no provision for the contractor or subcontractor submitting a quotation for variations. A notable exception is JCT 81 With Contractor's Design form were Optional Supplementary Provisions S1 to S7 are used.

The question may be asked as to why a contractor or subcontractor would wish to submit a quotation for extra work if the contract adequately provides for the evaluation of variations. It may be that the contractor or subcontractor considers the bill rates do not apply. Even so, most forms of contract provide for a fair valuation under these circumstances. Perhaps the idea of the quotation is to quantify the fair valuation. It is normally the duty of the Architect, Engineer or Quantity Surveyor to measure and value variations. The contractor or subcontractor's quotation may therefore be little more than a guide to assist in the evaluation.

Those standard forms in general use stipulate that no variation shall vitiate the contract. Nonetheless it may be argued that the variation represents such a substantial departure from the contract work that the work which is the subject matter of the variation constitutes a separate contract. This theory in the light of the recent decision in ***McAlpine Humberoak Ltd. -v- McDermott International Inc. (1991) 58 BLR 1*** will normally be extremely difficult to sustain.

Where the separate contract theory arises it may be argued that the receipt of the variation and the acceptance of the work when completed will constitute a contract which comes into being by way of an offer being accepted by conduct. It is submitted that this theory is only likely to apply if there is no variations clause included in the contract or the extremely difficult separate contract theory can be sustained. Otherwise the Employer is entitled to argue that the contract as entered into by the parties makes provision for the manner in which variations are to be evaluated and therefore the quotation has no contractual significance.

SUMMARY

It is unlikely that a quotation for extra work has any contractual status as most forms of contract provide a method of evaluating variations based upon bill rates or a fair valuation. Further many forms of contract normally state that the variations are to be measured and valued by the Architect, Engineer or Quantity Surveyor and not the contractor or subcontractor.

30. Where work is omitted from the contract by way of a V.O. can a contractor or subcontractor claim for loss of profit?

Contractors often argue that where work is omitted from their contract they lose an opportunity of earning the profit element which was built into the value of work omitted. This being the case they claim from the Employer the loss they allege to have been suffered.

Whether or not the contractor is entitled to the loss of profit isn't clear cut.

ICE 5th and 6th Editions deal with the evaluation of variations in the following clauses:

52.1 - valued at rates and prices set out in the contract

52.2 - Engineer has power to change rates in the contract which are rendered inappropriate due to the varied work

FIDIC Fourth Edition deals with the evaluation of variations in the following clauses:

52.1 - valued at rates and prices set out in the contract

52.2 - Engineer has power to change rates in the contract which are rendered inappropriate due to the varied work

52.3 - where additions or deductions from the contract price which taken together are in excess of 15% of the Effective Contract Price, i.e. excluding provisional sums and daywork, a further sum may be added or deducted to cover site and general overheads

These clauses are not too helpful in answering the question as to whether loss of profit should be paid where work is omitted.

In the case of ***Mitsui Construction Co Ltd. -v- The Attorney General of Hong Kong (1986) 33 BLR 1,*** the court seemed to give the Engineer wide scope when exercising his powers under the equivalent of clause 52.2 of the ICE conditions to adjust contract rates. A reasonable argument may be that such adjustment should be made to take account of lost profit.

Where JCT 80 applies, clause 13 deals with variations and stipulates that they will be valued at Bill rates where work is of a similar character, executed under similar conditions and doesn't significantly change the quantities. If there is a significant change of Quantities then the contractor may become entitled under clause 13.5.1.2 to a variation to the rate to include a fair allowance for the change of quantities. It

may be argued that the fair valuation should include the loss of profit in respect of work omitted.

Clause 13.5.5 provides for adjusting contract rates where the conditions have been substantially changed due to a variation. The wording differs from clause 52.2 of the ICE conditions and isn't therefore helpful to contractors wishing to argue that contract rates should be amended to take account of lost profit arising from omitted work.

In the case of ***Wraight Ltd. -v- P H and T Holdings (1968) 13 BLR 26,*** a contractor's contract was wrongly determined with the work part completed. The determinations clause provided for the contractor to be paid

"Any direct loss and/or damage caused to the contractor by the determination."

It was held by the court that this wording included loss of gross profit on the uncompleted work.

JCT 63 under clause 11(6) allows the contractor to recover direct loss and/or expense arising from a variation. Following the Wraight case this would include loss of gross profit. Therefore if the contractor could show that as a result of an omission profit had been lost the loss could be recovered if the contract were worded in a like manner to JCT 63.

JCT 80 however does not include a clause equivalent to clause 11(6) of JCT 63. Clause 26 of JCT 80 deals with loss and expense resulting from a variation but only applies where the regular progress of the works has been materially affected.

In ***Bonnells Electrical Contractors -v- London Underground (1995)*** it was held that where a call out contract was wrongly determined the injured party was entitled to loss of profit on work which would have been carried out during a period of notice which ought to have been given.

SUMMARY

The answer to the question isn't straightforward but depends upon the wording of the contract. Standard Forms in general use provide for the work to be varied including omissions and therefore there is no scope for claiming damages for breach.

Contracts which are worded along the lines of JCT 63 clause 11(6) allow the contractor to claim loss and expense where the work is varied. In ***Wraight Ltd. -v- P H and T Holdings (1968)*** it was held that the wording "direct loss and/or damage" included gross profit. Therefore it would seem that clause 11(6) of JCT 63 would also allow for loss of profit.

Where wording akin to clause 11(6) isn't included in the contract the net has to be cast wider by contractors looking for friendly wording in the contract.

FIDIC 4th Edition and ICE 5th and 6th Editions - clause 52.1 for example provides for adjusting contract rates rendered inappropriate due to the varied work. Contractors may argue that in adjusting rates allowance should be made for loss of profit from work omitted.

Under JCT 80 - clause 13.5.1.2 the contractor would have an entitlement to a fair valuation where a significant omission occurred. This it may be said should cater for lost profit from work omitted.

31. Where work is omitted by way of a VO and given to another contractor is there a liability to pay loss of profit?

It is within the powers of the parties to enter into a contract whose terms give the Employer the right to omit work and have it carried out by others. The terms of the contract should then go on to indicate whether or not the contractor is entitled to claim loss of profit. The standard forms of contract in current use do not include such a provision. In the absence of such a clause what remedy, if any, does a contractor possess where work included in its contract is omitted and the Employer arranges to have it carried out by others?

This matter was one of the subjects of dispute in ***Amec Building Ltd. -v- Cadmus Investments Co Ltd.*** **(1996)** which was referred to arbitration.

The arbitrator awarded Amec sums for loss of profit in connection with Food Court. The fitting out had been covered by certain provisional sums, but an Architect's Instruction of 9 April 1990 omitted the work from the contract. This was subsequently let to another contractor, and Amec claimed loss of profit of £12,846.72, plus statutory interest. There had been no agreement between Amec and Cadmus that the work should be omitted.

"There is no dispute between the parties that the term provisional sum is a sum provided for works or costs which cannot be entirely foreseen, defined or detailed at the time when tendering documents are issued. It is also accepted that an architect has a right to omit such sums, or part thereof, if not required and that in that event, the contractor has no recourse to a claim for loss of profit. There is apparently by way of case law which covered the situation whereby the architect having omitted a provisional sum then awarded the work to a third party. ...

"Both parties before me are agreed that the reason for the omission was irrelevant in considering whether or not the instruction was within the terms of the contract. The arguments before the arbitrator and the evidence that he heard were complicated and turned, it seems to me, in the main as to whether or not there had been an agreement between the parties that Amec would allow Cadmus partial possession of the site. ..."

The arbitrator then went on to say on balance, he found the claimants were entitled to damages for loss of profit. It appears to me that the argument that was running through the arbitrator's mind is this; that the contractor did not voluntarily give up possession of the site in the knowledge that he was not going to be required to carry out the Food Court work. What is missing from the arbitrator's findings is any conclusion that the withdrawal by the architect of the Food Court work from the provisional sum was not a proper variation within the meaning of the contract. ...

