

under the contract even if the Architect's action under those clauses is not in writing, provided that the parties are in no doubt what their mutual rights and liabilities are. Proper written notice, however, is always to be preferred.

Where clauses 23 and 33(1) (c) clearly cover the causes of delay in question any extension of time given by the Architect as a concluded opinion (or any expressed refusal to grant time) will bind the Contractor to the existing or revised Date for Completion even if the Architect is truly in breach of contract and even if the Contractor disputes the Architect's opinion on the matter. Under the JCT Standard Forms of Building Contract the Architect has no power to open up and review his own opinion previously given regarding extensions of time and the Date for Completion. It follows that the Architect's estimate of extended time may be wrong to the detriment of either party to the contract. The Employer may be denied his entitlement to liquidated damages, and the Contractor may be denied his right to fair and reasonable time for completion of the Works.

In the event of such error the following remedies are available:

- (a) the Employer need not exercise the discretionary power of clause 22 when it would be unjust to do so, the operative phrase in that clause being "the Employer may deduct" liquidated damages;
- (b) clause 35 gives either party the right to ask an Arbitrator to "open up, review and revise any" opinion, requirement or notice given under the Contract.

From what has been said, therefore, and on the basis of the precise words used in clause 22, it follows that an

Employer is entitled to liquidated and ascertained damages under the JCT Standard Form of Building Contract only if completion of the Works has been delayed beyond the date fixed by the Contract for reasons which are the fault of the Contractor; and only if the Employer (through the agency of his Architect) has given in due time grants of extended time where appropriate under the Contract; and only if the Employer through his own actions or those of his agents has not prevented the Contractor from completing by the date fixed.

If liquidated damages are properly due under the contract, it is no part of the Architect's duty to deduct such damages from payments otherwise certified as due under the contract nor, indeed, to do anything other than certify the date when in his opinion the Works ought reasonably to have been completed. Such action is all that is required by clause 22, and the Architect's opinion may yet be reviewed by others.

Per Roskill LJ in *Token Construction v Charlton Estates*:

"It is no part of (the Architect's) duty to state to one party, his own clients, a legal consequence, whether certain or only possible, of what he has certified. That consequence arises, if at all, from the contractual conditions which come into play upon, and only upon, due performance by the architect of his limited functions under the condition."

Roskill LJ then speaks of the "independent exercise by the architect" of those "limited functions which the architect is required to perform" by virtue of the contractual condition regarding liquidated damages, and distinguishes them from the architect's duties to his client outside the impartial duties imposed by the Contract.

Technical Queries

The following is a selection of questions submitted to the Members' Advisory Panel, together with the replies which were forwarded to the enquirers. We would be interested to receive the comments of readers who may be able to amplify any of the replies or who may have different views to offer in respect of them.

Members sending queries to the Panel are particularly requested to ensure that all relevant information is included, especially in regard to the precise edition of which form of contract, the method of measurement, specification clauses and bill preambles. When forwarding photostatic reproductions of documents it would be appreciated if ten copies could be sent for distribution to Panel members, as it is not always possible to make satisfactory photostat copies of photostats.

Profit on Nominated Supply Items

QUESTION

Under the current edition of the JCT Form of Contract (With or Without Quantities) when is the Main Contractor entitled to receive, in Interim Valuations, his profit on Nominated Supply items?

- (a) *After delivery of the goods, but before they are fixed*
- or (b) *Only after the goods are fixed.*

REPLY

Clause 30 (2) says "The amount stated as due in an interim certificate shall . . . be the *total value* of the work properly executed and of the *materials and goods delivered* . . .".

It is submitted that the total value would include contractor's profit in proportion to the amount included in the certificate as due to the nominated supplier.

In the case of nominated supply items, the fixing is

normally a separate item measured elsewhere in the bill and the rate for this would also include an element of profit. However, the profit item which immediately follows the P.C. for supply is payable when the goods are received on site and included in an interim valuation and so (a) in the enquirer's letter is correct.

