



Legal developments in construction law

1. Variation? So what's changed?

Variations (or not) are the field of many contractual battles. And one key to the solution is identifying the original scope of the works. In *Martifer UK Limited v Lend Lease Construction (EMEA) Limited*, a variation was defined as any alteration or addition to, or omission from, the subcontract works or any change in their design, quality or quantity required by a contractor's direction. Supply and fabrication of the cladding support system were to be "in accordance with the Engineer's drawings and specification" but the drawings issued did not contain any detail to assist a tenderer in the fabrication of the secondary steel support structure, other than a requirement for circular hollow steel tubes. When the contractor issued an instruction and design drawings for the support system the subcontractor made a substantial variation claim.

The contractor's commercial manager had, however, sent the subcontractor, at pre-contract stage, a table setting out in considerable detail the dimensions and weights of the various support system components. Could this table be taken into account in deciding if, and to what extent, there had been a variation? The Scottish court said it was legitimate, when interpreting the contractor's contractual obligation in terms of the pricing schedule included in the subcontract documents, to have regard to the greater degree of specification contained in the table. That specification was background knowledge available to the parties at the time when the contract was entered into and therefore relevant to identification of the parties' intention. Subject to changes accepted and paid for, the work required by the contractor's instruction was consequently not materially different from the work required under the subcontract.

[Martifer UK Limited v Lend Lease Construction Limited \(EMEA\) Limited](#)

2. When lump sum meets measure and value...

A lump sum contract is intended to give certainty by fixing the price of the works. But what if substantial changes come along, as they did in *Mascareignes v Chang Cheng*? The design and construct contract for an office building in Mauritius was stated to be a fixed price contract with no change allowed for increases in labour or materials costs. The employer, however, radically redesigned the building and, in preparing the final account, the quantity surveyor valued the bulk of the contract components by measurement and value, after deducting the original prices, while leaving the preliminaries unchanged. But was that the right approach?

The Privy Council noted that work that is not expressly or impliedly included in the work for which the lump sum is payable is extra work. Under the terms of the JCT contract used, additional or substituted work carried out within a lump sum contract could be measured and valued by using the rates and prices in the contract bills if certain contract conditions were met (being similar character work, executed in similar conditions and not significantly changing the quantity of the work set out in the bills). The use of measurement and value to ascertain the value of additional or substituted work was therefore not inconsistent with a lump sum contract and there was no error of law in the arbitrator's acceptance of the quantity surveyor's approach.

[Mascareignes Sterling Co Ltd v Chang Cheng Esquares Co Ltd \(Mauritius\) \[2016\] UKPC 21](#)

3. Concurrent delay – is the completion date actually affected?

A claim for liquidated damages under a ship refurbishment contract raised the challenging issue of concurrent delay. In considering the case law, the court identified some important groundwork for analysis of concurrent delay. In particular, it noted the importance of distinguishing between a delay which, had the contractor not been delayed, would have caused delay, but because of an existing delay made no difference and those where further delay is actually caused by the event relied on. There is only concurrency if both events (contractor delay and non-contractor's risk event) in fact (as distinct from theoretically) cause delay to the progress of the works and the delaying effect of the two effects must be felt at the same time. This reasoning has a

parallel in the prevention principle cases where the act relied upon must actually prevent the contractor from carrying out the works within the contract period.

In summary, the court said that, unless a concurrency actually affects the scheduled completion date, the contractor cannot claim the benefit of it. Causation in fact must be proved based on the situation at the time as regards delay. As the shipyard contractor had failed to prove this, the ship owner was entitled to liquidated damages.

[Saga Cruises BDF Ltd & Anor v Fincantieri SPA \[2016\] EWHC 1875 \(Comm\)](#)

4. BIM and construction contracts – how do they get on?

The King's College London, Centre of Construction Law and Dispute Resolution has produced a research report "*Enabling BIM through Procurement and Contracts*".

The two year research project investigated the links between BIM and procurement models (tested on UK government trial projects) and construction and engineering project contracting arrangements. The research group's report focuses primarily on BIM Level 2, but also touches briefly on BIM Level 3. Issues discussed include how BIM affects legal liability and the contractual status of BIM documents.

See: <http://www.kcl.ac.uk/law/research/centres/construction/assets/bim-research-report-1-jul-2016.pdf>

5. More JCT 2016 contracts, including the D & B family

The JCT has released more of the 2016 Edition contracts:

- Design and Build Contract 2016;
- Design and Build Contract Guide 2016;
- Design and Build Sub-Contract Agreement 2016;
- Design and Build Sub-Contract Conditions 2016;
- Design and Build Sub-Contract Guide 2016;
- the Short Form of Sub-Contract 2016; and
- the Sub-subcontract 2016.

Next up will be the Standard Building Contracts, Collateral Warranties and the Intermediate Building Contracts. Publication of the 2016 Edition is set to continue through 2017.

Free downloads are also available of the 2016:

- Model forms for the D & B main contract and subcontract Rights Particulars;
- Fluctuations Options B & C for the D & B main contract and subcontract;
- Construction Industry Model Arbitration Rules; and
- Minor Works Building Contract checklists.

For updates sign up to the JCT Network.

See:

<http://corporate.jctltd.co.uk/>

jct-launches-design-and-build-contract-2016/

<https://www.jctltd.co.uk/product/short-form-of-sub-contract>

<https://www.jctltd.co.uk/product/sub-subcontract>

<https://www.jctltd.co.uk/useful-documents>

6. Parliamentary report sets out 10 point plan on housing quality

The All Party Parliamentary Group for Excellence in the Built Environment has produced a report on the quality and workmanship of new housing in England. It contains 10 recommendations:

- setting up a New Homes Ombudsman;
- standardisation of housebuilding sales contracts;
- a right for buyers to inspect properties before completion;
- a requirement for builders to provide buyers with a comprehensive information pack;
- a review of consumer rights laws governing new house purchases;
- a thorough review of warranties;
- the adoption, by housebuilders, of quality systems to ISO standards;
- a significant increase in skills training;
- a minimum standard for compliance inspections; and
- housebuilders' annual customer satisfaction survey to be more independent.

See: <http://kjo6q2hv7o31ix2143c36tpx.wpengine.netdna-cdn.com/wp-content/uploads/2016/07/APPG-Final-Report-More-Homes-fewer-complaints.pdf>

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