SCHEDULE OF RATES CONTRACTS—THE ABILITY TO CLAIM FOR VARIATIONS FOR CHANGES IN QUANTITIES

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Differences between 'as built' quantities and those stated in bills or other contractual estimates and unit price (measured or schedule of rates) contracts, frequently come about without any alteration in the work being called for by the architect, engineer or owner, either because of errors in taking off quantities from the drawings in the first place or because of the inherently unpredictable or provisional extent of the particular work in question.

The difference between a lump sum contract and measured contract in this situation lies in the fact that, in the former case, both parties carry the risk of both of these types of differences and the price will not alter, whereas in the latter the contract sum will be adjusted, up or down, to take account of the differences.

A question therefore often arises in a schedule of rates contract, whether an increase or decrease in the quantities of work constitutes a variation.

In the leading Australian case on the subject—*Arcos Industries Pty Ltd v The Electricity Commission of New South Wales* (1973) 2 NSWLR 186—the court held that the word 'omissions' in the variation clause did not extend to a difference between estimated and actual quantities, arising from a difference between the dimensions and levels of the work as shown on the drawings accompanying the tender and the dimensions and levels of the work shown on the actual construction drawings subsequently supplied, that is to say, to a shortfall between the estimated and the actual quantity of any item.

The variation clause in question dealt with variations of the work of addition thereto or omission therefrom. The court stated:

The reason for having a schedule of rates contract is that the extent of the work cannot at the outset be predicted ... the nature of the work is certain, but its extent is not ... variations in the levels and dimensions of the work are integral to a schedule of rates contract ... the contractor was bound to carry out the works which it had agreed to carry out. The extent of the work would depend on levels and dimensions, but the works would not change.

(It should by noted that the judges in this case were influenced by the reference in the tender documents to the following:

The levels and dimensions given on these drawings and/or in the specification are intended to give only a general indication of the works. Construction drawings and/or details issued pursuant to the contract may give levels and/or dimensions differing substantially from those given in the undermentioned drawings and/or specification. It is emphasised that the contract covers the carrying out of the works shown on the construction drawings and details.)

In a more recent decision—in the matter of an application by Queensland Electricity Commission before Dowsett J—30 August 1991, His Honour determined a summons for the construction of a schedule of rates contract. In that case, His Honour stated:

There is a fundamental difference between limits of accuracy and limits of permissible variations. Limits of accuracy concern inaccuracies in estimates of the amount of work involved in a particular, identifiable task. As pointed out by Jacobs P in Arcos Industries, it is of the nature of a schedule of rates contract that the exact amount of work to be performed will not be known with certainty until the work has been completed. Nonetheless, tenders are usually invited and made upon the basis of the range of estimated quantities. In an appropriate case,

the principal or the contractor may choose to stipulate the limits of accuracy for those estimates. This will depend upon the agreement made by the parties... that is quite a different situation from that with which [the clause in question] deals. The latter clause is intended to deal with variations in the work to be performed, whereas limits of accuracy relate to the accuracy of estimates of the work agreed to be performed.

Contrast the decision of the Privy Council in *Mitsui v Attorney-General of Hong Kong* (1986) 33 BLR 1, which decided that quantities in excess of those anticipated were variations; and *J Crosby and Sons v Portland UDC* (1967) 5 BLR 121, in which an English High Court judge decided that an increase in quantities under ICE 4th edition amounted to a variation.

LIQUIDATED DAMAGES

'Penalty or Genuine Pre-Estimate of Damages?'

As a general principal, when considering the validity of a liquidated damages clause, the fact that no loss has actually been suffered is irrelevant (*BFI Group v Integration Systems Ltd* [1987] CILL 348).

As a rule of thumb, a clause which seeks to impose liquidated damages will be upheld, provided it is a genuine pre-estimate of damages—the time to assess whether the provision is compensatory or penal is the time when the parties entered into the transaction. In practice, successful attacks on the average liquidated damages clause in a contract are rare. It is only if the amount sought to be imposed is so far in excess of the maximum conceivable as to be out of all proportion, that it may be construed as a penalty.

The Prevention Principle

Another basis of attack on the principal's right to liquidated damages is what is known as the 'prevention principle'. It is a rule of law that one party to a contract cannot complain of a breach by the other if the complainant has, by its own act prevented the other from complying. It follows that a principal who delays a contractor's progress cannot insist on strict compliance by the contractor with the contractual date for completion. Further, if the contractual date for completion is not enforceable, then any liquidated damages provisions are paralysed, because they are expressed to operate from this contractual date.