It should be remembered that there is a provision in clause 30 (2) that the goods shall be included in a certificate only at "... such time as they are reasonably, properly and not prematurely brought to ... the works ..."

Discount and profit on Nominated Sub-Contractors fluctuations

QUESTION

Under Clause 31 D5(b) in the Main Contract, clauses 31A, 31B and 31C shall not apply and we are to refer to the relevant clauses of the Standard Form of Sub-Contract (Clauses 23A-D).

I quote Clause 23D(3) "The Contractor on behalf of and in consultation with the Sub-Contractor may agree with the Quantity Surveyor . . . what shall be deemed for the purposes of this Sub-Contract to be the net amount payable to or allowable by the Sub-Contractor in respect of fluctuations. . . ." This falls in line with the Main Contract Clause 31 D3 and seems to establish pretty conclusively that fluctuations for Nominated Sub-Contractors shall be paid and allowed strictly nett.

However, some Contractors request payment of Nominated Sub-Contractors fluctuations under Clause 30 5 (C) which requires profit adjustment "pro rata" to that included in the Schedule of Rates in settlement of Nominated Sub-Contractors accounts. Therefore the fluctuations would attract Contractors profit and not be strictly in accordance with Clause 31 D 4 (C) (ii). These two Clauses seem to be in contradiction.

If the Nominated Sub-Contractors fluctuations are adjusted under clause 31/F do the calculated fluctuations already include a provision for discount under clause 27(b)?

REPLY

Clause 31 is not applicable to this matter; it deals only with the contractor's own fluctuations and those of his domestic sub-contractors.

Clause 23 of the "Green Form" only deals with the payment to the sub-contractor by the main contractor.

Payment to the main contractor in respect of nominated sub-contractors' accounts is dealt with under 30 (5) (c) which states in line 1 "... the amounts . . . payable under the appropriate contracts . . ." and in lines 11/12 "... after allowing in all cases *pro rata* for the Contractor's profit at the rates shown in the Contract Bills . . .".

The profit percentage should therefore be added to the whole sub-contract account including fluctuations.

There exists unfortunately an anomaly between the main contract form and the green nominated sub-contractors form in the matter of main contractor's

discount. JCT form clause 27 (a) (vii) requires that the contractor shall be allowed 2½% discount on nominated sub-contractors' accounts (the *whole* accounts including fluctuations and dayworks). Green form clause 23A requires that the sub-contractor shall be paid his fluctuations *nett*. Clearly the two cannot be reconciled, except by the addition of 1/39 to the amount of the sub-contractor's account. There is no authority in the contract for adding the 1/39. However, many surveyors do so on grounds of equity. A majority of the panel members support this.

It is understood that the revision of the green form which is currently being carried out deals with the problem.

If the nominated sub-contractors' fluctuations are calculated by the formula method under green form clause 23F, the same situation as above exists as regards main contractor's discount. No separate provision is made.

Fluctuations after contract completion date

QUESTION

The Form of Contract is the JCT Standard Form of Contract where quantities form part of the contract and is on a fully fluctuating basis.

Am I correct in assuming that where a contract runs over the date for completion (or in this case, over the extended date for the completion) that the contractor is entitled to reimbursement of increased costs based upon the invoices presented even if these invoices are dated after the extended date for completion? The alternative which has been suggested to me by the local authority surveyor is that the increases should be frozen at the amount of the latest invoice received prior to the date of completion. Any invoices that are received after the date of completion he contends should be only used for their quantity and the quantity extended at the rate of the latest invoice prior to the date of completion.

My contention is that the contractor is entitled to all actual increases occurring and the building owner's redress is in the liquidated and ascertained damages.

REPLY

Fluctuations are payable in full right up to the date of practical completion whether or not the date for completion (or extended completion) has been exceeded. This was decided in the case of Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1971), where it was found that this was applicable irrespective of delays and by whom they were created.

If Clause 31F (the formula method) was applicable however, then the indices would indeed be frozen at the completion or extended completion date, subject to 31F(7) (b).

As the enquirer states, the Employer's redress is in liquidated damages.