"... the point I have to decide is whether or not the terms of the contract permit the architect to withdraw work from the provisional sum and award it to a third party. There is no dispute that the power is given to the architect in his sole discretion to withdraw any work from provisional sums for whatever reason if he considers it in the best interests of the contract or the employer to do so. The difficulty that arises in this case is that which arose in the Australian case ***[Carr - v- J A Berriman Pty.. Ltd. (1953)*** 89 CLR 327], namely that it would appear that the purpose was to remove it from the existing contractor and award the work to a new contractor. Without a finding that the architect was entitled to withdraw the work for reasons put forward by Mr. Ter Haar, and in view of the fact that the specific reasons he advances were expressly rejected by the arbitrator, it seems to me that the only conclusion I can come to is that the arbitrator had concluded that it was an arbitrary withdrawal of the work by the architect in order to give it to a third party other than Amec. In those circumstances, and, in particular, in view of the express finding of the arbitrator at paragraph 12.04 that the statement in Hudson reflect [sic] the 'generally accepted position in the industry', it seems to me that the arbitrator was perfectly correct in deciding that such an arbitrary withdrawal of work from the provisional sense [sic] and the giving of it to the third party was something for which Amec were entitled to be and the compensation that he arrived at, namely the loss of the profit having accepted figures put forward to him in evidence is one which is not open to be impugned on appeal as a matter of law. In those circumstances, therefore, albeit with some reluctance, it seems to me that I should dismiss the appeal as well."

SUMMARY

The parties are at liberty to enter into a contract which allows the Employer to omit work included in the contract and arrange for it to be carried out by others. Such a clause should state whether or not the contractor is entitled to claim for loss of profit. The standard forms in general use do not include such a clause. It has been held that where work is omitted and given to others the contractor is entitled to claim for loss of profit.

This also applies to provisional sums omitted and the work given to others.

FIDIC 4th Edition clause 51.1 clearly states that the Engineer shall make any variation of the form, quality or quantity of the Works and shall have the authority to instruct the Contractor to:

...(b) omit any such work (but not if the omitted work is to be carried out by the Employer or by another contractor)

In the event that the Employer or another contractor did carry out such omitted work then this would entitle the Contractor to claim compensation/damages (including loss of profit) for a breach of contract by the Employer.

32. If an Architect or Engineer issues a variation after the extended completion date has passed but before practical completion, can an extension of time be granted or will liquidated damages become unenforceable. If an extension of time is appropriate will additional time be allowed up to the date work on the variation is completed or should the net extra time taken to carry out the extra work be added to the existing completion date.

This argument which has raged for years and been the subject of endless numbers of claims has recently been settled in the High Court in the U.K.

Disputes have centred around the appropriate remedy which should apply where an Architect or Engineer issues a variation at a time after the date for completion or extended completion but before practical completion. The contractor is in default in working during this period of "culpable delay" but what remedy is open to the Architect or Engineer concerning any delay to the progress and completion resulting from the issue of the variation.

Contractors have argued that an extension of time ought to be issued up to the date when work resulting from the variation should reasonably have been completed. Alternatively they argue that the issue of a variation during this period of culpable delay renders the completion date inoperable. The legal effect of this argument will be for time to become "at large" leaving the contractor to complete within a reasonable time. The employer will lose the right to levy liquidated damages leaving an entitlement to levy a claim for such losses as can be proved to have stemmed from the contractor's inability to finish within a reasonable time if such be the case.

Many Architects and Engineers on the other hand contend that the appropriate contractual remedy is for him to assess the period of actual delay caused by the variation and add such period to the completion date or extended completion date. Similar arguments have been made out in respect of work by subcontractors in respect of variations issued after the subcontract period or extended period has expired.

The Case, ***Balfour Beatty Ltd. -v- Chestermount Properties Ltd. (1993)*** heard before Mr. Justice Colman of the commercial court, arose out of an appeal against an award of Christopher Willis, a well known and respected arbitrator and deals with the subject matter of the question.

The works employing JCT 80 comprised the construction of the shell and core of an office block. Work commenced on 18 September 1987, the completion date being 17 April 1989, later extended to 9 May 1989. A certificate of non-completion was subsequently issued by the Architect under clause 24.1. By January 1990 the work had still not been completed.

During the period 12 February 1990 to 12 July 1990 the Architect issued instructions for the carrying out of fit out works as a variation to the contract. Practical completion of the shell and core was achieved on 12 October 1990 with the fit out works not finished until 25 February 1991.

The Architect issued two extensions of time to give a revised completion date but prior to practical completion, in a period of default. The Architect then revised the non-completion certificate to reflect the extended completion date.

The contractor argued that the effect of the issue of variations during a period of culpable delay was to render time at large, leaving the contractor to complete within a reasonable time. This being the case, the Employer would lose his rights to levy liquidated damages.

Alternatively, the contractor contended that the Architect should have granted an extension of time on a gross basis. In this case it was argued that the fit out work should have taken 54 weeks, this period to be added to 12 February 1990 when the fit out variation was issued.

It was the Employer's contention that the correct approach should be a net extension of time, that is to say one which calculated the revised completion date by taking the date currently fixed for completion and adding to it the 18 weeks that the Architect considered to be fair and reasonable.

The main plank in support of the contractor's argument was that if the net method was adopted the extended completion date would expire before the variation giving rise to the extension had been instructed, which was logically and physically impossible. If the contractor's line were followed it would provide him with a windfall which swept up his delays. While recognizing this, the contractor considered the problem had resulted from the employer's own voluntary conduct in requiring a variation during a period of culpable delay.

Mr. Justice Colman did not agree. He found in favour of the Employer on a number of grounds:

- When the Architect reviews extension of time under clause 25.3.3.2 following practical completion he is entitled to reduce the extended contract period to take account of omissions. These may have been issued during a period of culpable delay. It would, therefore, be illogical for the Architect to have to deal with additions differently to the way he deals with omissions.

- The objective of clause 25.3.1 is for the architect to assess whether any of the relevant events have caused a delay and if so by how much. He must then apply the result of his assessment to give a revised completion date. It would need clear words in the contract to allow the Architect to depart from a

> requirement to postpone the completion date by the period of delay caused by the relevant event.

The final nail in the contractor's coffin came when Mr. Justice Colman said:

> "... in the case a variation which increases the works, the fair and reasonable adjustment required to be made to the period for completion may involve movement of this completion date to a point in time which may fall before the issue of the variation instruction."

This decision is unlikely to apply to ICE 7th Edition where under clause 47(6) liquidated damages are suspended during a period of delay resulting from variations, a clause 12 situation, or any other delaying event outside the control of the contractor.

SUMMARY

Where an Architect/Engineer issues a variation after the contract completion date but before practical completion, it is appropriate where resultant delays occur for an extension of time to be granted. Such extension of time will be calculated by extending the completion date by the net period of delay. This is unlikely to apply to ICE 7th Edition which provides for the suspension of liquidated damages during a period of delay caused by variations and the like.

33. Where a Contractor or Subcontractor successfully levies a claim against an Employer for late issue of drawings can the sum paid out be recovered by the Employer from the defaulting Architect or Engineer.

Employers who find themselves having to make payments to contractors as a result of the late issue of drawings by the Architect or Engineer usually feel aggrieved. They often contemplate sending a claim for payment to the Architect or Engineer or deduct such claims from fees as they fall due. For the Employer to have a legal right to take such action he or she must be able to show that the late issue of drawings by the Architect or Engineer resulted from a breach of duty.

Architects and Engineers and other designers' duties to their clients are either express or implied in their terms of engagement.

The Appoint of an Architect published by the RIBA in Schedule Two requires the Architect to prepare production drawings. Clause 1.2.1 states:

> "The Architect shall in providing the services exercise reasonable skill and care in conformity with the normal standards of the Architect's profession".

Late issue of drawings may result from a number of causes other than breach of duty by the Architect or Engineer. The Employer may have delayed making a decision or introduced a late change. Information from the Engineer or statutory authority may have caused the delay. Late issue of drawings therefore does not automatically mean that the Architect or Engineer is guilty of breach of duty.

Employers when appointing an Architect and Engineer may wish to be a little more precise in setting out their duties than the general wording provided in the RIBA Appointment of an Architect. JCT 1998 edition provides in the sixth schedule:

> "the Employer has provided the contractor with a schedule ("Information Release Schedule") which states what information the Architect will release and the time of that release."

