JARDINE ENGINEERING CORP LTD & ORS v SHIMIZU CORP - [1992] 2 HKC 271

HIGH COURT
KAPLAN J

CONSTRUCTION LIST NO 1 OF 1992

10 March 1993

Building and Construction -- Contract -- Implied terms -- Whether implied terms in sub-contracts that sub-contractors entitled to compensation for loss caused by delay not their fault -- Main contractor entitled to compensation and extensions of time -- Whether sub-contractor entitled to equivalent rights -- Whether terms can be implied into government's standard form contracts -- Relevant principles -- Whether main contractor in breach of contract

Contract -- Building contract -- Implied terms -- Whether implied terms in sub-contracts that sub-contractors entitled to compensation for loss caused by delay not their fault -- Main contractor entitled to compensation and extensions of time -- Whether sub-contractor entitled to equivalent rights -- Whether terms can be implied into standard form contracts -- Relevant principles -- Whether main contractor in breach of contract

On 13 May 1985, the defendant, Shimizu Corp, agreed with the Hong Kong government to undertake construction of extensions and improvements to the Queen Mary Hospital (the main contract). The work to be performed comprised the erection of two buildings and associated infrastructure. Building services and other specialist trades were reserved under the main contract to be performed by nominated sub-contractors under the general direction and responsibility of the defendant. Each of the four plaintiffs were nominated sub-contractors who entered into sub-contracts with the defendant on the terms and conditions specified in the government's standard form contract. Subsequently the completion dates of the main contract and sub-contracts were considerably extended due to the actions of the government. The defendant was granted extensions of time under the main contract and the plaintiffs were granted full extensions of time by the defendant. The plaintiffs sought declarations claiming payment from the defendant for the loss, expense and damage suffered as a result of the prolongation and disruption of their respective sub-contract works.

The main issue was whether a nominated sub-contractor, in addition to obtaining an extension of time for delay not its fault, could also claim against the main contractor for any loss and expense suffered as a result of such delay. Under the main contract, the defendant was entitled to compensation for loss and expense suffered as a result of delay as against its employer, the government. The plaintiffs first argued that the sub-contracts ought to be construed as incorporating relevant provisions of the main contract, whereby the various items claimed were to be paid pursuant to those provisions. The plaintiffs' main argument was that there were a number of implied terms in the sub-contracts which achieved the result that they were also entitled to be compensated for loss caused by delay. First, it was argued that there was an implied term that the plaintiffs, as sub-contractors, should have equivalent rights to payment for complying with or as a consequence

of an architect's instruction or other event as the defendant had under the main contract (term B). Second, it was argued that there was an implied term that the defendant should pay or indemnify the plaintiffs against any expense or loss which the plaintiffs reasonably incurred by reason of any breach of the main contract by the government, if and to the extent such loss was otherwise recoverable from the plaintiffs under the sub-contract (term C). Third, there was an implied term that the defendant should not hinder or prevent the plaintiffs from carrying out the sub-contract works with due expedition, economically and in accordance with

the sub-contract (term E). The defendant argued that such terms could not be implied into a standard form contract.

Held, granting the declarations sought:

(1) Although clearly connected, the main contract and the sub-contracts were separate and integral contracts. It would be unwise and would set a dangerous precedent to incorporate into the sub-contracts certain conditions of the main contract in order to fill identified lacunae in the sub-contracts.

(2) A term could not be implied if it were merely reasonable to do so. The court must be satisfied that the term is reasonable and equitable, is so obvious that 'it goes without saying', is capable of clear expression, does not contradict any express term of the contract and that it is necessary for the term to be implied in order to give the contract business efficacy. *BP Refinery (Westernport) v President, Councillors and Ratepayers of the Shire of Hastings* [1977] 16 ALR 363 applied.

(3) There is no general rule that terms cannot be implied into a standard form contract. The same principles apply to standard form contracts as they do to negotiated contracts, although the scope for implication of terms will clearly be limited in the former category of contracts. *Codelfa Construction v State Rail Authority of NSW* (1989) 149 CLR 337 applied.

(4) On the facts of the case, the plaintiffs did not knowingly and willingly agree to forego any claims for loss and expense caused in the circumstances posited by the agreed facts and in circumstances where, for the very same cause, the defendant was entitled to claim its losses against the government. This was not a possibility which had been within the contemplation of the parties to the contract. *Chandler Bros v Boswell* [1936] 3 All ER 179 distinguished.

(5) Applying the relevant principles, terms B or D could not be implied into the sub-contracts. It was impossible to conclude that these terms complied with the necessary conditions for the implication of terms. Although the terms would be fair and reasonable, the contracts worked without them, albeit to the prejudice of the plaintiffs. Furthermore, to imply terms B or D would be a serious rewriting of the parties' bargain, a fortiori because this form of sub-contract was imposed by government and because the government would have to foot the bill if the plaintiffs enjoyed equivalent rights.

