



JONES DAY
COMMENTARY

COORDINATING EMPLOYERS, CONTRACTORS, AND SUBCONTRACTORS ON CONSTRUCTION PROJECTS IN HONG KONG: THE LEGAL AND PRACTICAL CONSEQUENCES

An issue that often plagues large-scale construction work is the need to juggle when and how different contractors and subcontractors carry out their works on the same site. The recent Hong Kong District Court decision *Maysun Engineering Company Limited v International Education and Academic Exchanges Foundation Company Limited trading as Hong Kong Institute of Technology* DCCJ 27/2006, while not groundbreaking in terms of legal theory, aptly illustrates the practical consequences of a construction project that is not well coordinated.

This *Commentary* will focus on the three main topics addressed in the *Maysun Engineering* case:

- which party is responsible for providing the building works that must be in place before the contractor can carry out its works;

- how autonomously a contractor can be expected to act; and
- repudiation by suspension of works by contractor or by nonpayment by employer.

FACTS OF THE CASE

The facts surrounding the disputes in *Maysun Engineering* are relatively simple. The Hong Kong Institute of Technology (the “Employer”) initiated a project to convert a site formerly used as a hospital into a school and entered into a contract with Maysun Engineering Company Limited (the “Contractor”) for it to install fire services works and electrical works, among certain other things. The works were only one part of the project—they did not include essential work such as installing partition walls, doors, false ceilings, and so on.

What the Contractor found when it arrived at the site was essentially a bare shell of the building. None of the partition walls, false ceilings, or the like had been installed yet. The Contractor was in fact the first contractor that the Employer had engaged in the project, and no other contractor had been hired to provide any other building works. Moreover, the Employer had not given the Contractor detailed design information and instructions required to carry out the works.

The provision of fire services works and electrical works depends in part on how the other building works such as partition walls and false ceilings (“prerequisite works”) are to be installed. The Contractor complained to the Employer regarding the lack of prerequisite works and instructions, but the Employer refused to rectify the situation and also withheld interim payments. The dispute escalated until ultimately the Employer instructed the Contractor to remove all its employees and tools from the site, and the Contractor complied.

Proceedings were commenced, with each party alleging repudiatory breach by the other.

PROVISION OF PREREQUISITE WORKS

The Contractor argued that the Employer had breached two terms that, while not expressly set out, were nonetheless implied into the contract:

- that the parties would not hinder or prevent each other from carrying out and completing the works in a regular and orderly manner; and
- that the parties would cooperate with and do all such things necessary to facilitate each other in carrying out and completing the works.

The Employer, on the other hand, argued that the Contractor was in breach of the implied term that the Contractor would coordinate with other contractors to ensure that different works were carried out in the correct sequence.

The court held that all three terms could be implied into the contract as they were necessary to give business efficacy to the contract and to express the obvious intention of the parties and were not inconsistent with any express term of the contract.

The court went on to say that as the contract did not require the Contractor to provide the prerequisite works, and the Contractor was not the main contractor for the project, it fell upon the Employer to do so in order to facilitate the Contractor’s works. Similarly, it was also the Employer’s duty to coordinate the works with other building works to be carried out by different contractors.

The implied terms argued by the Contractor are well established at common law. The implied term argued by the Employer, however, appears to be more novel and somewhat at odds with the obligation on the Employer to coordinate the works to be carried out by the contractors. This incongruity was consolidated by the court thus: While it was the Employer’s duty to coordinate the contractors, the Contractor could not carry out its works without regard to other builders’ works. In other words, the court appears to be saying that the Contractor should communicate with other builders such that it can ensure the different works on the site are carried out in the correct sequence.

No precedent was cited by the court for this implied term, and it was unfortunate that the court in this instance did not elaborate on the reasoning behind its imposition of the term. Perhaps it is an extension of the implied terms put forward by the Contractor—that the Contractor has to facilitate the Employer’s coordination of other contractors by liaising with them. If this is indeed a new innovation of the court, it may well be open to challenge in higher courts. To imply it by way of business efficacy means that the court believed the contract would not be commercially workable without this term. Arguably, if employers were actively engaged in managing each contractor’s schedule, the contractors would not need to, by their own accord, communicate directly with

each other; they would speak to the Employer instead if they required information about other builders' works. Indeed, this is what the Contractor in the present case tried to do.

PROVISION OF INSTRUCTIONS

The Contractor had also complained of a lack of instructions from the Employer. Without these instructions, the Contractor argued, it could not carry out the works to completion. All the Employer had provided was the overall design of the site and the school facilities to be provided, without designs for classroom or computer room layouts that the Contractor needed in order to finalize the location of various fittings. It had tried to carry out the works that could be completed but had reached an impasse.

The Employer countered that the Contractor could carry out the works on its own accord. The court soundly rejected this proposition, stating that the Contractor could not indiscriminately decide on the designs of the project unless the Employer had given clear instructions to the Contractor that it had full discretion to make such designs and to carry out the works as the Contractor should see fit. The Employer should provide such information and instructions to the Contractor as reasonably required—the more complex the project, the more involved the Employer should be.

Further, the Contractor is not obliged to carry out the works in an exceptional, time-consuming, expensive, or inappropriate manner in the absence of express instructions; it is entitled to seek and wait for such instructions. If the Employer fails to provide the instructions, then the Contractor may treat it as breach of the implied terms of noninterference and cooperation as set out above.

Again, it comes back to the issue of the Employer's coordination and supervision of its contractors. It cannot simply sit back and expect the Contractor to carry out the works without regard to other builders' works unless there were express instructions to do so—that would, ironically, be a breach of the implied term that the Employer argued in favor of in the first place.

REPUDIATION BY NONPAYMENT

Yet another point of contention was which party had repudiated the contract first. The Employer's case that the Contractor repudiated by suspending work fell flat upon the court's finding of the facts. The Contractor's case was that the Employer had repudiated the contract when it refused to make interim payments pursuant to the terms of the contract. The Employer in fact denied accepting the very terms that stipulated when and how payments were to be made.

The starting point is that there is no general right to suspend work if payment is wrongly withheld. Whether nonpayment can be treated as repudiation depends on whether the non-paying party has objectively expressed a clear, unequivocal intention not to be bound by the contract. This not only applies to situations where there is nonpayment, but also where payment is delayed such that the delay may be construed as an attempt to unilaterally change payment obligations from cash payment to credit.

Here, the court held that the Employer's deliberate refusal to make interim payments constituted repudiation, as it had fundamentally changed the conditions under which the Contractor had agreed to complete the works. The Employer's breach of implied terms by not providing the prerequisite works or instructions further solidified the court's decision.

CONCLUSION

The construction project around which the *Maysun Engineering* case revolved was, in the court's own words, "simply not ... planned and coordinated, as it should have been." Given the finding of facts in this case, the court's final decision is unsurprising, but it also serves to highlight the legal consequences that apply to the real and practical problems faced by the numerous participants in a construction project. The short lesson is that employers or main contractors are generally obliged to coordinate the other contractors or subcontractors on site to ensure that the works can be completed in the correct sequence. They cannot expect the contractors to provide works that have not been contracted for, even if those works are a prerequisite of the contracted work.

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