

Hong Kong Institution of Engineers  
Alternative Dispute Resolution (ADR) Committee



Seminar  
Resolving and Avoiding Construction Disputes

**Gary Soo**

Barrister-at-Law & Chartered Engineer

*Dates 03/05/2011*

Copyright © 2011 Gary Soo's Chambers. All Rights Reserved.

**Gary Soo**

**Arbitrator, Barrister-at-Law, Chartered Engineer**

**CEDR Accredited Mediator**

LLM (Peking), LLB & BSc

FHKI Arb, FCI Arb, FIoD, CQP, MI StructE, MICE, MHKIE, MASCE

- **Arbitration and litigation involving commercial and construction disputes**
- **Listed on various panels of arbitrators / mediators / panelists**
- **Adjunct Professor at University of Hong Kong**
- **Authors of various books and articles**

● **Extension of Time and Liquidated Damages**

● **Prolongation Costs and Disruption Claims**

---

***Time in Construction  
Contracts***

# TIME IN CONSTRUCTION CONTRACTS

## ● What if no express agreement as to time to complete?

### ➤ *Charnock v. Liverpool Corporation*

- Car took 8 weeks to repair after collision with bus
- Agreement on price of repair only
- Bus owner responsible for 5 weeks and repairer 3 weeks of substituted car
- HELD: A contract to repair within a reasonable time based on an *objective test*, namely how long it would take an average competent repairer to do the work

5

# TIME IN CONSTRUCTION CONTRACTS

## ● What is reasonable time to complete?

### ➤ *Hick v. Raymond and Reid*

- Cargo shipped to London under bills of lading with no time stated for unloading; Upon arrival, unloading interrupted for several days by a strike of the dock labourers delaying the discharge beyond what normally sufficed; Then indeed not possible for unloading
- *“When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application... the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably.”*

6

# TIME IN CONSTRUCTION CONTRACTS

## ● What is reasonable time to complete?

### ➤ Insights

- Objective but with subjective elements (e.g. ability & resources)
- Not examined back at the time of the contract (i.e. not decided in advance)
- Court readily implied term to contract to make it workable [*British Steel Corporation v. Cleveland Bridge and Engineering* as regards payment of reasonable sum for works done upon request without formal contract]

7

# TIME IN CONSTRUCTION CONTRACTS

## ● What consequences follow if stipulated time not followed?

### ➤ *Carr v. J.A. Berriman Pty Ltd.*

- *Contract for factory building cancelled by architect's letter*
- *“Where a contract contains a promise to do a particular thing on or before a specified day, time may or may not be of the essence of the promise. If time is of the essence, and the promise is not performed on the day, the promisee is entitled to rescind the contract, but he may elect not to exercise that right, and an election will be inferred from any conduct which is consistent only with the continued existence of the contract. If time is not of the essence of the promise, the promisee is not entitled to rescind for non-performance on the day.”*

8

# TIME IN CONSTRUCTION CONTRACTS

- Contractual provisions as to time
  - Exist parallel with common law rights (e.g. quantum meruit )
  - Modify common law rights (e.g. liquidated damages)
  - Add common law rights upon breach (e.g. termination)
- Commencement date & Completion date
- LD & EOT clauses
  - Wholly borne by employer (e.g. late drawings or 3rd parties)
  - Wholly borne by contractor (e.g. shortage of plants)
  - Shared between employer and contractor (e.g. inclement weather)
  - Excusable vs. Non-excusable
  - Compensable vs. Non-compensable

9

## TIME AT LARGE

- Duty merely to complete with a reasonable time
- *Wells v. Army and Navy Co-operative Society Ltd.*
- Can be Resulted from:-
  - Subsequent agreement
  - Waiver of earlier breach
  - Prevention to complete by employer
    - *Duncanson v. Scottish Investment Co.: “We offer to execute the work specified in the foregoing schedule for the sum of two thousand one hundred and twenty-eight pounds, and undertake to finish our department of the work by 15th April...”*
    - Employer failed in allowing access to complete the works
    - *What if with extension of time clause?*

10

# ***Extension of Time and Liquidated Damages***

## **LIQUIDATED DAMAGES**

- Liquidated (e.g. \$3000 per day of delay) vs. unliquidated
- *Polyset Ltd. v. Panhandat Ltd.:* “Contracts often specify the sum payable in the event of breach. Even if the sum so specified is described as liquidated damages, it may be seen upon examination to have been fixed as a threat to be held over a party's head with a view to compelling him to perform. If so, the specified sum will be regarded as a penalty and therefore not recoverable. And the innocent party will be awarded damages assessed according to his actual loss. In order for the specified sum to be recoverable as liquidated damages, one condition must be met. It is that such sum, judged by the position at the time when the contract was made, represents a genuine effort by the parties to pre-estimate the loss which the innocent party would suffer in the event of breach. Compensation according to a genuine pre-estimate of loss is the purpose which liquidated damages are meant to serve.”
- Not in nature of a threat *in terrorem*