(6) However, as term E did not run foul of the relevant principles, it should be implied into the contracts, modified as follows: 'That the contractor should not hinder or prevent the sub-contractor from carrying out the sub-contract works in accordance with the sub-contract.'

(7) Accordingly, the defendant had been put in involuntary breach of contract by the actions of the government. It had deprived the plaintiffs, however unintentionally, of their rights to have the time within which to execute and

complete the sub-contract works. Therefore, the declarations were to be granted on the basis of implied term E (as amended) and on the basis of breach of contract. However, the defendant was amply protected by being able to pass liability back to the government and, by the terms of the declarations themselves, was not liable in principle to the plaintiffs unless it could actually do so. *Wells v Army and Navy Co-operative Stores (1903)* default Hudson's Building Cases (4th Ed), p 354, applied.

Cases referred to

Annefield, The (1971) P 168

Aughton v MF Kent Services [1991] 57 BLR 1

BP Refinery (Westernport) v President, Councillors and Ratepayers of the Shire of Hastings [1977] 16 ALR 363

Chandler Bros v Boswell [1936] 3 All ER 179

Codelfa Construction v State Rail Authority of NSW (1989) 149 CLR 337

Holland Hannen & Cubitts (Northern) v Welsh Health Technical Services Organisation [1981] 18 BLR 80

Liverpool City Council v Irwin [1977] AC 239

London Borough of Merton v Leach [1985] 32 BLR 51

Luxor (Eastbourne) v Cooper [1941] AC 108

Mackay v Dick (1881) 6 App Cas 251

Moorcock, The (1889) 14 PD 64

Neodox v Swinton and Pendlebury Borough Council [1958] 5 BLR 34

Reigate v Union Manufacturing Co (Ramsbottom) [1918] 1 KB 592

Shell (UK) v Lostock Garage [1977] 1 All ER 481

Shirlaw v Southern Foundries (1926) [1939] 2 KB 206

Trollope & Colls v Singer Hudson's Building Cases (4th Ed), Vol 1, p 849 default

Wells v Army and Navy Co-operative Stores (1903) Hudson's Building Cases (4th Ed), p 354 default

Other legislation referred to

Chitty Contracts Vol 1 paras 911-912 -

Keating Building Contracts (5th Ed) pp 48-52 -

Lewison Kim The Interpretation of Contracts (1989) Ch 5

Application

This was an application by the plaintiffs by way of originating summons dated 8 January 1992 seeking 21 declarations in relation to the recovery of costs against the defendant arising out of sub-contracts which the plaintiffs had entered into with the defendant for the performance of building works. The facts appear sufficiently in the following judgment.

Humphrey Lloyd QC, Anthony Haughton and Philip Nunns (Simmons and Simmons) for the plaintiffs.

Peter Clayton and David Bateson (Bateson Harris) for the defendant.

KAPLAN J

I have before me a re-amended originating summons dated 8 January 1992 by which the plaintiffs claim against the defendant 21 declarations which arise out of sub-contracts which they entered into with

the defendant. The declarations sought raise interesting and difficult questions of construction law which I understand do arise from time to time in Hong Kong. In essence, the point in issue is as follows. Can a nominated sub-contractor in addition to obtaining an extension of time for delay not his fault also claim against the main contract for any loss and expense suffered as a result of such delay? Put in shorthand, the cognoscenti would ask 'Can a sub-contractor under this form of sub-contract get money as well as time?' It is common ground that the defendant, as against his employer, in this case the Hong Kong government, can get compensation for such loss and expense under the form of the main contract. Sir Humphrey Lloyd QC, who with Mr Anthony Haughton, appears for the plaintiffs, castigated a situation where the main contractor could and the sub-contractor could not be so compensated as absurd and wholly unjust. To avoid this result, Mr Lloyd has addressed me on questions of construction of the sub-contract and main contract, incorporation, implied terms and breach of contract. The argument in this case has proceeded on agreed facts to which I will have to make reference.

