The hexagonal wheel

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In the Medieval Age, there was once an attempt by the priests, who were among the powerful ruling classes, to designate the round-off figure 3 as the gospel value for the newly invented term π. The idea was to settle the seemingly endless argument of what the value of π should be. Luckily, this attempt had never materialized otherwise the craftsmen would have to take instruction from the Church and make all wheels hexagonal.

The above story is not made up by me but was read from a book written by the famous scientific novelist, Issac Asmov. While I would not bother to verify the truth of this story, I found it amusing and quite educational. If you think that the Medieval priests inclined to be dictatorial and could not imagine that the craftsmen would follow rigidly the figure 3 as gospel, I can show you that similar mentality did prevail even today and in Hong Kong.

By this, I am referring to the land matters in the New Territories that some people still stick to the registered areas of the old scheduled lots as gospel. As is a matter of fact, we inherited the District Demarcation (DD) Sheets a century ago together with the areas schedule. The latter was derived data from graphical measurements of the DD sheet and recorded to the nearest 0.01 acre as the smallest unit. Apart from the measurement and the rounding off errors, the registered area might also contain copying and clerical errors as well.

Numerous examples of errors like that could be found from the land registry. For example, many a land lot of area 0.01 acre was divided into two sections of 0.01 acre each. Another extreme example was a land lot of area 0.02 acre divided into 5 sections each of which the area was still recorded as 0.01 acre. There was a case that the land lot was clearly shown graphically as a square of 25 feet by 25 feet and the area was stated, correctly, as 625 square feet. However, alongside this figure a remark "or 0.02 acre" was also printed. When only 0.02 acre was conveyed in subsequent land dealings, a false area would dominate the records instead of the original and correct ones.

I have chosen a group of house lots inside a walled village for demonstrating the area problem. I reasoned that the wall we now survey must be the same as that which existed at the time of the DD survey. The total area of all the lots bounded by this wall could not have changed. However, the number of lots was 45 including 43 lots of 0.01 acre each and 2 lots of 0.02 acres each thus giving a total area of 0.47 acres. By survey, the whole walled

village including certain lane areas as Government Land measured only 0.27 acre. The registered area was therefore nearly double the actual area and the effect of the rounding up error must be apparent.

All these examples are the tip of an iceberg but sufficiently reveal the derivative nature of the registered area. As far as the area information is concerned, the DD sheet must take precedence over the registered area. Better still, the physical boundary monument, if still available on ground, should be the best evidence for area determination.

Unfortunately, not everybody accepts this reasoning. Some people still take the registered area as gospel. Their argument seems to be that since the registered area is part of a legal document it must be regarded as binding. There was further argument that as the landowner had been paying the corresponding rent, say $0.01 for 0.01 acre of land, he must be entitled for the exact registered area.

To the first argument, I maintain that the above story of the π value may provide the answer. A physical quantity such as the number π must surely be a matter of fact. It is of a definite value irrespective of whether it can be nicely expressed in terms of our numbering system or not. Nor indeed would it be changed to suit the liking of a ruler or a dictator otherwise we will have to live with hexagonal wheels. Similarly, the area of a land lot is a physical quantity which could only be obtained by realistic measurements. If it had been incorrectly recorded, the blessing with a legal status will not make it right again.

To the second argument, I suggest that this is fallacious. While it is true that an area of 0.01 acre is to attract $0.01 as the rent, it should no longer be true for the reverse of the statement. Just consider that the fee for parking a car for an hour is, say $20, but the paying of $20 does not sufficiently prove that the car had stayed one full hour in the carpark.

In short, I must advocate that the registered area should not be regarded as gospel but must be viewed from the correct perspective. And we surveyors should not be timid in advising others, including landowners, solicitors, administrators and even judges of the true nature of the registered area.

The hexagonal wheel.

Moving Towards Greater Valuation Transparency

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Three fundamental concepts that underpin the valuation profession are ethics, knowledge and client service.

The three core principles, though of equal importance, have attracted varied degrees of attention from valuers in recent years.

The perception is that efforts focusing on knowledge and client are more instrumental in winning business, especially in this time of market downturn, while an undue emphasis on professional ethics may result in losing the competitive edge over others.

But what has shown quite clearly in Enron, Worldcom and other recent financial scandals is that a waning of professional ethics risks the business even more. Not only the organisation, but also the society has to pay a big cost for that!

One silver lining to these high-profile debacles is a heightened awareness of ethical issues. The behaviors of professionals have come under more public scrutiny. They have an undisputable responsibility for protecting the public interests.

Like auditors, property valuers play a critical role in divulging important corporate financial information for public dissemination. Shareholders and potential investors rely on the valuation report, one important component in the corporate balance sheet, to make an investment decision.

This type of valuation is called valuation for third party use and some of its examples are valuations for initial public offering (IPO) and those for accounting purpose.

Although the instructions normally come from the company directors, a valuer is required to preserve his or her objectivity, integrity and independence in carrying out the valuation.

Valuations for Third Party Use Draw Most Criticisms

But this requirement is considered insufficient in view of rising public and business expectations for greater openness and transparency in the valuation process.

Over the years it is this type of valuation work that has caught most of the public attention on the valuer's conduct.

There are increasing concerns regarding the client influence on valuers which may affect the outcome of valuation.

For instance, there may be a perception by a third party relying on the valuation that over-familiarity with the client, or the subject of valuation, may compromise the valuer's objectivity.

Likewise, if the client provides a significant proportion of the income of the valuer's firm there could also be a perception that this could consciously, or unconsciously, influence the valuer.

Clearly, there is a need for a clearer set of rules to dispel such concerns and to retain business community's trust and confidence in the valuation profession.

In response to the growing concerns on the valuer's behaviour, the Royal Institution of Chartered Surveyors (RICS) has issued a tighter code of practice in the new edition of the RICS Appraisal and Valuation Standards (Red Book), which came into force on 1 May 2003.

The new Red Book has also incorporated most of the 18 recommendations made in the Carsberg Report which was commissioned by RICS two years ago for a review in valuation.

Valuers' Interest Must be Disclosed in Valuation Reports

Where valuations are for third-party use, the valuer will have to disclose in the valuation report and in subsequent published references the details of his or her firm's fee earning relationship with the instructing client.

The same goes for how long the valuer has been valuing for the client, which is an indication of whether the valuer's firm is unduly dependent on the client for incomes.