# LIQUIDATED DAMAGES

## ● *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.*

- £5 per tyre sold or offered in breach or an agreement to sell tyres in a stipulated manner
- HELD: Where a single sum is agreed to be paid as liquidated damages on the breach of a number of stipulations of varying importance, and the damage is the same in kind for every possible breach and is incapable of being precisely ascertained, the stipulated sum, provided it be a fair pre-estimate of the probable damage and not unconscionable, will be regarded as liquidated damages and not as a penalty.

## ● *Robophone Facilities Ltd. v. Blank*

- Hire of equipment for fixed period with premature termination of contract by hirer; Provision in contract for half total rentals payable to be paid as liquidated damages
- Penalty?

13

# LIQUIDATED DAMAGES

## ● Condition Precedent - certificate by engineer or architect

## ● Evidence to rebut penalty?

- *Clydebank Engineering Co. v. Don Jose Yzquierdo y Castaneda* - delivery of torpedo boat destroyers when of utmost importance to government of Spain for being jeopardised the maritime strength
- Financial charges? Fluctuating markets? Onward liquidated damages?
- Formula?

## ● *Philips Hong Kong Ltd. v. Attorney General of Hong Kong*

- Roads & tunnels for highway project in 7 inter-linking contracts by way of key dates
- Formula based on value of interfacing contracts
- HELD: Court not to defeat the purpose of liquidated damages

14

# LIQUIDATED DAMAGES

- Agreed amount recovered?
  - *Pigott Foundations Ltd v. Shepherd Construction Ltd* - liquidated damages will normally be the employer's sole and exclusive remedy for delay of any kind to practical completion
  - *Temloc Ltd. v. Errill Properties Ltd.* - 'nil' entry

15

## EOT & LD

- Disruption of Works
- Delay to Completion
- Effects Regulated by *Both*
  - Common Law
  - Contract
- Express terms and Implied terms
- *BP Refinery (Westernport) Pty Ltd. v. The President, Councillors and Ratepayers of the Shire of Hastings* – factors for implying terms

16

## EOT & LD

- Duty to Co-operate

- Engineer in default of applying contract terms - *Perini Corporation v. Commonwealth of Australia & Canterbury Pipe Lines Ltd. v. Christchurch Drainage Board*

- Duty Not to Prevent

- *Jardine Engineering Corp. Ltd. v. Shimizu Corp.*: "...where you have a time clause and a penalty clause, it is always implied in such clauses that the penalties are only to apply if the builder has, as far as the building owner is concerned, and his conduct is concerned, that time accorded to him for the execution of the works which the contract contemplates he should have"

17

## EOT & LD

- Effects of prevention by employer --- *Right to deduct liquidated damages lost?*

- *Peak Construction (Liverpool) Ltd. v. McKinney Foundations Ltd.*

- 24 months to build block of flats for the local authority with LD clause
- Time for completion extendable by architect, if unduly delayed in consequence of unavoidable circumstances
- Foundation piles by nominated sub-contractors defective, stopping work ; independent engineer nominated by the employer entered his report six months later, accepted by the employer two months afterwards
- Works ceased 58 weeks
- LD?

- *Balfour Beatty v. Chestermount Properties*

18

# ***Prolongation Costs and Disruption Claims***

## **PROLONGATION & DISRUPTION**

- Notice as Condition Precedent?
- Notice of delay
  - JCT – *the progress of the works is being or is likely to be delayed*
  - FIDIC – *28 days when became aware or ought to have been aware of event giving rise to claim else liability discharged*
- A penalty clause? – *City Inn Ltd. v. Shepherd Construction Ltd.*
  - Failure to follow procedure for grant of EOT
  - Contractor said penalty clause and unenforceable
  - HELD: Conferring additional and optional right rather than burden

# PROLONGATION & DISRUPTION

## ● Formality - *Token Construction v. Charlton Estates*

- Architect wrote to certify interim payment and stated that the difference between the contract completion date plus an agreed extension of time allowed and the agreed practical completion dates was 24 weeks
- By clause 2(e) of the contract the architect could, at the request of the contractor, grant an extension of time for any one of eight reasons; by clause 16, in the event that the contractor failed to complete by the date specified and the architect certified in writing that in his opinion the work ought reasonably to have been completed the employer might deduct from moneys otherwise payable liquidated damages of £800 per week
- HELD: The architect's letter did not constitute the grant of an extension of time within the meaning of clause 2(e)