The basic facts

By an agreement in writing dated 13 May 1985, between the Hong Kong government and the defendant, the defendant agreed to undertake for the government the construction of the Queen Mary Hospital extensions and improvements, stage 2 ('the main contract'). The main contract contains, inter alia, the *Standard government Articles of Agreement and General Conditions of Contract for architectural Works* (1977 Ed), copies of which are contained in annexure 1 to the agreed facts. Also in annexure 1 are copies of the special conditions, form of tender and bill No 1 -- preliminaries of the main contract which also contain terms and conditions relevant to this action. The work to be performed by the defendant ('the works') comprised the erection of two buildings and associated infrastructure. Of in situ concrete construction throughout, the two buildings interconnect by means of walkways, tunnels and link bridges to the original hospital buildings. One building, 29 storeys high, known as 'Block K', fronts on Pokfulam Road and the other building known as 'Block J', 12 storeys high, were built at the rear of the existing hospital. Block 'K' contains inter alia, the paediatric unit, intensive care units and an outpatient department. Wards are provided for dialysis, urology, orthopaedic, reconstructive, obstetric and private patients and a burns unit. Block 'J' provides the psychiatric unit with wards and facilities for both inpatients and outpatients. In addition to these structures a new custodial ward and a major extension to the casualty block formed part of the works. During the tender stage, the defendant agreed to perform further work under the main contract in the existing 'Block B'. This work included the refurbishment of the temporary canteen, and extensions to the kitchen and refuse room.

[1992] 2 HKC 271 at 275

Building services and other specialist trades were reserved under the main contract to be performed by nominated sub-contractors under the general direction and responsibility of the defendant. In all, 15 specialist packages were prepared. Offers for each were invited by government from selected sub-contractors willing to enter into an agreement with the defendant using the Building Development Department's *Standard Form of nominated Sub-contract* (1978 Ed). The defendant was subsequently instructed by the government to enter into the said nominated sub-contracts in the form and on the terms and conditions specified by the government. All of the plaintiffs became nominated sub-contractors under this procedure. The first plaintiff entered into two sub-contracts with the defendant, both dated 5 August 1985, and the second, third and fourth plaintiffs each entered into a sub-contract with the defendant on 13 May 1985, the same date that the main contract was entered into between the defendant and the government. Copies of the conditions of tender, form of tender, form of agreement and general conditions of the sub-contract between the defendant and the fourth plaintiff (which, except for the pricing and description of the work to be carried out, are identical to the sub-contracts of the first, second and third plaintiffs) are contained in annexure 2 to the agreed facts together with copies of the preliminaries, the appendix to specification and two extracts from the specification of the sub-contract between the defendant and the fourth plaintiff (which are also identical in all relevant respects to the sub-contracts of the first, second and third plaintiffs).

The works

The first plaintiff's sub-contract was for the provision of the complete medical gas service installation and for the complete steam services installation. The second plaintiff's sub-contract was for the provision of the complete air-conditioning system. The third plaintiff's sub-contract was for the provision of the complete electrical services systems. The fourth plaintiff's sub-contract was for the provision of the complete fire services installation.

History of the work

I take these from the agreed facts.

> In accordance with the provisions of bill 1/34 in the preliminaries to the main contract, the works were to be phased. *Phase 1* consisted of completion of a temporary steel platform *to be completed within four months of commencement*. Phase 2 consisted of completion of Block J, the J-K services tunnel, Block K, a portion of K-B services tunnel and footbridge up to the new main entrance, and the footbridges linking Block K and the pathology building. *Phase 2 was to be completed within 35 months from the date of commencement*. *Phase 3* consisted of the completion of the whole of the remainder of the works [except for the demolition of the temporary steel platform and the J-B temporary
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> *[1992] 2 HKC 271 at 276*
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> walkway] and *had to be completed within 44 months from the date of commencement*. *Phase 4* consisted of the demolition of the temporary steel platform and temporary J-B walkway, including reinstatement works and making good all works disturbed. This phase *had to be completed within 45 months from the date of commencement of the main contract*. A site plan showing the location of the various structures is attached at annexure 3 to these agreed facts.

For the purposes of the four plaintiffs' claims in this action, *only phases 2 and 3 are relevant*. The four plaintiffs had no work to execute in phases 1 and 4 and the defendant's works in phases 1 and 4 had no effect on the sub-contract works referred to in para 5 of this introduction. *The commencement date for the main contract* and the *sub-contracts of the second, third and fourth plaintiffs* was *27 May 1985*. The commencement date for the sub-contract of the *first plaintiff was 12th August 1985*. Substantial completion for phase 2 for the main contract and all the sub-contracts was due on *26 April 1988* and for phase 3 on *26 January 1989*.