The disclosure requirements will help the users of the valuation report to have a better understanding of the business relationship between the valuer and the instructing client.

They will also be in a better position to decide if they could rely on the valuation.

The RICS new code also requires that the valuer should have an internal procedure to rotate valuation personnel in servicing the same client.

Moreover, it has also stated that a valuer should not undertake valuation if his or her firm has given transactional advice of the same property in the preceding twelve months.

This will help remove any perception that there could be a possibility of pressure on the valuer to justify earlier advice provided by that valuer or the valuer's firm.

When discussing the draft report with the client, valuers must keep file notes of discussions that lead to changes in valuation and the reasons for those changes. This record should be made available to auditors or others with material interest in the valuation if requested.

Promoting a Wider Recognition for the New Standard

The RICS has also recognized that enforcing a tougher requirement on valuers is not enough. Support from the clients is also important. Apart from publishing a new client guideline on the valuation standard, the RICS plans to approach the market regulators and hopes that companies when demanding valuation are also required to adhere to the standards of ethical behaviour and corporate governance that are similar to those RICS now requires of valuers themselves.

Amongst many initiatives which the RICS aims to ensure valuer's independence and to minimize client influence, this one by far represents the boldest move.

With the corporate governance and ethical issues now being pushed at the forefront of business thinking, the timing for the launch of this new imitative, it appears, couldn't be better.

There is an additional motive for companies to embrace reform. According to the Global Investor Opinion Survey 2002 published by McKinsey, investors were willing to pay a premium of up to 30% for companies with good corporate governance.

The Challenge for Hong Kong Valuers

Compared with the new RICS Red Book, the Guidance Notes on the Valuation of Property Assets published by the HKIS, which governs the valuation practice in Hong Kong, has lagged behind.

In light of the growing demand for greater transparency on valuation, there is a clear and pressing urgent need for its review and raising its standards to a global one.

Is Fractional Interest of a Real Property the same as the Proportion of the Entire Interest?

Part II – Discount for Lack of Marketability

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Part I of this article explored about the correctness of valuing a fractional interest of a real property being the same as its proportion of the entire interest. Some characteristics of a real property may be changed when it segregates into pieces. One of which is the "ownership", representing the vesting of control power to the asset. Its adjustment is called "control premium/minority interest discount", which was discussed previously. Another characteristic, "liquidity or marketability", is going to be examined in this article. The poorer the liquidity or marketability is, the poorer the ability of the asset can be sold. The discount of which is called "discount for lack of marketability".

The concept of marketability comes with the liquidity of interest, simply speaking, how quickly and certainly the asset can be converted to cash. In the *Business Valuation Standard* of the American Society of Appraisers, it defines that:

Marketability – *"the ability to quickly convert property to cash at minimal cost"*.

Liquidity – *"the ability to quickly convert property to cash or pay a liability"*.

In the Encyclopedia of Banking & Finance, more detailed definitions could be found:

Marketability – *"the relative ease and promptness with which a security or commodity may be sold when desired, at a representative current price, without material concession in price merely because of the necessity of sale. Marketability connotes the existence of current buying interest as well as selling interest and is usually indicated by the volume of current transactions and the spread between the bid and asked price for a security – the closer the spread, the closer are the buying and selling interests to agreement on price resulting in actual transactions. To look at it from the standpoint of a dealer maintaining the market, the closer his bid to current transactions and the smaller his markup as to asking prices, the larger the volume will be. By contrast, inactive securities that rarely trade or for which buyers have to be located or sales negotiated are characterized by large spreads between the bid and asked prices"*.

Liquidity – *"the amount of time required to convert an asset into cash or pay a liability. For non-current assets, liquidity generally refers to marketability…In economics, liquidity is the desire to hold assets in the form of cash. Common elements often included in the concept of liquidity include marketability, reliability, reversibility (as to the difference between buying and selling prices), divisibility of the asset, predictability or capital certainty, and plasticity (ease of maneuvering into and out of various yields after the asset has been acquired). Firms and individuals often prefer to hold money for sake of holding money. Liquidity may be desired for the following reasons: (1) the transactions motive, (2) the precautionary motive, and (3) the speculative motive. Money is desired to carry out future monetary transactions, to save for a rainy day, or to take advantage of movements in the price level"*.

While the above definitions are written by accountants or financial analysts, its significance to real property appraisal cannot be under-estimated. If the differences in marketability of an entire and a fractional interest are observed, the discount for lack of marketability is needed to be taken into account.

The ability to sell always relates to the disposal. Disposal of real properties are generally done by three manners: negotiation, tender and auction. None of them have superior advantages over neither interest. Many estate agents are happy to take assignments on both interests, only if an identical fee is gained. Moreover, there is no central market, like the stock exchange, particularly in trading any one of those. From the viewpoint of disposal method, no preference is observed to the marketability on either fractional or entire interest. Nevertheless, from the demand point of view, it does.

When you stand in front of the window of a property agency firm in town, it is easy to find a lot of residential flats available for sale. It is presumed that such flats are sold for entire interest. If you asked whether there was any flat sold for 1/3 share, it is believed that the estate agent may have a problem in answering your question. It is the norm that when purchasing a flat you would normally get its tangible product, together with its control rights such as the right to transfer, assign, sublet or mortgage. No one is comfortable to have a house if he is required to obtain approval for the above rights from a third party.

When a fractional interest transaction occurs, it usually involves unification of ownership. For example, a pre-war house has three owners under tenancy in common and each holds 1/3 share. If one owner wants to redevelop the house, one solution is to discuss with the other two owners and obtain their consent. The other way is to buy out their shares and make himself the sole owner to enjoy control power.

Another situation of transaction of fractional interest is the transfer of ownership among family members. But their interests are seldom available on the open market because strong objections may be raised by other family members. The transaction of fractional interest are hindered due to their lack of control and illiquidity which lead to an inactive market.

Some may be confused that the lack of control must involve discount for lack of marketability, or the control interest has to have a good marketability. This is not the case. In fact, the control premium/minority interest discount and discount of lack of marketability are two distinct concepts, although somewhat related and may co-exist at the same time. As discussed in Part I, a minority interest discount is measured in terms of the relative degree of control, which a minority owner has over the operations, and important decisions of the asset. The concept of marketability, however, deals with the liquidity of an ownership interest, that is how quickly and easily it can be converted to cash if the owner selected to sell.