This clause is optional but if it is used it may be in the Employer's interests to write a clause into the Architect conditions of engagement providing an obligation to issue drawings to conform with the Information Release Schedule.

Where wording of a general nature is included in the conditions of appointment such as the RIBA wording requiring the Architect to exercise reasonable skill and care in the normal standards of the Architect profession, it will be necessary for an Employer if he or she is to be successful to show that the drawing production by the Architect fell short of what one could expect from the ordinary skilled Architect.

In the case of ***London Underground –v- Kenchington Ford (1998)*** Kenchington Ford were appointed to provide civil engineering and architectural design services in connection with the Jubilee Line station at Canning Town. They were under an express duty set out in their terms of engagement to exercise all reasonable professional skill and diligence. Part of the obligations of Kenchington Ford was to correct any errors, ambiguities or omissions arising and answering questions for clarification on design matters from the Works Director or Project Director and clarify working drawings where required. The subcontractor Cementation Bachy was responsible for the design and construction of a diaphragm wall. Errors unfortunately were included in their design information. The judge concluded that Kenchington Ford should have checked and discovered the errors and hence were in breach of their duty. Mowlem the main contractor levied a claim resulting from the incorrect design. The claim was settled and London Underground sought to recover some of the amounts paid to Mowlem from Kenchington Ford. The submitted by Mowlem was on a global basis and failed to provide proper details of losses alleged to have been incurred.

Mr. Judge Wilcox was not impressed by this lack of detail. However he found that Kenchington Ford were obliged to make a payment to London Underground but in a substantially smaller amount than was claimed.

Employers who pay out claims to contractors for late issue of design information do not automatically have a right to recover those sums from the Architect or Engineer. In the first instance it is necessary for them to show that the late issue of design information constitutes a breach of duty. Further the Employer must be able to demonstrate to the satisfaction of the Court that the amount paid in respect of the claim can be linked to the breach of duty. Settlement of a contractor's claim is often the basis of a legal action for the recovery of the amount paid by the Employer from the Architect or Engineer. To be successful in such an action it is necessary for the Employer to be able to demonstrate that the settlement was reasonable ***Biggin –v- Permanite (1951), P & O Developments Ltd. –v- Guys and St Thomas' National Health Service Trust (1998).***

Likewise in the FIDIC Client/Consultant Model Services Agreement issued in 1990 incorporates the following: -

Clause 5 - Obligations of the Consultant

- Duty of Care and Exercise of Authority

(i) The Consultant shall exercise reasonable skill, care and diligence in the performance of his obligations under the Agreement.

The Association of Consulting Engineers (ACE Conditions of Engagement are similarly worded.

In the absence of written conditions to this effect the law will imply such a duty, ***Bolam -v- Friern Hospital Management Committee (1957) 1WLR 582.***

The Architect or Engineer will escape liability if the late issue of drawings results from matters other than their own default, for example a late change by the Employer or revisions to the design due to bad ground conditions.

Where however the late issue of drawings results from default by the Architect and Engineer who ultimately issue a payment certificate for the sum involved, the Employer will be entitled to recover from the defaulting Architect or Engineer.

A more complex situation may arise if the claim is disputed and the matter referred to arbitration or litigation. From the Employer's point of view it would be the best solution for the matter to be dealt with by multi-party proceedings. The court or arbitration will then decide the extent to which the claim succeeds and the liability of the Architect or Engineer.

Where the claim from the contractor or subcontractor is compromised the Employer will usually meet stiff resistance to any attempt to recover from the Architect or Engineer who will no doubt argue that the sum which the Employer agreed to pay was excessive. This will leave the Employer to seek redress against the Architect or Engineer through arbitration or litigation.

SUMMARY

The Employer, if he is to succeed in an action against the Architect or Engineer to recover the payments made to a contractor or subcontractor, must show there has been a breach of duty. Obviously if the late issue of drawings results from a late change by the Employer or a redesign due to bad ground conditions, the Architect or Engineer will have no liability. Where the Architect or Engineer, due to his own mismanagement issues drawings late and then certifies resultant additional payment to the contractor or subcontractor, it will be difficult for him to escape liability. If the contractor or subcontractor's claim is compromised by the Employer difficulties may occur in attempting to recover the sum paid from the Architect or Engineer who will no doubt argue that the settlement was too generous.

34. Will a Contractor or Subcontractor who fails to serve a proper claims notice and supporting documentation lose his entitlement to additional payment.

Disputes often arise between contractors or subcontractors and the Employer's Consultants concerning the service of a written notice in relation to a right to additional payment. Does a lack of a written notice lose the contractor or subcontractor his or her rights. In other words is the procedure which has been written into the contract a condition precedent to the rights which are provided by the terms of the contract to one of the parties.

Hudson's Building and Engineering Contracts Eleventh Edition as at page 566 states:

> "Since the purpose of such provisions is to enable the owner to consider the position and its financial consequences, (by cancelling an instruction or authorising a variation, for example, he may be in a position to reduce his financial liability if the claim is justified), and since special attention to contemporary records may be essential either to refute or regulate the amount of the claim with precision, there is no doubt that in many if not most cases the courts will be ready to interpret these notice requirements as conditions precedent to a claim, so that failure to give notice within the required period may deprive the contractor of all remedy."

In the case of ***London Borough of Merton -v- Stanley Hugh Leach (1985)*** **32 BLR 51** at page 68, with regard to the need for a loss and expense notice under clauses 11(6) and 24(1) Vinelott J. had this to say:

> "The common features of sub clauses 24(1) and 11(6) are first that both are "if" provisions (if upon written application being made, etc) that is, provisions which only operate in the event that the contractor invokes them by a written application....."

Vinelott J. then went on to consider the amount of detail which must be included with the notice:

> "The question of principle is whether an application under clauses 24(1) or 11(6) [of the JCT Form] must contain sufficient information to enable the architect to form an opinion on the questions whether (in the case of clause 24) the regular progress of the work has been materially affected by an event within the numbered sub-paragraphs of clause 24 or (in the case of clause 11(6)) whether the variation has caused direct loss and/or expense of the kind there described and in either case whether the loss and/or expense is such that it would not be reimbursed by payment under other provisions of the contract or (in the case of 11(6) under clause 11(4))."

The judge pointed out that it would not necessarily be enough simply to make what might be described as a "bare" application which would satisfy the requirements of clause 11(6) or clause 24(1).

The application had to be framed with sufficient particularity to enable the architect to do what he was required to do. It follows that the application must therefore contain sufficient detail for the architect to be able to form an opinion as to whether or not there is any loss or expense to be ascertained.
Vinelott J also commented upon the circumstances following the contractor's application which had satisfied the minimum requirements of clause 11(6) and/or clause 24(1) so that the architect had been able to form an opinion favourable to the contractor and was then under a duty to ascertain or instruct the quantity surveyor to ascertain the alleged loss and/or expense. He said:

> "The contractor must clearly co-operate with the architect or the quantity surveyor giving such particulars of the loss or expenses claimed as the architect or quantity surveyor may require to enable him to ascertain the extent of that loss or expense; clearly the contractor cannot complain that the architect has failed to ascertain or to instruct the quantity surveyor to ascertain the amount of direct loss or expense attributable to one of the specified heads if he has failed adequately to answer a request for information which the architect requires if he or the quantity surveyor is to carry out that task."

Later he said:

> "If [the contractor] makes a claim but fails to do so with sufficient particularity to enable the architect to perform his duty of if he fails to answer a reasonable request for further information he may lose any right to recover loss or expense under [clause 11(6) or clause 24(1)] and may not be in a position to complain that the architect was in breach of his duty."

In ***Rees and Kirby Ltd. -v- Swansea City Council (1984) 25 BLR 129*** at page 133, the Court had this to say with regard to the contractor's claim for finance charges as part of the loss and expense claim and the need for reference to be made in the notice to finance charges:

> "I agree with the judge's construction of Clause 11(6) and 24(1) and with his conclusion that the architect can only ascertain and certify the amount of interest charges lost or expended at the date of the application (11 BLR 1 at pp. 13 and 14). It is these charges which are the subject of the application; it is these charges which he has power to investigate, ascertain and certify. I respectfully agree with the judge that the architect would be exceeding his powers were he to take into account further financial charges or other losses accruing during these two periods, however long, and such further charges and losses would be recoverable only, if at all, under a subsequent application or subsequent applications - although he might obtain the respondents' approval to waiving the required applications or extending the time for making them."