The completion dates of the main contract and the sub-contracts were considerably extended. *Phase 2 was certified* as completed on 31 March 1989, *339 days later than stipulated*. *Phase 3 was certified* as completed on 20 January 1991, *726 days later than stipulated*. *The defendant has been granted extensions of time for completion by the architect under the main contract up to the certified dates for completion of phases 2 and 3 for the following reasons*:

Phase 2

25 days for additional excavation work

17 days for additional drainage work

5 days for water seepage on east rock face

3 days for suspension relating to HKU examinations

4 days for congested reinforcement

1 day for topping out ceremony

45 days for inclement weather

134 days for late nomination of the OT fixed services sub-contractor

34 days for the accumulated effect of variations

27 days for delay by fire services department, re: inspection to fire services system

43 days for additional works and delay by other contractors of government

1 day for public holiday for the Queen's visit to Hong Kong

Total 339 days

Phase 3

339 days for knock-on effect of phase 2

83 days for late possession of the phase 3 site

74 days for suspension of works to allow asbestos removal

62 days for extra works, late instructions, delays by other construction of government carrying out diversion work of services

32 days for disruption to progress caused by site memorandum OAP/756

32 days for delay to issue and approval of casualty block level 1, combined services drawings

[1992] 2 HKC 271 at 277

64 days for re-roofing of casualty block at level 1, extra works for casualty block

Total 726 days

Whilst extensions of time for completion were granted to the defendant for the reasons stipulated above, the defendant made a number of claims for extensions of time for other events which the defendant contends caused delays concurrent with the delaying events for which extensions have been granted. The architect, while stating that extensions of time were granted for the reasons stated above, also took into account these concurrent causes of delay when granting extensions of time. In its claims against the government for additional payment, the defendant relies upon those concurrent delays in addition to the delays for which extensions of time were granted.

The four plaintiffs have all been granted full extensions of time by the defendant under the terms of the sub-contracts up to the certified dates for completion for phases 2 and 3. The reasons for the awards of time under the sub-contracts were generally not specified but were granted by the defendant for the conse-

quences of the events for which it claimed the extensions of time under the main contract. In their claims against the defendant for additional payment, the four plaintiffs also rely upon events which they contend caused delays concurrent with the events for which extensions of time have been granted under the main contract.

The four plaintiffs have each claimed payment from the defendant for the loss, expense and damage suffered as a result of the prolongation and disruption of their respective sub-contract works. These claims have not been paid to them by the defendant.

The defendant has commenced arbitration proceedings against the government concerning, inter alia, the events which are the subject of these proceedings. The plaintiffs have also referred their claims against the defendant to arbitration. However, in view of the fact that the same issues of legal principle would arise in all arbitrations commenced by the four plaintiffs against the defendant in connection with this project and also in view of the fact that a resolution of the legal issues in dispute in advance of a detailed investigation of the factual circumstances surrounding each of the four plaintiff's claims on this complex project would save a considerable amount of time and cost, the four plaintiffs have referred the said legal issues to this honourable court for a decision which will be binding upon an arbitrator considering these issues during the course of any arbitration proceedings arising out of this project.

Procedure

Although the defendants invited me to refuse to make any of the declarations sought, they do not take objection to the procedure adopted in this case. Had they objected, then they could have applied for a stay of these proceedings in the light of the arbitration clause which appears in each sub-contract. Mr Peter Clayton, who appeared for the defendants, recognized

[1992] 2 HKC 271 at 278

that this procedure was a useful one even though, on the law, he invited me to make no declarations. He was clearly concerned that his clients should not be left in the position where, by virtue of this judgment and if the facts are subsequently proved, they may have to pay the plaintiffs and not be able to recover the precise sums back from the government. He was also concerned to see that, if granted, the declarations were not too wide so as to permit recovery in circumstances where any of the plaintiffs may have been at fault. He was also concerned to see that, on the assumption that one or more declarations were granted, it did not pre-empt the defendants from arguing in the arbitration as to causation and remoteness. In order to cover all these points, Mr Lloyd QC refined the declarations sought and Mr Clayton appeared satisfied that the points raised had been covered. However, Mr Clayton did submit that any declarations should be limited to the agreed facts and should not extend beyond them. On this point, there was no agreement and I will have to rule on that point in due course. In the latter regard, Mr Clayton submitted that the declarations sought were hypothetical and thus fell foul of the principles upon which declarations are normally granted. However, I wish to emphasize that he was not submitting that the whole application should fail *in limine*. One of the reasons why this procedure was adopted without objection was because it was felt that an arbitrator would be greatly assisted in having the courts view on the legal position in advance of the arbitration. But perhaps the strongest reason was that both sides generally felt that a decision of the court, one way or the other, would be dispositive of many of the disputes resulting from the sub-contracts. It will be noted that the government is not a party to these proceedings and made no application to be joined. If the plaintiffs succeed in some or all of their declarations, it may well be that the government will take a different view of their stance to date, namely, that the defendants cannot add on to their claims against the government anything representing the loss and expense suffered by its sub-contractors for the same cause.