The prevention principle may be formulated as follows:

- a principal will lose the right to claim liquidated damages if some of the delay (prior to the date for completion) is due to its defaults or those of its employees or agents, unless:
    - the extension of time clause, strictly construed, allows for extensions to be granted for delays caused by acts or defaults of the principal; and
    - an extension has been validly granted;
- this will be the case even if the principal's delays are part only of the delay—the court will not seek to apportion delay, at least when considering the enforceability of the liquidated damages clause;
- even if the contractor would have been unable to complete on time in the absence of a delay by the principal, the liquidated damages clause will still cease to apply if the principal is responsible for some of the delay; and
- if the liquidated damages clause is held inoperative because of the application of this principle, the principal will still be entitled to sue the contractor for any general law damages that it can prove flow from the contractor's default.

The two key features required of extension of time provisions so as to maintain the efficacy of a liquidated damages clause are:

- extensions of time must be available for delays which are caused by preventative acts;
- the superintendent must have the right to extend time of his or her own motion. Otherwise, the contractor, simply by not applying for an extension, could cause the prevention principle to be activated.

To summarise:

- the fact that the principal has not in fact suffered any loss as a result of a delay in completion will not, of itself, have the effect of rendering void a provision in relation to liquidated damages;
- the contractor should examine the circumstances giving rise to the figure which was inserted into the contract as liquidated damages to satisfy itself that it does qualify as a 'genuine pre-estimate' at the time at which the contract was entered into;
- if the reason that the contractor has been delayed is as a result of an act of 'prevention' by the principal or its agents then, notwithstanding that the contractor may not have sought an extension of time under the contract, it is arguable that the principal has lost its right to levy liquidated damages if there is no mechanism provided in the contract for it to grant an extension of time of its own volition.

THE CONTRACTOR'S ABILITY TO CLAIM ADDITIONAL COSTS DUE TO INEFFICIENCIES IN ADMINISTERING THE CONTRACT

To succeed in establishing a claim for disruption and delay for **breach of contract** (as opposed to a claim under the contract) arising from poor coordination and planning by the principal, the authorities support that the following would need to be established by the contractor.

(i) An implied term requiring co-operation between the parties in order for them to enjoy the benefits of the contract. The implication of such a term was thought to be well established on the authorities, although recent decisions have called this into question, particularly where the contract contains express provisions to the contrary.

(ii) In breach of this implied term, the principal failed to direct or coordinate the work of other subcontractors on the site causing the contractor disruption and delay in carrying out its obligations under the contract within the time specified in the contract.

In *J & J Fee Ltd v Express Lift Co Ltd* (1993) 34 Con LR 147, it was held that in the absence of contrary express terms, there would be implied not only the 'Perini' implied terms not to hinder and to co-operate, but also the implied term to provide correct information concerning the works in such a manner and at such times as was reasonably necessary in order for the contractor to fulfil any obligations under the contract.

However, in *Martin Grant & Co Ltd v Sir Lindsay Parkinson & Co Ltd* (1984) 29 BLR 31, the court rejected an implied term that work and operations would be available so as to enable them to be carried out in a manner which was not piecemeal nor uneconomic as that implied term was contrary to the express term to carry out the works under the contract at times and in manners as directed or required.

In the Australian case of *B G Gregory Pty Ltd v Shire of Greenough*—Butterworths Unreported Judgments, BC 870 0718, the appellant claimed that when it was preparing the tender it relied upon a document described

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as 'construction managers construction program', from which the times at which the appellant was to commence and complete various aspects of its work could be established. It argued for an implied term that the respondent would manage the project to enable the appellant to start its work on a fixed date and thereafter work progressively in an orderly manner.

On appeal from a case stated for the opinion of the Supreme Court of Western Australia, the majority of the Full Court concluded it was not possible to imply a term to that effect as:

[I]t was not necessary to give business efficacy to the contract and more importantly it would be inconsistent with the express terms of the contract.

Quantum Meruit/Restitution

Confusion abounds as to the circumstances in which contractors are entitled to formulate claims for extra payment outside of the contract on the basis of the legal notions above.

(a) Quantum Meruit

An action on a quantum meruit generally rests not on implied contract but on a claim to restitution or a claim based on unjust enrichment, arising from the acceptance of benefits accruing to one party as a result of the work done by the other. The obligation to pay fair and just compensation for a benefit which has been accepted will only arise in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable.

On the other hand, where a variation has not been valued prior to execution, and the valuation is determined after the event on principles of reasonableness, recovery is on the basis of a contractual quantum meruit. This differs from a restitutionary quantum meruit in that the obligation to pay is grounded in the principal's promise to do so, rather than the duty to make restitution.