The ICE conditions deal precisely with the problem of late notice in that clause 52(4)(e) states:

> "If the Contractor fails to comply with any of the provisions of this clause (notice of claims) in respect of any claim which he shall seek to make then the Contractor shall be entitled to payment in respect thereof only to the extent that the Engineer has not been prevented from or substantially prejudiced by such failure to investigate the said claim."

Likewise as similarly worded in the FIDIC conditions 4th Edition in Clause 53.4:

> "If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim which he seeks to make , his entitlement to payment in respect thereof shall not exceed such amount as the Engineer or any arbitrator or arbitrators appointed pursuant to Sub-Clause 67.3 assessing the claim considers to be verified by contemporary records (whether or not such records were brought to the Engineer's notice as required under Sub-Clauses 53.2 and 53.3)".

The case of ***Hersent Offshore S.A. and Amsterdamse Ballast Beton-Waterbouw B.V. -v- Burmah Oil Tankers Ltd. (1978) 10 BLR 1*** also deals with the question of notice. The relevant wording in the contract was as follows:

> "(1) The Engineer shall make any variation of the form quality of quantity of the Works ..... that may in his opinion be necessary and for that purpose ..... shall have power to order the Contractor to do and the Contractor shall do any of the following .....
>
> (c) change the character or quality or kind of any such work.
>
> (2) No such variation shall be made by the Contractor without an order in writing of the Engineer.
>
> Clause 52 of that contract, amongst other things, provided that:
>
> ..... no increase of the Contract Price under sub-clause (1) of this Clause or variation of rate or price under sub-clause (2) of this Clause shall be made unless as soon after the date of the order as is practicable and in the case of extra or additional work before the commencement of the work or as soon thereafter as is practicable notice shall have been given in writing:
>
> (a) By the Contractor to the Engineer of his intention to claim extra payment or a varied rate, or
>
> (b) By the Engineer to the Contractor of his intention to vary a rate or price as the case may be.

> The dispute as to the claimants' entitlement to additional payment in respect of the variation was referred to the arbitration of the Hon Sir Henry Fisher who, having found the facts as set out above, determined in his award (amongst other things) that the notice of intention to claim should have been given as soon after the date of the order (10 May 1973) as was reasonably practicable and that it had not been so given and that accordingly the respondents were not liable to the claimants in respect of the variation.
>
> The claimants moved to have the award set aside or remitted to the arbitrator on the grounds that the arbitrator had erred in law in reaching such conclusions."

Thompson J. in the Queens Bench Division dismissed the appeal:

> "I am, however, not persuaded that the arbitrator has erred in law in holding that notice should have been given as soon after the date of the order, 10 May 1973, as was practicable. I do not find that he misconstrued the words used in the proviso to clause 52 in so holding.

The arbitrator finds (award paragraph 5(j)) that notice in writing of intention to claim extra payment was first given by the claimants on 9 August 1974, and that that was not as soon after 10 May 1973, as was reasonably practicable. The relevant construction work had been commenced in January 1974, and was completed, at latest, by early April 1974. If I had considered that the arbitrator had applied the wrong test and should have applied the test of 'as soon after the commencement of the work as is practicable' I should not have remitted the case to him with a direction to apply that test since, in my judgment, notice of intention given after completion of the work could not be said to have been given as soon after the commencement of the work as was practicable."

From the above it can be seen that a contractor or subcontractor who fails to serve a proper claims notice will in all probability lose his rights. Contractors and subcontractors from time to time fail to comply with the contract requirements in relation to notice or some other procedural matter, and are thus prevented from levying a claim under the contract. If the event giving rise to the claim would also give an entitlement to a common law damages claim, e.g. late issue of Architect's drawings, can the contractor claim for common law damages as an alternative?

Clause 26.6 of JCT 80 and clause 24(2) of JCT 63 states that the provisions of these conditions are without prejudice to any other rights and remedies which the contractor may possess.

From the judgment of Justice Vinelott in the case of ***Stanley Hugh Leach -v- London Borough of Merton (1985) 32 BLR 51***, it seems clear that a claim under clause 26.6 of JCT 80 and 24(2) of JCT 63 is an alternative to a claim under clause 24(1) where he observed:

> "But the contractor is not bound to make an application under clause 24(1). He may prefer to wait until completion of the work and join the claim for damages for breach of obligation to provide instructions, drawings and the like in good time with other claims for damage for breach of obligations under the contract. Alternatively, he can, as I see it, make a claim under clause 24(1) in order to obtain prompt reimbursement and later claim damages for breach of contract, taking the amount awarded under clause 24(1) into account."

It would seem that even without the express retention of common law rights they would not be lost. A clause which excluded all rights except those set out in the contract would be required if this end were to be achieved.
The failure of a contractor to submit written notice of a monetary claim entitlement under a contract may not result in loss of all rights.

In ***Maidenhead Electrical Services –v- Johnson Controls*** a clause in the contract required written notice and the contractor failed to comply. The wording in the contract was:

> "PAYMENT... Any claims by the contractor requesting consideration for payments additional to those provided for the subcontract or in Amendments to the subcontract shall be submitted in writing to the Company within 10 days of the occurrence from which the claim arises. If no notification of the claim is received by the Company within 28 days of such date, then the said claim shall be automatically invalid."

The defendants argued that this clause applied to payments additional to those provided for in the subcontract and not those for extensions of time and associated monies which were claims under the subcontract. The Courts considered opinion was:

> "The issue as reformulated focuses on damages for breach of contract and additional monies under the contract. I do not consider that the limitation applies to claims for damages for breach of contract. I do not see that a claim for damages for breach of contract as a claim for payment additional to those provided for in the subcontract. The words are wholly insufficient to exclude liability for damages for breach of contract in the event of failure to comply with those time limits. "In my view, the limitation is directed to the case where, for example, the contract rates are insufficient to cover the contractor's costs. The reference to 'amendments' supports this view. Thus, the relevant wording of condition 17 would not operate to exclude a money claim associated with an extension of time, or a disputed Amendment."

GC/Works/1 (1998) condition 46 states that prolongation or disruption costs will not be paid unless the contractor immediately upon becoming aware that the regular progress of the works has been or is likely to be disrupted or prolonged given a notice to the PM specifying the circumstances.

In the insurance case of ***Kier Construction Ltd. –v- Royal Insurance (UK) Ltd. (1992)*** the insurance policy required the claimant to notify the insurer as soon as possible if there was an occurrence such that in consequence a claim is to be made. The claim should have been made on 12 June 1989 but it was not submitted until 4 July 1989. The claimant lost his rights.

SUMMARY

Whether the lack of a proper claims notice and back up details will result in a contractor or subcontractor losing an entitlement to additional payment will depend upon the wording of the contract. Where the contract states that a notice is a condition precedent then a lack of notice will be fatal. The same would seem to apply if the contract is silent on the matter.

Some contracts, for example the ICE and FIDIC, are explicit as to the effect of lack of notice.

Loss of a right to claim under the terms of the contract may not affect a right to recover sums for breach of contract.

35. Where a delay to completion for late issue of drawings has been recognised, is it correct for loss and expense or additional cost claims in respect of extended preliminaries to be evaluated using the rates and prices in the Bills of Quantities.

Matters such as site supervision, equipment, health and safety welfare, storage and the like normally fall within the definition of preliminaries.

The time honoured method adopted by Quantity Surveyors and Engineers when evaluating a contractor's overrun claim is to use the preliminaries as priced in the Bill of Quantities. Contractors and subcontractors have in the past accepted this method with some reluctance. Nowadays contractors and subcontractors are openly asking whether this method is correct.

The main claims clause under the JCT 80 form is:

> 26(1) " ... that he has incurred or is likely to incur direct loss and/or expense"

Other JCT contracts are similarly worded.