The above situation only comes across the difference in marketability between entire and fractional interests when no central market trades both interests. What if a central market is established to trade the fractional interest or stocks like the Stock Exchange? It is inevitable that many requirements may be fulfilled before a real property can be put on the central market. But once available on the central market, the stock of that real property can be easily sold in a timely manner such as by phoning a broker and receiving cash within several working days. The marketability improves significantly and even better then the entire interest sold by estate agents.

In so far there is no comprehensive study to quantify the amount of discount for lack of marketability. Similar to control premium/ minority interest discount, discount for lack of marketability spreads over a spectrum of figures which depends on the relative marketability between the subject property and the comparables. In the United States, there are a number of studies quantifying the discount for lack of marketability. The popular one is Restricted "Letter" Stock Studies.

Restricted or Letter Stocks are identical in all respects to the freely traded stock of public companies except that they are restricted from trading on the open market for a certain time period. Marketability is the only difference between a restricted stock and its freely traded counterpart. The studies have attempted to find out the differences in prices at which restricted stock transactions take place compared with open market transaction in the same stock on the same date.

Having discussed a lot on the control premium/ minority interest discount and discount for lack of marketability, it should be borne in mind that they are not meaningful until a conceptual basis underlying their base value to which it is applied is defined. For example, if a valuation on a fractional interest with minority interest and lack of marketability is conducted, what comparables used is vital. Where comparables are available, it is preferable to adopt the comparables with the same basis of subject property, i.e. transaction of fractional interest with minority interest and lack of marketability, since the quantification of premium/discount involves substantial adjustment which may be varied from one valuer to another. However, when those comparables are not available, it is unavoidable to apply a minority interest discount and discount of lack of marketability to the proportionate value of the subject property before comprehensive studies on these discounts on real estate are conducted.

探討新房貸政策 對國內房地產市場的影響

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本年六月十三日中國人民銀行發佈《關於進一步加強房地產信貸業務管理的通知》(以下稱《通知》)。新的房貸政策甫一出台,受到房地產業界極大關注。有業界人仕認為,這是近十年來對房地產業最嚴厲的一個措施。

早於去年末今年初,中央有關政府部門、學者和傳媒已就房地產發展過熱,樓價升幅過高等問題進行了廣泛討論和報導。有人質疑房地產業泡沫已出現。前國家轂理朱鎔基曾於去年底表示對房地產市場過熱感到憂慮。而建設部在對各地房地產市場進行調查後,認為房地產業存在局部過熱,並提出要防止過熱情況持續,僅防市場泡沫。

綜觀國內樓市,過往幾年發展興旺,樓價逐年上漲,尤以沿海大城市為顯著。以上海為例,中房上海綜合指數今年三月份房價較去年同期上升19.3%。而住宅指數較去年同期上升達 20%。房價上漲快速,市民開始抱怨購置房屋越來越難。

《通知》重點內容摘要:

細閱《通知》條文,內容不僅規定了房地產開發貸款,對房地產發展各個環詳都加強了管理,囊括土地儲備及開發、建築施工、個人購房、個人商業用房等領域。其重點內容有以下幾點:

1) 房地產開發商申請銀行貸款,其自有資金(指所有者權益)應不低於開發項目總投資額的 30%。
2) 對土地儲備機構發放的貸款為抵押貸款,貸款額度不得超過所收購土地評估價值的 70%,貸款期限最長不得超過二年。
3) 商業銀行不得向發展商發放用於繳交土地出讓金的貸款。
4) 嚴格防止建築施工企業使用銀行貸款墊資房地產開發項目。
5) 商業銀行只能對購買主體結構已封頂住房的個人發放個人住房貸款。
6) 購買第二套以上(含第二套)住房的,應適當提高首付款比例,並不再執行個人住房貸款利率,而按央行公佈的同期同檔次貸款利率執行。
7) 借款人申請個人商業用房貸款成數不得超過 60%,貸款期限不得超過十年。
8) 購買高檔商品房、別墅和商業用房,銀行應按央行公佈的同期同檔次貸款利率執行。

房地產業汰弱留強

抬高自有資金比重和限制貸款期限,無疑對發展商帶來資金壓力,對現金流量造成了巨大影。《通知》限制內地銀行對發展商貸款額不得超過其開發項目轂投資的七成。打擊最大的將是自有資金不充裕的中小型發展商和操作不規範的企業。

部份沒有足夠實力的發展商因資金鏈斷裂,資金周轉不靈,會面對倒閉,在建工程可能成為爛尾樓。房地產業在新房貸政策推行下將進行新一輪的「汰弱留強」局面,長遠對房地產業的健康發展有良好的影。短期而言,由於有不少項目因沒有足夠資金支持將緩建或取消,住房的供應量因而減少。

圈地活動將減少

《通知》規定,商業銀行不得向房地產商發放用於繳付土地出讓金的貸款。這對單靠炒地皮為生的企業和"空手套白狼"的房產商無疑是沉重的打擊。但事實上,發展商從政府拿得土地所需付的土地出讓金,是以分期支付,短則半年,長則一至兩年。特別情況還會要求延遲付出讓金,對政府財政收入造成影。這次政策調整並沒有要求土地部門推行一次性收取土地出讓金,讓房地產商鬆一口氣。其實,深圳早年已對賣地方式作出規範,土地一經拍賣後,買家必需於五天內支付地價。這樣將增加發展商的流動資金壓力和利息成本,對發展商的現金流會有一定影,亦是促使房地產業汰弱留強的一種手段。

在國內,市政府一般以協議磋商出讓土地,土地交易市場欠缺透明度,對市場帶來種種弊端。國內曾多次頒佈法規調整土地市場,如上海市於 2001 年 7 月推行《上海市土地使用權出讓招標拍賣試行辦法》,國土資源部於2002年5月頒佈《招標拍賣掛牌出讓國有土地使用權規定》,其中規定經營性土地需以招標和拍賣形式出售土地,卻未見落實執行。上海市每年出讓土地數百幅,但只有少數土地是以公開拍賣和招標出售。那麼為數不少的土地可能是早期圈地或通過不正敘程序出讓給發展商。

將土地交易市場納入正軌,《通知》規定,對土地儲備機構發放的貸款金額不得超過所收購土地評估價值的70%,而貸款期限最長不得超過 2 年。圈地所需大量的資金一般靠銀行貸款支付,新規定限制七成貸款,將對圈地活動產生一定的抑制作用。而限制貸款期不超過2年,會促使發展商利用貸款靜待土地升值的時間縮短,加上自有資金要求增加,不得不縮短土地吐現時間,因此土地增值的機會和幅度將降低。圈地活動減少,土地釋放於市場,供應因而增加,地價相對降低而長遠將趨於穩定。