21

# PROLONGATION & DISRUPTION

## ● Formality

- *Pyrok Industries Ltd. V. Chee Tat Engineering Co. Ltd.*
  - Certificate copied to sub-contract
- *London Borough of Camden v. Thomas McInerney*
  - Certificate signed but not delivered
- *East Ham Borough Council v. Bernard Sunley & Sons Ltd.*
  - Contractor allowed extra time for engineer to give decision but not refer decision to arbitration within time limit

22

# PROLONGATION & DISRUPTION

## ● *W Hing Construction Co Ltd v Boost Investments Ltd*

- Standard form GCC 23 EOT clause but amended by SCC:  
“...*Provided that the main contractor’s compliance with these requirements shall be a condition precedent to his entitlement to an extension of time*”
- No notice given but no certificate for non-complying under GCC 22 made: “...*and the Architect certifies in writing that in his opinion the same ought reasonably so to have been completed...*”
- Condition precedent for claim of EOT? LAD deductible?
- HELD: Notice was condition precedent to claim of extension of time *BUT* Court had no power to issue or waive such a certificate if the architect had not issued one

23

# PROLONGATION & DISRUPTION

## ● Programme analysis

- *Without CPM*
  - As-planned vs. As-built
- *With CPM*
  - As-planned impacted
  - As-built but-for
  - Window analysis
  - Snapshot analysis

24

# PROLONGATION & DISRUPTION

## ● Global Claim

- One where a global sum or amount in time is put forward as the measure of compensation (in time or cost) when two or more separate matters of claim or complaint are relied on and it is said to be impractical or impossible to provide a breakdown or sub-division of that sum or amount among the matters
- Advantages vs Risks

25

# PROLONGATION & DISRUPTION

## ● *John Doyle Construction Ltd. v. Laing Management (Scotland) Ltd.:*

*“Normally individual causal links must be demonstrated between each of the events for which the employer is responsible and particular items of loss and expense. Frequently, however, the loss and expense results from delay and disruption caused by a number of different events, in such a way that it is impossible to separate out the consequences of each of those events. In that event, the events for which the employer is responsible may interact with one another in such a way as to produce a cumulative effect. If, however, the contractor is able to demonstrate that all of the events on which he relies are in law the responsibility of the employer, it is not necessary for him to demonstrate causal links between individual events and particular heads of loss”*

26

# PROLONGATION & DISRUPTION

- Burden of proof and Standard of proof
- Contemporaneous records vs. Subsequent memories
- *McAlpine Humberoak Ltd. v. Mc Dermott*: “When the defendant's witnesses came to give evidence, they undertook the task which was never undertaken by the plaintiff, of tracing the impact of every drawing revision, VO and TQ.... The judge [at first instance] dismissed the defendants' approach to the case as being 'a retrospective and dissectional reconstruction by expert evidence of events almost day by day, drawing by drawing, TQ by TQ and weld procedure by weld procedure, designed to show that the spate of additional drawings which descended on McAlpine virtually from the start of the work really had little retarding or disruptive effect on its progress'. In our view the defendants' approach is just what the case required.”

27

# PROLONGATION & DISRUPTION

- *Attorney-General v. Shimizu Corp.*
  - Extension and improvement works to the Queen Mary Hospital
  - Shimizu lodged its claim for extra cost and expense on a global basis contending that it was impracticable to separate and particularise the interrelationship of every item of loss including one rubbish removal claim
  - Arbitrator held that an award could not be made for this claim in the absence of further evidence, investigation and analysis and directed Shimizu to review the costs and identify as thoroughly as possible, the sums to be excluded
  - Government submitted that in so doing the arbitrator misconducted the reference, made procedural errors and adopted a course not agreed to by the parties
  - Court of Appeal HELD remit matter for decision on existing materials

28

# PROLONGATION & DISRUPTION

- Heads of Claims
- *Hsin Chong Construction (Asia) Ltd v Henble Ltd* :“Additional preliminaries and overhead costs and lost profit are routinely claimed where a construction project has been prolonged. It cannot therefore be said that such heads of loss are too remote in the sense of not being reasonably foreseeable.”
- Causation – Extent and Actual
- Effect of Prolongation
- Evidence required & Use of Formula
  - Site preliminaries
  - Head office overheads (formula, average, data)
  - Loss of profit