The 5th edition of `Keating on Building Contracts' has this to say concerning the meaning of direct loss and/or expense:

> **"Meaning of Direct Loss and Expense**
>
> This was considered by the Court of Appeal in ***F.G. Minter -v- W.H.T.S.O.*** The court held that direct loss and/or expense is loss and expense which arises naturally and in the ordinary course of things, as comprised in the first limb in ***Hadley -v- Baxendale***. The court approved the definition of `direct damage' in ***Saint Line Ltd. -v- Richardsons*** as `that which flows naturally from the breach without other intervening cause and independently of special circumstances, whereas indirect damage does not so flow'. It follows from the decision in Minter that the sole question which arises in relation to any head of claim put forward by a Contractor is whether such claim properly falls within the first limb in ***Hadley -v- Baxendale*** so that it may be said to arise naturally and in the ordinary course of things".

A similar line was taken by Megan J in ***Wraight Ltd. -v- P H and T Holdings (1968) 13 BLR 26*** when he said:

> "In my judgment, there are no grounds for giving to the words `direct loss and/or damage caused to the contractor by the determination' any other meaning than that which they have, for example, in a case of breach of contract or other question of relationship of a fault to damage in a legal context. Therefore it follows .... that the [contractors] are, as a matter of law entitled to recover that which they would have obtained if this contract had been fulfilled in terms of the picture visualised in advance but which they have not obtained ....."

The ICE conditions refer to additional cost which in the 5th Edition is defined as:

> "the word cost when used in the conditions of contract shall be deemed to include overhead costs whether on or off site except where the contrary is expressly stated."

The 6th Edition defines cost as:

> "The word cost when used in the conditions of contract means all expenditure properly incurred or to be incurred whether on or off the site including finance and other charges properly allocatable thereto but does not include any allowance for profit."

FIDIC 4th Edition defines cost as:

Clause 1"(g) (i) "cost" means all expenditure properly incurred or to be incurred, whether on or off the Site, including overhead and other charges properly allocable thereto but does not include any allowance for profit.

Cost is defined in The Concise Oxford Dictionary as

> "Price paid for thing".

It would seem from this that actual cost or loss should be the basis on which claims are based and not the preliminaries as priced in the Bills of Quantities.

GC/Works/1 Edition 3 defines expense in condition 46(6) as:

> "expense shall mean money expended by the contractor, but shall not include any sum expended, or loss incurred, by him by way of interest or finance charges however described."

MF/1 defines costs in clause 1.1j as:

> "all expenses and costs incurred including overhead and financing charges properly allocable thereto with no allowance for profit."

In ***Whittal Builders –v- Chester-Le-Street (1985)*** the court decided that the overhead sum built into the tender figure was not the one to be used when evaluating overheads but the actual overheads incurred extracted from the year-end accounts. Mr. Recorder Percival QC had this to say:

> "Lastly, I come to overheads and profit. What has to be calculated here is the contribution to off-site overheads and profit which the contractor might reasonably have expected to earn with these resources if not deprived of them. The percentage to be taken for overheads and profit for this purpose is not therefore the percentage allowed by the contractor in compiling the price for this particular contract, which may have been larger or smaller than his usual percentage and may or may not have been realised.
>
> It is not the percentage that one has to take for this purpose but the average percentage earned by the contractor on his turnover as shown by the contractor's accounts."

Cost is defined in The Concise Oxford Dictionary As

> "Price paid for thing"

It would seem from this that actual cost or loss should be the basis on which claims are based and not the preliminaries as priced in the Bills of Quantities.

SUMMARY

Having said that extended preliminaries should be based on actual cost it is necessary to state that this means reasonable costs which flow from the late issue of drawings.

It will be necessary to identify the periods of time which were affected and to cost only those preliminary items where extra costs were incurred.

From the definitions in the various contracts and text book references it seems clear that when evaluating loss and expense, expense or cost claims in respect of extended preliminaries, actual cost or loss should be the basis on which the evaluation should be made and not the prices of the preliminaries in the Bills of Quantities.

36. If a final certificate and payment is substantially in excess of earlier certificates and payments, is the Contractor/Subcontractor automatically entitled to interest on the outstanding balance? The argument being that some or all of the money included in the balance should have been certified and paid when the work was in progress.

Contractors frequently allege that Engineers and Architects deliberately undervalue work in interim certificates. With a recession in the construction industry in some parts of the world resulting in many contractors becoming insolvent, the tendency is often to ensure that contractors are not overpaid. Where this occurs there will often be a catching up of payments after practical completion with contractors paid substantial sums long after the work has been completed. The amounts involved can be much greater where genuine disputes occur which are ultimately resolved. Contractors often claim interest on these late certifications but rarely receive payment.

A great deal of the law as it applies to different countries is judge made. When judges fail to agree, confusion and a great deal of additional cost inevitably is the result.

Take for example the alternative ways in which the courts have interpreted clause 60(6) of the ICE 5th Edition. This clause states:

> "In the event of failure by the Engineer to certify or the Employer to make payment in accordance with sub-clauses (2), (3) and (5) of this clause the Employer shall pay to the Contractor interest on any payment overdue."

The FIDIC conditions do not cater for the Engineer's failure to certify, but only for the Employer's failure to pay.

FIDIC 4th Edition Clause 60(10) states:

> "In the event of the failure of the Employer to make payment within the times stated, the Employer shall pay to the Contractor interest at the rate stated in the Appendix to Tender upon all sums unpaid from the date by which the same should have been paid".

Many modified forms of FIDIC as used in the Middle East delete this part of the clause, such as in the Dubai Municipality Conditions of Contract which are based on FIDIC.

Different judges in recent times have placed more than one interpretation as to what is meant by 'failure by the Engineer to certify'. In the Scottish case of *Nash Dredging -v- Kestrel Maritime (1987) SLT 62*, Lord Ross held:

> "Accordingly if it appeared at the end of the day that the sum certified by the Engineer was less than ought to have been certified in my opinion the Engineer could not be said to have failed to have certified, provided that it had been his honest opinion that the sum certified by him was the amount then due."

In other words there would be no failure to certify if the Engineer, for example, issued a certificate concerning say a claim under clause 12 and having given the matter further consideration later increased the amount certified provided he acted in good faith. This decision was clear and free from ambiguity.

The second case to deal with an interpretation of clause 60(6) was ***Hall and Tawse -v- Strathclyde Regional Council (1990) SLT 774***, another Scottish decision. In this case the judge followed ***Nash Dredging -v- Kestrel Marine*** using the following wording:

> "I agree with Lord Ross that there would not be a failure on the part of the Engineer to certify merely because the sum certified turned out to be less than the sum which the court or arbiter thought was due."

The judge went on to suggest a further situation which may call for interpretation under clause 60(6) but declined to express a view:

> "It is not necessary for present purposes to consider whether there would be a failure on his (the Engineer's) part if he had proceeded on an interpretation of the contract or some other point of law relating to matters on which his opinion is required in order to provide a certificate which is later found to be erroneous."

An arbitration award was the subject of an appeal to the High Court in ***Morgan Grenfell Ltd. and Sunderland Borough Council -v- Seven Seas Dredging Ltd. (1990).*** This case involved the dredging of the harbour entrance channel at the Port of Sunderland. The contractor encountered materials which could not be dredged but had to resort to blasting and rock ripping. A dispute arose between the Engineer and contractor with regard to payment for the work and was referred to arbitration.

Mr. Douglas Stephenson, the arbitrator, decided that in compliance with clause 60(6) the Employer was duty bound to pay interest totalling £967,604 on the principal sum awarded of £1,954,811. This interest to apply whether the Engineer had failed to certify at all in respect of a particular item or merely failed to certify an adequate amount. He found that the contractor was entitled to monthly payments in respect of interest and therefore the interest should be compounded monthly.

The matter was referred on appeal to Judge Newey. His view was:

> "If the Engineer certifies an amount which is less than it should have been, the contractor is deprived of money on which he could have earned money ..... If the arbitrator revises his (the Engineer's) certificate so as to increase the amount, it follows that the Engineer has failed to certify the right amount."

Judge Newey upheld the decision of the arbitrator in holding that interest would be payable under clause 60(6) if the Engineer acting in a bona fide manner under-certified. This is in stark contrast to the Scottish decisions which deprived the contractor of a right to interest if the Engineer acts honestly.

There was no appeal against Judge Newey's decision.