物業估值專業受考驗

由於限制七成貸款，發展商將會諮詢更多房地產評估公司以獲取最高的估值。加上市場競爭激烈，估價師會面對來自發展商越來越大的壓力。一些小型的估價師行可能基於商業考慮因素，作出過於樂觀的估值，對估價行業造成不良影響。專業估價師需平衡商業因素和專業操守兩方面，不得失客戶之餘仍能保持高水準的專業服務，所面對的挑戰將更大。

二手物業投資市場將受阻

新房貸政策規定,對個人購買第二套房的貸款提高首付款比例和貸款利率。這措施直接影房地產投資市場。現時個人購買住房首付成數最低為20%,貸款優惠利率為5.04%(6-30年),而一般個人貸款利率為5.76%(6-30年)。因此,購買第二套房的人仕將多付首期金額和貸款利息。

若以100平方米的公寓,售價人民幣700,000元為例。以貸款額560,000元(八成按揭),貸款期限20年,按原來住房貸款優惠利率計算,每月還款額為3,708元,利息總額約329,920元。按照新規定,若首期成數不提高(即八成按揭),每月還款額為3,935元,每月多還款227元,利息負增加約54,480元。若首付款比例提高至30%,每月還款額雖減至3,443元,利息總額卻達336,320元。

首付款比例	20%	30%	40%	50%
首期付款	140,000	210,000	280,000	350,000
貸款額	560,000	490,000	420,000	350,000
每月還款(原利率5.04%)	3,708	3,245	2,781	2,318
每月還款(新利率5.76%)	3,935	3,443	2,951	2,459

可見新房貸政策下,購買第二套房作為投資或自用,需多付首期款項同時,還要負較多利息。投資回收期因而拉長,投資回報率卻降低。直接阻礙二手房的投資行為和影房地產投資市場的發展。

二手商品房供應量將增多

在新房貸政策下,購買第二套(或以上)住房的業主將要付出較高的首期款項和利息。據統計,現時二手商品房存量中約有60%是帶有按揭貸款。若擁有這些物業的業主或投資者希望購買新房子作為自住或投資,將會受到新房貸政策影。為了享受原有房貸政策的優惠利率,他們會將現有的房子出售而不作出租。這些房子便會釋放於二手物業市場,可流通出售的二手住房便相對增加。二手房源的增加對穩定樓價有一定作用,會否對樓價構成壓力便要視乎其增加的數量。

高檔商品房供應漸少

新房貸政策對高檔商品房的供應和需求兩方面加以控制。首先,銀行對個人購買高檔商品房和別墅會提高貸款利率,這將使許多有意投資高檔商品房的投資者放棄購買,從而減少高檔住宅的需求。在提高高檔商品房購房門檻同時,新房貸政策對大戶型、大面積、高檔商品房和別墅等項目貸款進行限制。發展商面對需求減少和融資困難的情況下,投資意慾下降,高檔商品房的開發量將會逐漸減少。

高檔商品房租賃市場將升溫

對於北京、上海和廣州等大城市,有較多外資企業投資設廠,外籍員工和港澳台人仕一般租住高檔公寓和別墅。只要這些城市的經濟持續發展,外資企業進駐數量不斷增加,對高檔公寓和別墅的租賃需求將會持續。因此,預期高檔商品房租務市場將逐漸升溫。

新政策三大難題有待解決

其實新房貸政策提出了對房貸管理的指導思想和政策大方向,對具體細詳和操作並沒有清楚說明。例如對第二套房怎樣界定,怎樣才算大戶型、大面積和高檔商品房,對首付貸款比例提高多少等等問題。

1) 第二套房難以界定

對第二套房的一種界定方法是同一家銀行不能辦理同一申請人兩套住宅按揭貸款。但是,個人到另一間銀行申請另一套房按揭貸款是否會限制,就不得而知。目前,銀行查詢貸款申請人是否購買第二套房時比較困難。國內銀行與銀行間的信貸系統和信息共享平台未見完善,要解決信息互不相通的情況還有待專家再作研究。

此外,第二套房是以家庭還是個人作為單位,《通知》也沒有明確界定。如果兩夫妻聯名購下一套房子,其後妻子以個人名義購買另一套公寓,她是否買第二套房子?

2) 怎樣才算高檔商品房

高檔商品房怎樣界定,銀行和法律界尚未有定案。若以房屋單價定位,郊區的別墅每平方米約四千至五千元,市內的公寓動徹就要八千至九千元。若以轂樓價為基準,便涉及面積大少問題。一個人數較多的家庭,需要買較大的房子,房價轂額大,這樣是否算購買高檔房子?若因此要付較高貸款利率,是否合理?實際情況可能更複雜。較客觀的做法可以是同時以單價和轂售價作為界定基準,可避免面積大但價值不高的平房落入高檔房內。但是按那一價位水平作為分界線,便需作仔細研究。

3) 提高首付比例彈性大

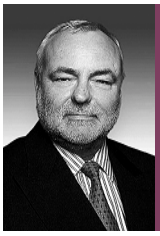
新房貸政策對購買第二套住房應當提高首付比例,但沒有說明確實比例。這樣給銀行留下很大的空間和彈性。房貸市場競爭激烈,銀行為爭取客戶和市場佔有率,提高首付款比例將削弱其競爭力,亦因《通知》沒有明確首付款提高的比例,銀行的做法可能以象徵性提高首付款比例少許,以維持其競爭力。這樣,新房貸政策便失去其效用。

轂結

央行推出新房貸政策,是通過貨幣政策這一宏觀調控手段,規範金融業的房地產信貸業務,從而把內地房地產事業納入正軌,防止房地產泡沫的出現。新政策加速開發商新一輪的淘汰賽,對自有資金不足的中小型開發商打擊最大。若然銀行界切實執行央行的《通知》規定,勢必對高檔商品房開發項目和二手市場的買賣活動帶來紳遠的影。這次房貸政策的調整,相信不會像1994年宏觀調控對房地產業打擊那麼嚴重。從正面看,對未來房地產市場的健康發展起著重要作用。

Concurrent Delays

A practical approach - Part I



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This is the first part of a three-part article on concurrent delays – a practical approach. Part one deals with time, part two deals with money and part three provides some examples and a conclusion.