The declarations sought

Declaration 1

In a situation where the architect has issued a *variation order* to the main contractor which did not vary the works of a particular nominated sub-contractor and that order was not issued to that nominated sub-contractor by the main contractor under cl 9(A) of the nominated sub-contract conditions but that variation order nevertheless indirectly caused that nominated sub-contractor delay and/or disruption, that nominated sub-contractor's time related and/or disruption costs are recoverable by the nominated sub-contractor provided that they are not due to default by the nominated sub-contractor and provided also that the

[1992] 2 HKC 271 at 279

main contractor is, in principle, entitled to recover payment under the main contract either

> (a) because, on a proper interpretation of the sub-contract, as the sub-contract works form part of the works under the main contract, the nominated sub-contractor is entitled to have the amount of such costs included in the payments directed by the architect to be made under clauses 73(1), 75(5), 90(2)(a) and 97 of the main contract; or
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> (b) because, on a proper interpretation of the sub-contract, such costs are to be added to the sub-contract sum (as defined in cl 10) as they are to be ascertained and paid under the relevant main contract conditions, namely cll 73(1), 75(5), 90(2)(a) and 97; or
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> (c) because, on a proper interpretation of the sub-contract, the relevant conditions of the main contract were *incorporated* therein whereby such costs are to be paid pursuant to cll 73(1), 75(5), 90(2)(a) and 97 of the main contract; or
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> (d) because it was an *implied term* of the sub-contract that the sub-contractor should have *equivalent rights* to payment for complying with or as a consequence of an architect's instruction or other event as the contractor has under the main contract and such costs would be recoverable by the contractor pursuant to cll 73(1), 75(5), 90(2)(a) and 97 of the main contract [implied term B]; or
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> (e) because it was an *implied term* of the sub-contract that the contractor *should not hinder or prevent* the sub-contractor from carrying out the sub-contract works with due expedition; economically and in accordance with the sub-contract and, in the situation postulated, the main contractor would have been in breach of that term so that, subject to considerations of causation and remoteness, the costs are recoverable as damages for breach of contract [implied term E]; or
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> (f) because, in the situation postulated, the main contractor deprived the sub-contractor of its right to have the time within which to execute and complete the sub-contract works with due expedition and by the time set out in part III of the appendix, whereby, subject to considerations of causation and remoteness, the costs are recoverable as *damages for breach of contract*.

The relevant facts

When the defendant took possession of the Block K site, it encountered solid rock instead of loose rock backfill, which was the consequence of out of tolerance site formation works by the previous site formation contractor.

As a result of the unexpected presence of solid rock, the defendant received variation orders from the architect's representative to carry out additional rock excavation work to the formation level of Block K for the construction of the permanent structure at various points due to

discrepancies between the site conditions and the design. The authority to issue such orders was delegated to the architect's representative pursuant to cl 2(3) of the general conditions of the main contract. These variation orders did not vary the works of any of the four plaintiffs. No orders in respect of these variation orders were issued by the defendant to any of the four plaintiffs under cl 9(A) of the sub-contract conditions. These variation orders caused delay and/or disruption to the defendant by requiring the defendant to:

> (a) undertake the extra works in a haphazard, out of sequence, piecemeal manner;
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> (b) alter its planning and construction programme for the follow-on works directly (or indirectly) affected by (a);
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> (c) alter and increase its site labour and plant resources to undertake these extra works and the follow-on works affected by the variation works.

As a result of this delay, 25 days' extension of time was granted by the architect to the defendant. These variation orders indirectly delayed and/or disrupted all the four plaintiffs. The variation orders delayed the construction of the defendant's structural works. With the exception of the installation of cast in conduits which were installed as the structure was constructed by the defendant, the plaintiffs could not commence their installation works on each floor level until after the structural concrete to the relevant part of the structure was cast and cured, and temporary works were removed. The 25 days' delay to the structure caused by

the additional excavation therefore equally delayed the commencement of the plaintiffs' installation works. Each of the four plaintiffs claims Declaration 1.

Declaration 2

In a situation where the architect has issued an instruction (other than a variation order) to the main contractor which directly affected the works of a particular nominated sub-contractor and that instruction was issued to that nominated sub-contractor by the main contractor under cl 9(B) of the nominated sub-contract conditions, and that instruction caused that nominated sub-contractor delay and/or disruption, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract either:

> (a) because, on a proper interpretation of the sub-contract, as the sub-contract works form part of the works under the main contract, the nominated sub-contractor is entitled to have the amount of such costs included in the payments directed by the architect to be made under
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> *[1992] 2 HKC 271 at 281*
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> cl 57(2) (or other relevant condition), 75(5), 90(2)(a) and 97 of the main contract; or
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> (b) because, on a proper interpretation of the sub-contract, such an instruction varied the sub-contract works which were works only to be undertaken and completed within a specific *sequence and time by causing them to be undertaken in a different sequence or longer time so that such costs are, on a proper valuation* made under cl 73(1)(b) or (c) (as applied by cl 10 of the sub-contract), to be added to the sub-contract sum, or to be ascertained and paid under the relevant main contract conditions, namely, cll 73(1)(b) or (c), 75(5), 90(2)(a) and 97; or such costs are to be added to the sub-contract sum (as defined in cl 10) as they are to be ascertained and paid under the relevant main contract conditions, namely, cll 73(1)(b) or (c), 75(5), 90(2)(a) and 97; or
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> (c) because, on a proper interpretation of the sub-contract, an instruction issued under cl 9(A) or (B) (other than for an authorized variation) is subject to an implied promise to pay the reasonable costs, loss or expense incurred by the sub-contractor and occasioned by or in consequence of compliance with such instruction; or
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> (d) because, on a proper interpretation of the sub-contract, the relevant conditions of the main contract were *incorporated* therein whereby such costs are to be paid pursuant to cll 57(2) (or other relevant condition), 75(5), 90(2)(a) and 97 of the main contract; or
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> (e) because it was an *implied term* of the sub-contract that the sub-contractor should have *equivalent rights* to payment for complying with or as a consequence of an architect's instruction or other event as the contractor has under the main contract and such costs would be recoverable by the contractor pursuant to cll 57(2) (or other relevant condition), 75(5), 90(2)(a) and 97 of the main contract [implied term B]; or
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> (f) same as 1(e) [implied term E]; or
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> (g) same as 1(f).

The relevant facts

On 23 October 1989, the architect's representative issued a site memorandum to the defendant ordering immediate suspension of all works within the casualty block under cl 57(1) of the main contract conditions due to the discovery of asbestos and to allow the asbestos to be removed by a specialist contractor of the government. On the same day, the defendant issued a covering site instruction to the second and third plaintiffs instructing them to suspend works in the casualty block immediately. By a site memorandum dated 29 December 1989 and received by the defendant on 4 January 1990, the defendant was instructed to recommence works to the casualty block immediately. This memorandum was copied by the defendant

[1992] 2 HKC 271 at 282

to the second and third plaintiffs instructing that they also recommence works immediately. This suspension order caused delay and/or disruption to the defendant since the defendant had to stop all works within the casualty block for 74 days. The casualty block was on the critical path of the defendant's programme for the phase 3 works. During this period, all the resources used for the works within the casualty block remained idle or, where possible, were demobilized or redeployed. As a result of this delay 74 days' extension of time was granted by the architect to the defendant. As the second and third plaintiffs were progressing their works

in the casualty block at the time of the suspension order, the order also caused the second and third plaintiffs delay and/or disruption. The suspension order directly delayed the works of the second and third plaintiffs by 74 days. This declaration is sought only by the second and third plaintiffs.

Declaration 3

In a situation where the architect has issued an instruction (other than a variation order) to the main contractor which did not directly affect the works of a particular nominated sub-contractor and that instruction was not issued to that nominated sub-contractor by the main contractor under cl 9(B) of the nominated sub-contract conditions but that instruction nevertheless indirectly caused that nominated sub-contractor delay and/or disruption, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract because, in the situation postulated, the government was in breach of the main contract and such costs are recoverable by the main contractor pursuant to cl 76(1)(a) or as damages for breach of contract; and

> (a) because, on a proper interpretation of the sub-contract, the relevant conditions of the main contract were *incorporated* therein whereby such costs are to be paid pursuant to cll 75(5), 76(1)(a) (or other relevant condition), 90(2)(a) and 97 of the main contract or damages for breach of the main contract; or
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> (b) because it was an *implied term* of the sub-contract that the sub-contractor should have *equivalent rights* to payment for complying with or as a consequence of an architect's instruction or other event as the contractor has under the main contract and such costs would be recoverable by the contractor pursuant to cll 75(5), 76(1)(a) (or other relevant condition), 90(2)(a) and 97 of the main contract or damages for breach of the main contract [implied term B]; or
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> (c) because it was an *implied term* of the sub-contract that the main contractor *should pay or indemnify the sub-contractor against any*
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> *[1992] 2 HKC 271 at 283*
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> *expense or loss which the sub-contractor should reasonably have incurred by reason of any breach of the main contract by the government*, if and to the extent that such expense or loss is not otherwise recoverable from the main contractor under the sub-contract [implied term D]; or
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> (d) Same as 1(e) [implied term E]; or
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> (e) Same as 1(f).

The relevant facts

By letter dated 20 November 1987, the architect instructed the defendant to enter into a nominated sub-contract with Jardine Matheson & Co Ltd for the operating theatre fixed services installation, which was part of the phase 2 works. In this letter, the architect acknowledged that the time remaining for the completion of the phase 2 works under the main contract was insufficient for Jardine Matheson to carry out its works. The architect requested the defendant to inform it of the extent of the delay.