In view of the vast sums involved, it seemed predictable that Judge Newey's decision would be challenged which was the situation in ***The Secretary of State for Transport -v- Birse Farr Joint Venture (1992)***. The case arose out of a contract to construct part of the M25. This contract, in like manner to the contracts the subject of the earlier mentioned disputes, involved the use of the ICE 5th Edition. A dispute arose concerning payment for a variation to the specification for the paving work. The sum claimed by the contractor was £3.66M. It was the Employer's contention however that there had been an over payment. As the matter was not resolved, it was referred to Mr. Derek Simmonds who was appointed an arbitrator.

It was held by Mr. Simmonds that the contractor was entitled to be paid the sum of £291,213 in respect of the paving. The contractor claimed interest on the sum under clause 60(6), plus interest in respect of under certification on other matters which were resolved without the need to refer them to arbitration.

The arbitrator found in favour of the contractor with regard to interest which was to be computed from a date three months after each valuation date.

An appeal was lodged by the Secretary of State for Transport. Mr. Justice Hobhouse in the Commercial Court was impressed by the views expressed by Mr. Justice Buckley in the case of ***Farr -v- Ministry of Transport (1960)*** in commenting as follows:

> "A distinction clearly emerges from this case between the issue of a certificate which bona fide assesses the value of the work done at a lower figure than that claimed by the contractor and a certificate which, because it adopts some mistaken principle or some errors of law, presumably in relation to the correct understanding of the contract between the parties produces an under-certification."

Mr. Justice Hobhouse, in finding in favour of the Secretary of State for Transport, said that interest under clause 60(6) would only be due where the Engineer undercertifies due to some mistaken principle or some error of law. A certificate which bona fide assesses the value of the work done at a lower figure than is due to the contractor which does not involve a contractual error or misconduct of the Engineer will not rank for interest under clause 60(6). This shows a marked difference from what was said by Judge Newey in the *Morgan Grenfell* case when allowing interest on undercertification when the Engineer acts honestly without making any contractual errors.

In Birse-Farr it was recognised that the Engineer did not only act as the agent of the Employer. On some matters which required professional skill the Engineer was required to form and act on his own opinion. In sub-Clause 60(2) and (3) the Engineer was required to form an opinion or to decide what he considered was proper. Under Clause 60(2) this requirement was to form an opinion as to the amount to certify. Under Clause 60(3) the Engineer was to form an opinion on the amount finally due to be stated in the final certificate. The expression "failure to make payment" therefore had a "qualitative content" in the same way as the phrase "withholding a certificate" has under Clause 66(2) as found in ***Farr –v- Ministry of Transport (1960).*** The question whether the Engineer has failed to certify must therefore be answered by reference to whether he has failed to form an opinion:

> "The opinion which the Engineer is required to form and express in his certificate is a contractual opinion. It must be a bona fide opinion arrived at in accordance with the proper discharge of his professional functions under the Contract.....if it therefore should be the case that the engineer's opinion is based upon a wrong view of the contract then it can be said that he has failed to issue a certificate in accordance with the provisions of the contract. This was the situation in the Farr case.....a contractor who is asserting that there has been a failure to certify must demonstrate some misapplication or misunderstanding of the contract by the engineer. For example, it certainly does not suffice that the contractor should merely point to a later certification by the engineer of a sum which had been earlier claimed and not then certified."

The words "failure of the engineer" therefore referred only to a failure by the Engineer which could be identified as a failure by the Engineer to respect and give effect to the provisions of the contract. The words did not refer to an under-certification which did not involve any contractual error or misconduct of the Engineer.

The most recent case on the subject is *Kingston Upon Thames -v- AMEC Civil Engineering Ltd. (1993)* where the court, on hearing an appeal from an arbitration, followed the line of the decision in *Birse Farr*.

In ***BP Chemicals –v- Kingdom Engineering (1994)*** the ICE 5th Edition applied with clause 60(6) deleted. It was held that the arbitrator could only award interest from the date of his award.

The ICE 7th Edition clause 60(7) has expanded the wording of clause 60(6) of the 5th Edition making it clear that interest is payable on undercertification and thus following the Seven Seas decision. Clause 60(7) defines the failure of the Engineer as follows:

> "if in an arbitration pursuant to Clause 66 the arbitrator holds that any sum or additional sum should have been certified by a particular date in accordance with the aforementioned sub-clauses but was not so certified this shall be regarded for the purposes of this sub-clause as a failure to certify such sum or additional sum."

The ICE 6th Edition clause 30(7) has expanded the wording of clause 60(6) of the 5th Edition making it clear that interest is payable on undercertification and thus following the Seven Seas decision.

The situation with regard to undercertification by the Architect where the JCT Conditions apply is somewhat different. There is no equivalent clause in the JCT contracts to clause 60(6) of the ICE conditions. In Lubenham Fidelities and Investments Co Ltd. against South Pembrokeshire District Council heard in 1986, an Architect deducted liquidated damages from the face of a certificate. This was regarded as an undercertification but the judge found that his did not constitute a breach of contract by the Employer. As such, the contractor would not be entitled to damages or interest as a result of the Architect's undercertification.

Arbitrators frequently include in their awards interest on sums undercertified....

SUMMARY

The situation with regard to interest on undercertification is now extremely unclear due to conflicting legal decisions. Where the ICE 5th Edition applies a failure to certify at all or undercertification due to influence by the Employer or a misunderstanding of the contract by the Engineer would give an entitlement to interest. With regard to undercertification in good faith the conflicting judgements leave the situation unclear where the ICE 5th Edition applies. Such interest will however be recoverable under ICE 7th Edition, however under the standard FIDIC form, 4th Edition, interest would only be due on late payments by the Employer.

Where the JCT conditions apply it is unlikely that interest will be due on undercertification.

37. When evaluating a claim for additional cost due to the late issues of instructions and/or drawings and the like, is it appropriate to assess delays against the contractor's programme or should the effect on progress be the yardstick?

The majority of standard forms in general use require the contractor to produce a programme.

FIDIC 4th Edition – Clause 14.1

- The Contractor shall, within the time stated in Part II of these Conditions after the date of the Letter of Acceptance, submit to the Engineer for his consent a programme, in such form and detail as the Engineer shall reasonably prescribe, for the execution of the Works.

ICE 5th and 6th Editions – clause 14

- The contractor shall submit a programme to the Engineer for approval ("acceptance" 6th Edition) within 21 days of acceptance of the tender ("award of the contract" 6th Edition).

JCT 80 – clause 5.3.1.2

- The contractor shall produce 2 copies of his master programme as soon as possible after the execution of the contract.

GC/Works/ 1 Edition 3 – clause 33(1)

- "The Programme shall show the sequence in which the Contractor proposes to execute the works, details of any temporary work, method of work, labour and plant proposed to be employed, and events, which in his opinion, are critical to satisfactory completion of the Works. The Contractor shall ensure that the Programme conforms with the requirements of the Contract, permits effective monitoring of progress, and allows reasonable periods of time for the provision of information required from the Authority. The Programme shall be based on a period for the execution of the works to the Date or Dates of Completion."

The conditions in the standard forms under which claims are made for late issue of drawings and instructions include the following:

FIDIC 4th Edition – clause 6.4

- "If, by reason of any failure or inability of the Engineer to issue, within a time reasonable in all the circumstances, any drawing or instruction for which notice has been given by the Contractor in accordance with Sub-Clause 6.3, the Contractor suffers delay and/or incurs costs then the Engineer shall, after due consultation with the Employer and the Contractor determine:

  (a) any extension of time to which the Contractor is entitled under Clause 44, and

  (b) the amount of such costs, which shall be added to the Contract Price,

  and shall notify the Contractor accordingly, with a copy to the Employer."

ICE 5th Edition – clause 7.3, ICE 6th Edition – clause 7.4

- If the contractor suffers delay and/or incurs costs by reason of any failure or inability of the Engineer to issue any drawing or instruction within a time reasonable in all the circumstances, he will become entitled to an extension of time and the amount of such costs.

JCT 80 –clause 26.1

- Provides for the contractor to be reimbursed direct loss and expense where the regular progress of the works has been materially affected by late issue of drawings, instructions and the like.

GC/Works 1/Edition 3 – Clause 4.3

- Includes for the recovery by the contractor of any expense directly incurred which would not otherwise have been incurred and which unavoidably results from the regular progress of the Works or any part being materially disrupted or prolonged due to the issue of any drawings and the like by the Project Manager or any direction or instruction by the Authority or Project Manager.