What is meant by concurrent delays?

Concurrent delays occur when the delaying effects of two or more independent events impact upon progress and would, each delaying effect without the other, have caused delay to completion. For delays to be called concurrent, the effects of the events must impact upon progress in similar time periods although, not necessarily, in exactly the same time period; i.e. a delay from days 8 to 15 on one programmed string of activities could be said to be concurrent with a delay from days 12 to 19 on another programmed string of activities because the effects would, one without the other, have caused similar delays to completion. However, the effects of two delaying events, which impacted upon progress two months apart on an eighteen-month contract, could not be said to be concurrent.

Concurrent delays could be caused by the delaying effects of events that were either excusable (i.e. the events for which the employer takes the risk of time and for which extensions of time should be granted to the contractor) or culpable (i.e. events for which the contractor takes the risk of time).

There are also what are termed in the USA "*pacing delays*" which are reviewed later in this article.

Royal Brompton Hospital v Watkins Gray International

In the recent English case of the *Royal Brompton Hospital NHS Trust v Watkins Gray International (2000)* His Honour Judge Seymour QC provided clarification upon what he, and English law, considered to be concurrent delays. He referred to two scenarios. In the first scenario he confirmed that where there were truly concurrent delays then the contractor was entitled to an extension of time for the effects of the excusable delaying event. For the second scenario, the judge observed:-

"...it is, I think, necessary to be clear what one means by events operating concurrently. It does not mean, in my judgement, a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a relevant event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a relevant event, the completion of the Works is [not] likely to be delayed thereby beyond the completion date.

The relevant event simply has no effect upon the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, the works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a relevant event, while the other is not. In such circumstances there is a real concurrency of causes of the delay."

The relevant event in the example referred to by His Honour Judge Seymour QC could have been the late issue of information which was rendered on time as the contractor had earlier been in culpable delay due to labour shortages. The effects of the information delay therefore did not cause any real delay to progress. For Hong Kong, where many subcontractors will not supply workers until they have been issued with detailed construction information and can see continuity of work for one to two months ahead, the example may not apply as the contractor could not procure labour unless it had adequate construction information in the first place.

A third scenario would be where the delaying effects of an excusable event occurred after the delaying effects of a culpable event had already delayed completion. If the delaying effects of the later excusable event caused a further delay to completion then that type of scenario was covered in the case of *Balfour Beatty Building Ltd v Chestermount Properties Ltd (1993)* and the extension of time should be based upon the "*dot on*" philosophy.

Excusable and Culpable Events

There can be events, both excusable and culpable, which do not result in delays either critical delay or localised delay.

An example would be where a piling contractor was in delay due to ground conditions for which it had accepted the risk and the contract administrator was late in issuing information for the pile caps which information was still issued before the contractor needed it. The late issue of information was an excusable event but as the contractor was not waiting for it (either in terms of planning or procurement) and it did not cause delay to completion, then no extension of time would be due.

However, if the contractor could have used additional plant to overcome the ground condition problems, but did not do so as it had advance knowledge that the pile cap information would not be available for continuity of working if it did increase its plant resources, then this is a different situation. In such a situation, the contractor would be well advised to inform the contract administrator in advance of implementing his intentions to avoid misunderstandings later.

Therefore, for an excusable or culpable event to become a delaying event, it must cause actual delay.

In a complex structure, such as a railway station, there may be many changes caused by design development and co-ordination. If those changes were issued early enough then they would not necessarily cause delay (unless there was extra work or they caused revised sequencing). What is early enough? The contractor must be able to carry out detailed construction planning, co-ordination, design formwork, organize subcontractors, prepare bending schedules and the like. Therefore, four months is not an unreasonable lead-in-time from the start of a new activity for a contractor to be able to absorb changes that do not increase workload, although small changes and detailed clarifications for civils works can be assimilated, co-ordinated and implemented within two to four weeks of issue.

If contractor design were involved then the assimilation, co-ordination and implementation periods would usually be longer.

Therefore, concurrent delays must be where there were concurrent delaying effects of excusable and culpable events impacting upon a string of activities and each, without the other, would cause delay to completion. The effects of concurrent excusable and culpable events, which did not cause such delays, would not be concurrent delays.

Complexity of Delay Analysis with Concurrent Delays

Concurrent excusable, culpable and pacing delays

create complexities for delay analysis and there may be occasions when the effects of excusable and culpable delaying events cannot be distinguished. In the USA, it is established case law, that a party cannot recover damages when there are concurrent delaying events, the effects of which cannot be apportioned i.e. the delaying effects of excusable and culpable events were similar. In such circumstances, the concept of "*in pari delicto*" prevails, i.e. because both parties have done wrong, neither party should be able to recover its damages.

The Protocol published by the Society of Construction Law in the UK advocates a philosophy for extensions of time similar to the USA case law.

Philosophy for Concurrent Delays and Extensions of Time

Large projects, which go awry invariably, involve concurrent delays caused by excusable and culpable events. This situation can arise as the contractor was distracted from what it would or could otherwise have done by the effects of excusable events.

Case law in England appears to have established the philosophy that, when assessing extensions of time, the contract administrator must consider what the delaying effects of the excusable events would have been absent the delaying effects of any culpable events and grant extensions of time accordingly. It has also been established, by case law, that the "dot-on" principle for extensions of time is to be followed and that the delaying effects of an excusable event, such as a variation order, occurring after a period of culpable delay, does not negate the culpable delay.

However, when it comes to claims for additional payment, the delaying effects of excusable/compensable, excusable/non-compensable and culpable events should be considered.

GCC Clause 50 – Hong Kong Government Form of Contract

Clause 50(2) in the Hong Kong Government general conditions of contract for civil engineering works (the GCC) deals with extensions of time. GCC Clause 50(2) states:-

"the Engineer in determining any extension shall take account of all the circumstances known to him at that time, including the effect of any omission of work or substantial decrease in the quantity of any item of work."

This wording is similar to (but not the same as) that used in the ICE general conditions of contract 4th, 5th and 6th editions used in the UK and other countries which used similar forms of contract.