The decision of *Atlantic Civil Pty Ltd v Water Administrations Ministerial Corporation* (unreported decision of Giles J, NSW Supreme Court, 16 October 1992) raised the existence of a valid contract as a defence to a claim on quantum meruit. The decision of the referee, who ruled that a quantum meruit was available even though there was a valid contract was challenged. The court held that the referee in making his determination considered that the schedule of rates were inapplicable, and referred to 'a quantum meruit under the contract'. The court interpreted this as meaning a reasonable sum for the additional work, and was not an assessment outside the contract.

Similarly in the matter of *Concrete Constructions Group Ltd v DVP Engineering Pty Ltd* (1998) 14 BLCL 168 a fabricator subcontractor had entered into a lump sum contract with a builder, whereby the fabricator had agreed to supply and install the structural steel component of works under the head contract. A dispute arose between the parties as to the fabricator's entitlement to the price of the works performed by it. The dispute was referred to arbitration. The arbitrator in his award said that the works had so dramatically changed under the terms of the subcontract that the pricing formula accepted by the parties could no longer apply. It followed that the only way to price the work under the contract was as a total re-measurement of the works.

The builder appealed to the Supreme Court of Victoria for orders settling aside the award. The Court in refusing the builders appeal held that the arbitrator had decided the matter within the contract and not on restitutionary

principles. He had approached the issue on the basis of the contractor receiving a sum which was to be calculated at a fair value.

These later cases raise the possibility of an arbitrator valuing the works undertaken by a contractor on a re-measurement basis, notwithstanding the existence of the contract. The likelihood of any similar decision would be dependant upon a contractor demonstrating to an arbitrator that the works had so dramatically changed under the subcontract that the pricing formula accepted by the parties should no longer apply.

(b) Restitution

Provided the additional works performed are extra-contractual obligations, the court may impose an obligation on the principal to pay for work done by operation of the principle that it has taken the benefit of the work done and had actually or constructively accepted this benefit. Because the principal would be unjustly enriched if it were allowed to accept this benefit without paying for it, the law imposes an obligation to make restitution. It is on this restitutionary basis that a contractor is entitled to recover a quantum meruit for his work.

The decision of *Update Constructions Pty Ltd v Rozelle Childcare Centre* (1990) 20 NSWLR 251 is instructive on this point. This case involved a claim for variation work in the absence of a written order. The court ultimately decided that the principal was estopped from relying on the requirement for a variation order to be in writing. Where a condition precedent to enforceability of payment under a variation clause is not fulfilled, a contractor may be able to recover on a quantum meruit, the obligation being imposed by operation of law where it can be shown that the principal has actually or constructively accepted the benefit of the work.

WET WEATHER DELAYS

As a general principle, a contractor who undertakes to complete works by a specified date (time being of the essence) for a fixed lump sum, will bear the risk in both a time and money sense, in the absence of specific provisions which pass some or all of this risk to the principal or other parties. Under an evenly balanced contractual regime, there is often provision for a contractor to be awarded an extension of time for events beyond its control not reasonably anticipated at the time of contract, e.g. inclement weather. The ability to gain an extension of time in these circumstances is however a quite separate issue from the ability of the contractor to recover extra costs as a result of it being delayed by these events. Normally such a right, if it is given at all, will only arise in circumstances where the contractor has been delayed by the principal or, in certain circumstances, parties for whom the principal is responsible, e.g. superintendent, acts of other contractors etc.

The relevance to the contractor of receiving an extension of time in the absence of any entitlement to claim damages or extra costs for delay, is that it may avoid being placed in a position where it is forced to accelerate the works (at its cost) in order to achieve completion by the due date. The sanction for failing to achieve completion by the due date is often a daily or weekly sum of liquidated damages. Even in the absence of a provision for liquidated damages, failure to achieve completion by the due date, will, in the absence of any disentitling factors by the principal, give the principal a right to sue the contractor for breach of contract.

Generally, in the absence of an express provision giving the contractor the ability to claim an EOT in respect of neutral events of delay, the obligation to complete by the due date will not be altered by such events. It should be noted that a number of the standard forms provide such a mechanism. While this protects the contractor from the imposition of liquidated damages it will not, in the absence of a generous delay costs provision, assist recovery of the contractors additional costs caused by the extra time spent on site.

Patrick Mead's article first appeared in Carter Newell's *Constructive Notes* newsletter (July 2001). It appears here with permission.