There is no reference in these claims clauses to the contractor becoming entitled to claim for loss resulting from delay to the programme alone. For the contractor to become entitled to claim additional monies he must be able to demonstrate that he has incurred additional cost due to:

FIDIC	Delay
ICE	Delays
JCT 80	The regular progress of the works being materially affected

GC/Works/1 The regular progress of the works or any part thereof being materially affected

It is therefore necessary for the contractor to show delay to the progress and resultant additional cost to succeed with a claim. The contractor's ability to show that the timing of the issue of drawing and instructions did not comply with the programme is in itself insufficient to found a claim.

SUMMARY

Where one of the standard forms of contract applies, the contractor must be able to demonstrate that the late issue of drawings or instructions has affected the progress and resulted in additional costs to found a claim.

The ability to show that the timing of the issue of drawings and instructions did not comply with the programme is in itself insufficient to found a claim.

38. When ascertaining claims on behalf of Employers how should consultants deal with claims for finance charges which form part of the calculation of the claims.

Contractors and subcontractors when submitting claims for loss and expense or additional cost will invariably include sums in respect of finance charges. The argument being that they have been stood out of their money for considerable periods of time which has involved borrowing to make up the shortfall. Interest has to be paid to the bank or if money is taken off deposit interest is lost.

There is now no doubt that a contractor is entitled to relief by way of loss and/or expense for financing charges.

In the Court of Appeal decision in ***F.G. Minter Ltd. -v- Welsh Health Technical Services Organisation (1980)*** **13 BLR 1**, Stephenson L.J. had this to say:

> "It is further agreed that in the building and construction industry the "cash flow" is vital to the contractor and delay in paying him for the work he does naturally results in the ordinary course of things in his being short of working capital, having to borrow capital to pay wages and hire charges and locking up in plant, labour and materials capital which he would have invested elsewhere. The loss of the interest which he has to pay on the capital he is forced to borrow and on the capital which he is not free to invest would be recoverable for the employer's breach of contract within the first rule in ***Hadley -v- Baxendale (1854)*** **9 Ex 341**, without resorting to the second, and would accordingly be a direct loss, if an authorised variation of the works, or the regular progress of the works having been materially affected by an event specified in clause 24(1), has involved the contractor in that loss."

In the more recent case of ***Rees and Kirby Limited -v- Swansea City Council (1985)*** **30 BLR 1**, the court held, in respect of the sum of £206,629.00 claimed for interest as part of a claim, that the contractor was entitled both legally and morally to every penny. The Court of Appeal confirmed that financing costs were a recoverable head of loss and expense and stated such costs shall be calculated at compound interest, with periodic rests taken into account. However, the amount of interest awarded by the judge was reduced due to circumstances particular to the case.

When ascertaining the cost of financing, the Court held that the following should be taken into account: -

i) The appropriate rate of interest is that actually paid by the contractor provided it is not unreasonable. In the event of the contractor paying well above or well below prevailing market rates it seems from ***Tate & Lyle -v- GLC [1983]*** **1 All ER 1159** that appropriate rates are those "at which (contractors) in general borrow money".

ii) The cost of finance shall be calculated on the basis that it is charged by the contractor's bank, i.e. using the same rates and compounding accrued interest at the same intervals.

iii) Where the contractor is self-financed or financed from within its corporate group the appropriate rate of interest is that earned by the contractor (or its group) on monies it has placed on deposit.

iv) Account should be taken of actual negative cash flows by way of primary expense, i.e. expenses are incurred progressively.

It has now been recognised in Scotland following the decision in ***Ogilvie Ltd. -v- City of Glasgow District Council (1993)*** that finance charges should be paid as part of a loss and expense claim.

The ICE conditions 5th edition makes reference in most of the claims clauses to reasonable costs (clause 12), costs as may be reasonable (clause 42(1)). No specific reference to the ICE conditions was made in the *Minter* and *Rees and Kirby* cases. In the light of the decision in ***Secretary of State for Transport -v- Birse Farr (1993)*** where it was held that under clause 60(6) of the 5th Edition, interest due to a failure to certify in accordance with the terms of the contract did not include undercertification, the courts may have difficulty in reconciling this with the payment of finance charges.

The FIDIC conditions refer to costs, which would be implied to be reasonable, and expressly described as properly incurred as defined in Clause 1.1(g)(i).

The ICE 6th Edition includes in its definition of cost for finance charges.

Under the ICE 7th Edition costs are defined as:

> "all expenditure properly incurred or to be incurred whether on or off the site including overhead Finance and other charges properly allocable thereto..."

MF/1 defines 'cost' as meaning:

> "all expenses and costs incurred including overhead and finance charges properly allocable thereto with no allowance for profit."

GC/Works/1 (1998) deals with finance charges in condition 47(1) in a different manner where it states:

> " (1) The Employer shall pay the **Contractor an amount by way of interest or finance charges (hereafter** together called "finance charges") only in the event that money is withheld from him under the Contract because, either

The Employer, PM or QS has failed to comply with any time limit specified in the Contract or, **where the parties agree at any time to vary any such time limit, that time limit as varied, or**

The QS varies any decision of his which he has notified to the Contractor."

Condition 46(6) excludes finance charges from the definition of expense.
The PSA took the bull by the horns and issued Technical Instruction Serial 5/85 in April 1985 setting out in precise detail the manner in which finance charges should be calculated with regard to the GC/Works/1 edition 2 Conditions.

SUMMARY

It is clear from recent cases that contractors and subcontractors are entitled to finance charges from the date the loss first occurs. The contractor or subcontractor however will lose his entitlement if he fails to submit a proper notice and details required by the terms of the contract. A further restriction upon the contractor's rights may be imposed by the conditions of contract, for example GC Works/1 Edition 3.

39. Can a contractor or subcontractor recover the cost of preparing a claim?

When a claims situation arises, contractors and subcontractors are invariably put to cost in preparing a submission to go to the Architect or Engineer. The question often asked is whether the cost is recoverable as part of the claim ascertainment and payment.

There is no definitive "yes" or "no" answer to this question. Few examples in practice can be identified where costs of preparing a claim have been certified and paid.

There is however, one reported case where a court had to decide whether a claims consultant's fees should be reimbursed to a successful claimant. The case being ***James Longley and Co Ltd. -v- South West Regional Health Authority (1983)*** 25 BLR 56. The case arose out of a dispute concerning a successful claimant's right to recover the costs of employing a claims consultant as part of the costs of the action.

An arbitration between the parties was settled after the hearing had lasted sixteen days.

The claimants' bill of costs contained an item of £16,022 for the fees of Mr. Roy K Short, a claims consultant. It was directed that the fees insofar as they related to work done in preparation of the claimants' final account and to work as a general adviser to the claimants were to be disallowed but allowance was made for £6,452 in respect of work done in preparing the claimants' case for arbitration, namely the preparation of three schedules annexed to the Points of Claim.

This case is no authority for the proposition that costs incurred in preparing claims are recoverable.

It would seem that when approaching the matter of recovery of the costs of preparing a claim, a number of questions should be addressed:

1. It would seem unlikely that in the absence of express terms in the contract which give an entitlement to payment, the cost of producing documents in support of a claim as required by the conditions of contract will be recovered. In providing this information the contractor or subcontractor is merely complying with the requirements of the contract.

2. Where the conditions of contract require the Architect or Engineer having received notice and details from the contractor or subcontractor to ascertain loss and expense, any failure to so ascertain will constitute a breach of contract.

Vincent Powell-Smith in an article appearing in Contract Journal dated 30 July 1992 had this to say on the matter with regard to claims under JCT 80:

> "If the contractor invokes clause 26 and does what is required, the Architect in under a duty to ascertain or instruct the quantity surveyor to ascertain whether loss or expense is being incurred and its amount. This follows from the wording of clause 26.1 which uses the word `shall' and which thus imposes a duty on the Architect, provided that the Architect has formed a prior opinion that the contractor has been or is likely to be involved in direct loss and/or expense as a result of the specified event(s) and which is not recoverable under any other provisions of the contract".