The opponents of the extension of time philosophy referred to earlier in this article say that reference to "*all the circumstances*" in GCC Clause 50(2) must include the delaying effects of culpable events that caused concurrent delay and that, in those circumstances, no extensions of time should be granted with the conclusion that the contractor should pay liquidated damages irrespective of the concurrent delaying effects of the excusable events. That opposite philosophy cannot be correct. Not only is this interpretation of GCC Clause 50(2) not construing the wording of that Clause correctly (the examples referred to are not culpable delaying events, the clause does not refer to culpable delaying events, and case law has established that the concurrent delaying effects of culpable events do not override the concurrent delaying effects of excusable events) but it is also ingenuine in that it assumes that, absent the concurrent delaying effects of excusable events, the contractor would not, or could not, have taken measures to extinguish the delaying effects of culpable events. Such an assumption is contrary to common sense as a competent contractor would wish to avoid the imposition of liquidated damages, incurring prolongation costs, and causing subcontractor's claims, if it was possible to do so, and if the contractor did not have grounds for an extension of time, it could have taken measures to reduce or extinguish the delaying effects of culpable events.

Where there were no contemporary complaints about the contractor's progress from the contract administrator but extensions of time were later rejected on the basis of alleged concurrent culpable delays, then the contract administrator did not give due weight to the likelihood that had there not been excusable delays then the contractor may have been able to either avoid the delaying effects of culpable events or extinguish the effects thereof.

Once the contract administrator has decided that there were excusable delaying events, the procedure for considering extensions of time appears to be as follows (taken from pages 1033 and 1034 of Keating 6th edition when referring to the ICE 6th edition which is similar to the Hong Kong Government form of contract):-

" (1) The Engineer must make an assessment of the delay suffered;

(2) He must consider whether this delay fairly entitles the Contractor to an extension of the time for substantial completion.

(3) *The Contractor is required to be notified.*

(4) *No further criteria are laid down.*

(5) *Presumably, the second step involves considering how far the individual delayed items are critical to progress of the Works or any relevant Section.*

(6) *Note that in assessing the delay suffered, the Engineer is required to consider "all the circumstances known to him at the time", which may include factors outside the grounds put forward by the Contractor.*"

Obviously the contract administrator must also have a good knowledge of the construction process, how a contractor operates and how resources respond to delaying events.

All the Circumstances

Had it been intended that the contractor's culpable delay was to be one of the "*circumstances*" then GCC Clause 50 would have, and should have, referred to it thereby creating certainty. By referring to omission of work and quantity reductions it must be construed that "*all the circumstances*" were to be similar to those quoted and were not something completely different.

Further, the clause is not wide enough to overturn established case law precedents. Hence, when considering "*all the circumstances known to him at the time*", the contract administrator must follow established case law precedents.

Further, consideration of the "*all the circumstances*" would include consideration of the efficacy (or significance) of the events, criticality and excusability.

The English case law precedents were established based upon different contracts to the Hong Kong Government form of contract, however, the forms of contract in those cases required the contract administrator to similarly consider all the circumstances known to him / her at the time.

Efficacy

The efficacy of the events should also be considered by the contract administrator. If alleged culpable delaying events (e.g. paperwork, preparatory work, cleaning up and the like) were of little significance in relation to the excusable events (e.g. delay in the issue of information, instructions to carry out extra work, delay in responding to submissions and the like), then the effects of the alleged culpable delaying events were not of the same significance as, and were of lesser efficacy, than the effects of the excusable delaying events. Such alleged culpable events should not, therefore, be held to override the delaying effects of the more efficacious concurrent excusable events. Two examples follow.

1. Most contracts require the contractor to submit a method statement and receive approval from the contract administrator before commencing work. Where the contractor was late in preparing or revising the method statement it could extinguish the effects thereof by commencing work on time and at its own risk until the method statement was approved. The lateness of the method statement was, therefore, of lesser efficacy than, say, the late issue of information for continuity of working after an activity had commenced.

2. On most contracts, even those which finished on time, a contractor will have defects to rectify and minor outstanding works to complete. This is often called snagging work and is always carried out in the closing stages of a project. The efficacy of snagging works using, say, 5 No. workers was less than the efficacy of, say, additional work which had to be completed before statutory inspections could begin and which prolonged the construction period and was carried out at the same time as the snagging work using, say, 15 No. workers. In general, on-going snagging work should not be held to be a concurrent culpable delay when an impartial investigation would find that the main cause of delay to completion was the additional work and not the on-going snagging work, which is always done when progress is approaching completion.

Excusable Delay in a Period of Float

It is generally accepted that if there were delays caused by the effects of an excusable event and such delays occurred on strings of activities where there was float that was large enough to subsume such delays without completion being delayed, then a contractor was entitled to:-

(i) no extension of time as, either there was no delay to completion, or the delay to completion was caused by the delaying effects of another excusable event affecting the critical path which went through another string of activities;

(ii) no reimbursement of prolongation cost as construction of the works was not prolonged by the delaying effects of excusable events on the strings of activities with float, however, there may have been additional cost associated with the delayed portion of the works, as opposed to the whole of the works, or a section thereof.

Therefore, for the contractor to be entitled to an extension of time, the delaying effects of an excusable event must have impacted, or have been likely to impact, upon the critical path.

Pacing Delay in a Period of Float

As the foregoing is the generally accepted view for the delaying effects of an excusable event in a period of float then it should also be accepted that a similar philosophy, acting in the converse, should apply for the delaying effects of culpable events in a period of float. Using float to subsume delay is referred to in the USA as "*pacing delays*". The delaying effects of "*pacing delays*" and excusable events, both of which occurred in periods of float, should be treated similarly by the contract administrator. Therefore, for a "*pacing delay*" which was subsumed by float, there would be no culpable delay to completion and a contractor would be entitled to:-

(i) no liquidated damages would be payable where the period of float subsumed the effects of the "*pacing delay*" which, therefore, did not cause delay to completion;

(ii) a non-critical "*pacing delay*" should not be used to offset the delaying effects of a critical excusable event when extensions of time are being assessed.

Therefore, the delaying effects of a culpable event would not cause, or would not be likely to cause, delay to completion as they were subsumed by float. Indeed, it is doubtful that such effects, when subsumed by float, could be classified as a delaying event at all and is better described as a "*pacing delay*".

Therefore, a culpable delay does not really occur when a programmed activity duration is exceeded, as the available float must also be subsumed before a culpable delay is created. Just as there is no entitlement to an extension of time where the delaying effects of excusable events are not critical, there are no entitlements to liquidated damages where the effects of "*pacing delays*" are not critical.

In the USA, it appears to be accepted case law that float in non-critical strings of activities created by the delaying effects of an excusable event which caused critical delay in a critical string of activities can be used to reprogramme non-critical work. "*Pacing delays*" occur when a contractor deliberately decelerates the pace of non-critical activities to keep pace with the delaying effects of critical excusable events.