Jardine Matheson informed the defendant that it could complete its works by 31 October 1988. The defendant estimated that it required a further six weeks from 31 October 1988 to complete its follow-on works. No instructions in respect of the late nomination of the operating theatre nominated sub-contractor were issued by the defendant to the four plaintiffs under cl 9(B) of the nominated sub-contract conditions. The aforesaid instruction in respect of the late nomination of the operating theatre nominated sub-contractor caused delay and/or disruption to the defendant since the defendant:

> (a) was required to carry out preliminary work in an out-of-sequence manner;
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> (b) was required to undertake certain work concurrently with Jardine Matheson;
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> (c) could not complete its follow-up works until Jardine Matheson completed its work.

As a result of this delay, 134 days' extension of time was granted by the architect to the defendant. The late nomination of the operating theatre nominated sub-contract indirectly delayed and/or disrupted all the four

plaintiffs by causing the design and subsequent installation of the operating theatres fixed services to be delayed. The four plaintiffs required details of the specialist's equipment included in the operating theatre nominated sub-contract in order that coordination of the various services installations and fabrication and installation of parts of the plaintiffs' related works in the operating theatre could be executed. The original programmes issued by the defendant in September 1985 show the operating theatres nominated sub-contract being awarded in mid-January 1986, by which time it would be expected that the choice of equipment and general design would be

[1992] 2 HKC 271 at 284

complete. The production of the operating theatre detailed drawings and coordination with other services was to take place in a four-month period after award of the sub-contract, ie by end-April 1986). The design and coordination of the plaintiffs' installation works could not be finalized until details of the installation to be carried out by the operating theatre sub-contractor were issued by the architect. By way of example of the delay and disruption that occurred, the second plaintiff's works in regard to the operating theatre comprised an independent air-conditioning system, and supply and installation of a specialist ventilated ceiling system imported from Germany. The fabrication and installation of the materials and equipment for this installation could not take place until details of the specialist's equipment to be supplied to the operating theatres was provided by the government and/or its architect. In accordance with the defendant's original programmes, the ceiling installation was to have started at the following days in those levels of Block K containing the major operating theatres: level 11 -- 30 April 1987; and level 19 -- 2 August 1987.

Due to lack of necessary design information for the specialist operating theatre equipment, the installation of the operating theatre ceilings could not commence until August 1988, some 16 months later than programmed in the defendant's original programme.

This declaration is sought by all four plaintiffs.

Declaration 4(a)

In a situation where a particular nominated sub-contractor's progress was directly delayed and/or disrupted by an order given under cl 57(1) of the main contract conditions that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor provided that they are not due to the default of the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract either:

(a) same as 2(a); or

(b) same as 2(b); or

(c) same as 2(c); or

(d) same as 2(d); or

(e) same as 2(e) [implied term B]; or

(f) same as 1(e) [implied term E]; or

(g) same as 1(f)

The relevant facts

This declaration relates to suspension of works for asbestos removal. The facts referred to for declaration 2 are equally applicable to this declaration.

[1992] 2 HKC 271 at 285

Declaration 4(b)

In a situation where a particular nominated sub-contractor's progress was directly delayed and/or disrupted by failure by the government to give possession of the site in accordance with cl 60 of the main contract conditions, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract because in

the situation postulated the government was in breach of the main contract and such costs are recoverable by the main contractor pursuant to cl 60(2) or as damages for breach of contract; and

> (a) because, on a proper interpretation of the sub-contract, the relevant conditions of the main contract were incorporated therein whereby such costs are to be paid pursuant to cll 60(2), 75(5), 90(2)(a) and 97 of the main contract or damages for breach of the main contract; or
>
> (b) because it was an *implied term* of the sub-contract that the sub-contractor should have *equivalent rights* to payment for complying with or as a consequence of an architect's instruction or other event as the contractor has under the main contract and such costs would be recoverable by the contractor pursuant to cll 60(2), 75(5), 90(2)(a) and 97 of the main contract or damages for breach of the main contract [implied term B]; or
>
> (c) same as 3(c) [implied term D]; or
>
> (d) same as 1(e) [implied term E]; or
>
> (e) same as 1(f).