There is no doubt that the Employer is liable in damages for breach by the Architect of this duty and this is so whether the Architect is an employee, e.g., where the Employer is a public authority, or, as is more usual, an independent Architect engaged by the Employer . Where clause 26.1 says `the Architect shall' this, in effect, means `the Employer shall procure that the Architect shall.' This point is implicit in the reasoning in ***Merton -v- Leach*** and also follows from ***Croudace Ltd. -v- London Borough of Lambeth*** (1986) which is clear authority for the view that the Architect's failure to ascertain, or instruct the quantity surveyor to ascertain, the amount of direct loss and/or expense suffered or incurred by the contractor is a breach of contract for which the Employer may be liable in damages if the contractor can establish that he has suffered damage as a result of the breach.

This he can do without difficulty in most cases, and it does not raise any great difficulties. In ***Croudace*** Lord Justice Balcombe dealt with the matter in this way:

• `Unless it can be successfully maintained by Lambeth that there are no matters in respect of which Croudace are entitled to claim for loss and expense under [what is now clause 26], it necessarily follows that Croudace must have suffered some damage as a result of there being no one to ascertain the amount of their claim' - the Employer in that case having failed to appoint a successor Architect when the named Architect retired."

A contractor when claiming damages for a breach by the Architect in not ascertaining loss and expense will be governed by the rules in ***Hadley -v- Baxendale (1854)***. The damages recoverable under these rules are

- those arising naturally i.e. according to the usual course of things from such breach
- such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract.

It may be argued that both parties would contemplate that if the Architect fails to ascertain loss and expense and hence is in breach the parties should have contemplated that the contractor would be put to expense in preparing a fully, documented claim which should therefore be recoverable.

The same type of argument would apply under ICE or GC Works/1 conditions of contract where the Engineer or S.O. fails to certify sums due arising out of a claim.

There is a precedent for the payment of managerial costs resulting from a breach, in the case of ***Tate and Lyle Food Distribution -v- GLC (1982)*** 1 WLR 149. In that case Forbes J said:

> "I have no doubt that the expenditure of managerial time in remedying an actionable wrong done to a trading concern can properly form the subject matter of a head of special damage."

This argument may be extended to cover the cost of claims preparation following a breach.

Where matters are referred to arbitration an arbitrator has a discretion to direct by whom and to whom costs shall be paid. The exercise of the arbitrator's discretion is limited to costs connected with or leading up to the arbitration. Normally the arbitrator will award costs in favour of the successful party which have been incurred after the service of the arbitration notice. However, if costs incurred before the service of the notice are in contemplation of the arbitration then the arbitrator may include them in his award of costs. It may be argued that costs of preparing a claim document which ultimately forms part of the pleadings but is prepared before the arbitration notice is served falls into the category of costs in contemplation of arbitration. A note on the file before the claim is prepared to the effect that it is being prepared in contemplation of arbitration may prove helpful.

SUMMARY

Payment of the costs of preparing a claim is usually resisted by Engineers, Architects and Quantity Surveyors acting for Employers. The subject often becomes emotive. Contractors and subcontractors will be required to demonstrate a positive legal entitlement to stand any chance of success. In the absence of an express entitlement in the contract, contractors will have to look to some form of breach of contract to succeed. If it can be shown that prior to the service of an arbitration notice the preparation of the claim is in contemplation of arbitration, the arbitrator may in exercising a discretion with regard to the award of costs include the cost of preparing the claim.

40. What methods of evaluating disruption have been accepted by the courts?

One of the most difficult items to evaluate with any accuracy is disruption. The problem is usually caused by a lack of accurate records.

With the spotlight on linking cause and effect having been created by the decision in ***Wharf Properties -v- Eric Cumine (1991)***, claims for disruption will in the future come under greater scrutiny. It is unlikely that contractors and subcontractors will succeed where their claims for disruption are based simply upon the global overspend on labour for the whole of the contract. More detail will have to be given which isolates the cause of the disruption and evaluates the effect.

The courts have recently given some assistance in the manner in which disruption should be evaluated.

Comparison of Output

In the case of ***Whittal Builders Company Ltd. -v- Chester-Le-Street District Council (1985)***, difficulties were experienced by the Employer in giving possession of dwellings on a rehabilitation scheme. The court found that during the period when these problems existed the contractor was grossly hindered in the progress of the work and as a result ordinary and economic planning and arrangement of the work was rendered impossible. However, a stage was reached in November 1974 when dwellings were handed over in an orderly fashion and no further disruption occurred. The court had to decide upon the appropriate method of evaluating disruption. Mr. Recorder Percival QC in his judgement had this to say:

> "Several different approaches were presented and argued. Most of them are highly complicated, but there was one simple one - that was to compare the value to the contractor of the work done per man in the period up to November 1974 with that from November 1974 to the completion of the contract. The figures for this comparison, agreed by the experts for both sides, were £108 per man week while the breaches continued, £161 per man week after they ceased.
>
> At one stage I thought that some adjustment should be made in the figure of £161 to allow for inflation, but Mr. Collins satisfied me that that was not appropriate as both figures had been calculated at contract rates.
>
> It seemed to me that the most practical way of estimating the loss of productivity, and the one most in accordance with common sense and having the best chance of producing a real answer was to take the total cost of labour and reduce it in the proportions which those actual production figures bear to one another - i.e. by taking one-third of the total as the value lost by the contractor.

> I asked both Mr. Blackburn and Mr. Simms if they considered that any of the other methods met those same tests as well as that method or whether they could think of any other approach which met them better than that method. In each case the answer was no.
> Indeed, I think that both agreed with me that that was the most realistic and accurate approach of all those discussed. But whether that be so or not, I hold that that is the best approach open to me, and find that the loss of productivity of labour, and in respect of spot bonuses, which the plaintiff suffered is to be quantified by adding the two together and taking one-third of the total. That gives a figure of £21,479.35."

There should be little difficulty in calculating the productivity per man week using the build up for interim certificates. The productivity per man week could be calculated by dividing the number of man weeks worked during a valuation period into the value of work carried out giving an output per man week.

Additional Labour and Plant Schedules

It may not be possible due to the nature of the disrupting matters and the complexity of the project to employ the simple approach used in the ***Whittal Builders*** case. It may therefore be appropriate to attempt to isolate the additional hours of labour and plant which results from the event giving rise to disruption.

Assessment

Difficulties may be encountered in isolating the additional hours of labour and plant which result from each and every disrupting matter. Inevitably some form of assessment will be necessary.

The courts again have provided assistance in dealing with this problem. In the case of ***Chaplin -v- Hicks*** heard as long ago as 1911, it was held:

> "Where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case."

Two years later, Justice Meredith in the Canadian case of ***Wood -v- The Grand Valley Railway Co***, had this to say:

> "It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned Judges that such an impossibility cannot 'relieve the wrongdoer of the

> necessity of paying damages for his breach of contract', and that on the other hand the tribunal to estimate them whether jury or Judge must under such circumstances do 'the best it can' and its conclusion will not be set aside even if 'the amount of the verdict is a matter of guess work'."

The Canadian case of ***Penvidic Contracting Co Ltd. -v- International Nickel Co of Canada Ltd. (1975)*** also provides some guidance on the manner in which disruption should be evaluated where anything like an accurate evaluation is impossible. The dispute arose out of a construction agreement to lay ballast and track for a railroad. The owner was in breach in several respects of its obligation to facilitate the work. The contractor, who had agreed to do the work for a certain sum per ton of ballast, claimed by way of damages the difference between that sum and the larger sum that he would have demanded had he foreseen the adverse conditions caused by the owner's breach of contract. There was evidence that the larger sum would have been a reasonable estimate.

At the hearing, damages were awarded on the basis claimed, but on appeal to the Court of Appeal this portion of the award was disallowed. On further appeal the Supreme Court of Canada, held, restoring the trial judgement, that where proof of the actual additional costs caused by the breach of contract was difficult, it was proper to award damages on the basis used at trial. The difficulties of accurate assessment cannot relieve the wrongdoer of the duty of paying damages for breach of contract.

SUMMARY

Disruption can often be difficult to properly evaluate. One of the most satisfactory methods is by comparison of outputs when work is disrupted with outputs when no disruption is taking place.

In the absence of this type of information records showing the disruption from individual disrupting activities may be illustrated in schedule form.

Finally, when all else fails, courts have accepted disruption based upon assessed costs.