At page 223 of Keating 6th edition it states:-

"Interim slowness not resulting in a failure to complete on time may not be a breach of contract at all."

This statement is referenced to case law (*GLC v Cleveland Bridge and Engineering (1984)*) and provides support for using float to subsume "pacing delays" that, therefore, should not be classified as culpable delays as they did not cause delay to completion.

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Features

中國《建設工程工程量清單計價規範》解讀

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中國建設部標準定額研究所制定的中國《建設工程工程量清單計價規範》(以下簡稱計價規範)于二〇〇三年七月一日在中國施行。業界可能因文字本身的多義性而對計價規範產生不同的理解。作者嘗試在本文探討計價規範的解釋。

一、解釋權

在中國政府工程和國有企業工程計量要求的推動下，計價規範將會成為在建設行業中的一個重要規範，並在中國各地普遍被採用。這是一個可預見的將來，亦因如此，有關計價規範的糾紛將會逐漸增加。

計價規範的前言說明"本規範由國家建設部負責管理和強制性條文的解釋，建設部標準定額研究所負責具體技術內容的解釋。"計價規範中的強制性條文只有6條，而這些條文內容清晰易明，出現歧義的機率不大。然而建設工程是多方面的，各個工程項目的天然條件、技術要求、設計規範等各有不同，計價規範不可能詳盡說明每一細節，而按計價規範計算工程量清單的招投標人亦難以從多案例中尋找到切合自己問題的先例，他們極有可能需要尋求計價規範中技術內容的解釋和指引。這種需要是眾多的且急切的。若所有這些涉及計價規範技術內容的解釋和指引皆由中國建設部標準定額研究所作出，他們的工作量當然是眾多的，眾多的量又催化中國各地的建設工程在時間與空間上的阻礙，惡化採用計價規範的合同當事人的糾紛，對工程的進展產生不良的影響。

計價規範於本年七月一日在中國施行，上述的情況是可以預見的。有關的決策人應正視這一問題的嚴重性，預先作出解決安排，避免市場因為害怕合同糾紛而對計價規範的採用有所保留。筆者建議：

為了減少中央與中國各地的建設工程在時間與空間上的阻礙，有關決策人仕可按行政程序中的效率原則制定程序，授權適合的中國地方部門接受當地對計價規範的技術內容的申訴(注意：計價規範的強制性條文的解釋仍由中國建設部統一負責)。為了技術內容的統一性，地方部門按程式作出初步解釋和指引後立即通過互聯網上報中國建設標準定額研究所請求作最終解釋和指引，中國建設標準定額研究所審查後可對地方部門的解釋和指引作出同意、補充或否定的最終解釋和指引的決定，這最終解釋和指引立即在指定的互聯網發佈，通告所有適合的地方部門，而有關建設企業亦可立即上網查閱。雖然地方部門的初步解釋和指引可解決空間與時間的阻礙，但這初步解釋和指引不是最終的。如果作出初步解釋和指引的地方部門發現與最終解釋和指引有矛盾，立即通知當事人糾正。而當事人可按下列不同情作出相應補救：

(1) 在回標截止日期前，招標人立即通知所有投標人就矛盾之處作出更正；

(2) 回標截止日期後，但在簽定建設合同前，招標人應通知所有投標人初步解釋和指引與最終解釋和指引存在矛盾。避免中國《合同法》中的重大誤解，應由投標人自由平等地決定是否維持或放棄投標書。筆者認為這矛盾在招投標期間已成投標人的"合意"風險，並應已包容在投標書中的投標金額、工期、質量、條件內，所以這些矛盾不會對投標書有實質的改變，而可按中國《工程建設項目施工招標投標辦法》的變更原則處理。當然如果這些矛盾改變了投標書的實質內容，便應重新招投標。

(3) 初步解釋和指引在簽定建設合同前，而最終解釋和指引在簽定建設合同後，則由當初作出初步解釋和指引的地方部門調解這些矛盾，企圖貫切最終解釋和指引，但又維持初步解釋和指引的後果。因這是合同當事人在簽定建設合同時的“合意”。

(4) 初步解釋和指引與最終解釋和指引都在簽定建設合同後(通敘指變更)，合同當事人應按最終解釋和指引調整金額。

二、法規與合同的衝突

一般的合同條款規定工程量清單的錯誤可構成變更。在簽定建設合同後，合同當事人對編制工程量清單的計價規範的解釋往往有爭議，企圖尋找工程量清單的錯誤，爭取更多的利益。按照中國《合同法》第十二條，簽訂合同的雙方當事人一般預先約定解決爭議的方法。若然合同當事人在合同條款中規定以仲裁或訴訟解決爭議，合同當事人應按合同的約定將計價規範的技術內容爭議交由仲裁機構裁決或法院判決，而仲裁機構或法院理應就計價規範的技術內容諮詢中國建設標準定額研究所，才作出裁決或判決。但若仲裁機構或法院對計價規範技術內容的爭議沒有諮詢中國建設標準定額研究所而自行作出與這研究所有矛盾的裁決或判決，在這情況下，作為合同的當事人，應該怎樣處理？是按照合同的仲裁條款或訴訟條款，依從仲裁機構或法院對計價規範技術內容的裁決或判決，還是請求中國建設標準定額研究所復審後依循他們的解釋和指引？

為了避免對計價規範的解釋權有衝突，筆者認合同條款與計價規範的規定應相統一，並且建議在合同條款中規定解決爭議的方法：“有關建設工程工程量清單計價規範的具體技術內容交由中國建設部標準定額研究所或其授權的地方部門解釋和仲裁，而其他爭議可交由預先約定的仲裁機構或法院裁決或判決。”

三、解釋原則

如前所述，文字的多義性容易令工程量清單的編制者對計價規範有所誤解。雖然中國建設部標準定額研究所沒有規定計價規範的技術內容的解釋原則，根據中國《合同法》第一百二十五條的規定，“當事人對合同條款的理解有爭議的，應當按照合同所使用的詞句、合同的有關條款、合同的目的，交易習慣以及誠實信用原則，確定該條款的真實意思”，所以計價規範的解釋原則理論上有：

(1) 以計價規範文義出發點、客觀與主觀相結合原則；

(2) 體系解釋原則；

(3) 歷史解釋原則；

(4) 符合計價規範目的原則；和

(5) 參照習慣或慣例原則。

計價規範雖然是屬于技術範疇，但不是全新的，計價規範亦有其歷史。在這計價規範之前，我國計算工程金額的方法單一採用中國“定額”。 筆者推斷計價規範的編制者是以中國“定額”為本而結合國際慣例，所以他在邏輯上應將被接納在計價規範中的全新國際慣例和概念（相對“定額”而言）以文字清楚地表示。按這立論，計價規範的採用者應先以計價規範文義為出發點，當遇見計價規範中的技術內容的規定文字上有不清晰，便可參考中國“定額”的規定。

計價規範涉及的範圍廣大，筆者對計價規範的研究尚很粗，本文有疏漏和缺陷在所難免，懇請廣大讀者和建設各界同仁不吝賜教，筆者表示誠摯的謝意。

Does Possession Amount To Completion?

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The date of completion of the works is clearly a matter of great importance for both contractors and employers. For contractors it marks the end of their responsibility to care for the works, the beginning of the defects liability period, the end of any potential liability for liquidated damages and the date when at least some of the retention money will be released. For employers it indicates the time when they can enter into occupation and use the building.

However, in the two principle forms of contract in use in Hong Kong, i.e. the Government forms and the Private form, there is no definition as to exactly what will constitute completion. This is not as simple a matter as may be expected because due to the nature of construction contracts most authorities are agreed that it is not possible to require that the works are 100% complete before a completion certificate is issued.

The Private form states that the Architect will issue a Practical Completion Certificate when the works are practically complete. Authority suggests that Practical Completion means that the works are fully completed to a state to permit the Employer to enter into full beneficial occupation, i.e. no outstanding works remain to be carried out save for very minor items of work being left incomplete on the '*de minimis non curat lex*' (the law does not concern itself with trifles) principle.

This was confirmed in *H W Nevill (Sunblest) Ltd v. Wm. Press & Son Ltd* (1981) where the judge said:

'*I think that the word "practically" in clause 15 (1) gave the architect a discretion to certify that William Press had fulfilled its obligation under clause 21(1) where very minor de minimis works had not been carried out, but if there were any patent defects in what William Press had done the architect could not have given a certificate of practical completion.*'

Most standard forms also include a clause that provides for the employer taking possession of part of the works before completion of the whole. In such situations the provisions of the contract normally go on to state that if the employer does take possession of a part of the works before the completion of the whole then the liquidated damages for the whole of the works will be reduced – usually in the proportion that the value of the part possessed by the Employer bears to the whole.

This is all reasonably clear and well understood, but these provisions led to a most interesting question in the recent case of *Skanska Corporation v Anglo-Amsterdam Corporation TCC* 20 June 2002.

The case concerned the construction of an office in Edinburgh in Scotland. Skanska was the contractor and the Anglo-Amsterdam Corporation was the employer. The date for completion of the works was 12 February 1996 but the works were not completed by this date. The main problem was the air conditioning, which was not functioning properly and this problem was exacerbated by the fact that Skanska had failed to produce operating and maintenance manuals for the air conditioning system.

However, the proposed tenants of the building, a company called ICL, were keen to gain access to enable their fitting-out works to commence as soon as possible. Therefore, as the air conditioning problems were not anticipated as having any affect upon the fitting-out works ICL decided to move in immediately on 12 February 1996.

Skanska did not resolve the air conditioning problems and complete the minor outstanding works until 25 April 1996, and the Architect issued the Practical Completion Certificate for that date. Accordingly Anglo-Amsterdam levied liquidated damages for the period from 12 February 1996 until 25 April 1996, at the full rate for the whole of the works of £20,000 per week.

The contract was a JCT 1981 With Contractors Design standard form of contract. Clause 16 of the contract deals with practical completion and the clause requires that the Architect provide a written statement to indicate the date upon which practical completion has been achieved.

For this particular project the standard wording had been amended to read that the statement will only be issued when the Architect was satisfied that any unfinished work is very minimal and of a minor nature, which was really little more than an express statement of the position adopted by the courts.

The matter went to arbitration where the arbitrator had to decide whether Practical Completion took place on 12 February 1996 or 25 April 1996.

Skanska argued firstly that as the tenant, ICL, had moved in on 12 February 1996, the works had achieved Practical Completion on that date and liquidated damages could not be deducted for the period thereafter.

In the alternative, Skanska argued that even if the works had not achieved Practical Completion on 12 February 1996 the provisions of Clause 17 must be applicable and the employer should be deemed to have taken partial possession of a part (which was in this case the whole) of the works.

In his analysis the arbitrator considered that Clause 16 was explicit that the Architect could not issue the statement that Practical Completion had occurred if work, except for that of a very minimal and minor nature, was still outstanding. In this case it was clear that such a statement could not be issued because the air-conditioning was not working by 12 February 1996.

The arbitrator then examined the wording of Clause 17. However, he concluded that this clause did not apply because he considered that it only dealt with the situation where the employer takes possession of a part but not the whole of the works. In this case it was his opinion that the employer (or at least his tenant) had not taken possession of part of the works but possession of the whole of the works and so Clause 17 and its provisions could not apply.

Accordingly, the arbitrator decided that Skanska was liable to pay liquidated damages from 12 February 1996 until Practical Completion which he considered was on 25 April 1996, at the full rate of liquidated damages set out in the contract.

Not surprisingly the arbitrator's award was the subject of an appeal to the TCC court where the matter was heard before His Honour Judge Thornton QC.

The judge took a far more pragmatic and sensible view of the situation than the arbitrator and held that Clause 17 was not limited to possession of only parts of the works, it could operate perfectly well when possession had been taken of the whole of the works.

The judge considered that when the employer takes over a part of the building then as far as that part of the works is concerned the contractor is deemed to have achieved Practical Completion, even if, as was the case here, the contract did not permit a Practical Completion certificate to be issued at that stage.

Whilst the contract did not deal with the situation where the employer takes possession of the whole of the works before Practical Completion, the same principle should apply as where the employer takes possession of part of the works. In other words Practical Completion is deemed to have taken place.

The judge concluded therefore that by the employer (or its tenant) agreeing to enter the building and to commence fit out works, partial possession of the whole of the works had in fact been taken, with the consequence that Skanska became entitled to repayment of the liquidated damages it had paid out.

This is an interesting case and one in which it was refreshing to see the court adopting a pragmatic and sensible approach particularly when matters such as completion and liquidated damages are in issue.