The relevant facts

This declaration relates to the delayed possession of the phase 3 works. These works were principally to be carried out in two locations, the first at the site of the new main entrance and the second in the casualty block. The main contract provided that the new main entrance site area would be given to the defendant one month after the substantial completion of Block J and following the completion of the temporary main entrance area. Accordingly, possession of this area should have been given on 1 May 1989. The government did not give possession of this site to the defendant until 22 July 1989. The main contract further provided that the casualty block was to be given to the defendant three months after the substantial completion of Block J. Accordingly, possession of casualty block should have been given on 1 July 1989. The government did not give possession of the casualty block to the defendant until 22 July 1989. This failure by the government to give possession caused delay and/or disruption to the defendant. The delay prevented the commencement of the phase 3 works and, accordingly, all the site resources for this portion

of the works remained idle or, where possible, were redeployed. As a result of this delay, 83 days' extension of time was granted by the architect to the defendant. The late possession of the casualty block also directly delayed and/or disrupted the third plaintiff, who was scheduled to commence removal of electrical fittings and equipment in the casualty block on 1 July 1989. This work was not able to commence until 22 July 1989, a direct delay of 22 days. The third plaintiff was notified in late June 1989 that possession of the casualty block would not be given on 1 July 1989. On 22 July 1989, the defendant notified the third plaintiff that it had received the necessary areas of the site for the phase 3 works on 22 July 1989. The defendant also notified the third plaintiff in the same letter that this was the new commencement date for the phase 3 works.

This declaration is sought by the third plaintiff.

Declaration 4(c)

In a situation where a particular nominated sub-contractor's progress was directly delayed and/or disrupted by any of the matters referred to in cl 76(1)(a)-(e) of the main contract conditions, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract because, in the situations postulated, the government would have been in breach of the main contract (other than in situations described by cll 76(1)(b) and (c)) and such costs are recoverable by the main contractor pursuant to cll 76(1)(a)-(e) or (other than as aforesaid) as damages for breach of contract and in each case:

> (a) because, on a proper interpretation of the sub-contract, the relevant conditions of the main contract were *incorporated* therein whereby such costs are to be paid pursuant to cll 75(5), 76(1)(a)-(e) (as applicable), 90(2)(a) and 97 of the main contract or damages for breach of the main contract; or
>
> (b) because it was an *implied term* of the sub-contract that the sub-contractor should have *equivalent rights* to payment for complying with or as a consequence of an architect's instruction or other event

as the contractor has under the main contract and such costs would be recoverable by the contractor pursuant to cll 75(5), 76(1)(a)-(e) (as applicable), 90(2)(a) and 97 of the main contract or (other than as aforesaid) as damages for breach of the main contract [implied term B]; or

(c) same as 3(c) [implied term D]; or

(d) same as 1(e) [implied term E]; or

(e) same as 1(f).

[1992] 2 HKC 271 at 287

The relevant facts

This declaration relates to the late information on the medical gas pipework in the operating theatres. The original drawings for the first plaintiff's medical gas pipe work showed the pipework entering the operating theatres at level 11s and 19 of Block K and plugged off. There was a requirement for connecting pipework from this pipework entry point to the medical gas outlets within the operating theatres. This requirement was recognized by both the defendant and the architect, but no design information had been provided. The defendant requested information from the architect's representative regarding the medical gas pipework by letter dated 18 December 1987. On 6 June 1988, not having received the required information, the defendant provided coordinated services layouts for the operating theatres and noted the lack of information in the existing medical gas pipework design. The defendant received a site instruction on 21 July 1988 providing information of the medical gas connecting pipework. This required approximately 350m of pipework. The architect noted in correspondence that this work was complicated, time consuming and critical and would exacerbate the delay already caused by the late nomination of the operating theatre fixed services nominated sub-contractor.

This late information caused delay and/or disruption to the defendant as its works in the operating theatres could not be progressed without the information on the details of the medical gas connecting pipework. As a result of the delay and/or disruption caused to the defendant by the late information contained in the site instruction, the architect included this delay as one of the reasons justifying an extension of time to the defendant of 25 days. This site instruction was also issued directly to the first plaintiff by the defendant on 25 July 1988. As the first plaintiff could not proceed with its pipeworks in the operating theatres until receipt of the information contained in this instruction, this late provision of information also directly delayed and/or disrupted the works of the first plaintiff in the operating theatres. This declaration is sought by the first plaintiff.

Declaration 5(a)

In a situation where a particular nominated sub-contractor's progress was indirectly delayed and/or disrupted by an order given under cl 57(1) of the main contract conditions, that nominated sub-contractor's time related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract either:

(a) same as 2(a); or

(b) same as 2(b); or

(c) same as 2(c); or

[1992] 2 HKC 271 at 288

(d) same as 2(d); or

(e) same as 2(e) [implied term B]; or

(f) same as 1(e) [implied term E]; or

(g) same as 1(f).

The relevant facts

This declaration relates to the suspension of works for asbestos removal. On 23 October 1989, the defendant was instructed to suspend the works to the casualty block under cl 57(1) of the main contract conditions for the purpose of removing asbestos from the said area.

By a site memorandum dated 29 December 1989 and received by the defendant on 4 January 1990, the architect's representative instructed the defendant to recommence works on the casualty block immediately.

While the first plaintiff was instructed by the defendant on 23 October 1989 to suspend all work in the casualty block, this instruction did not directly affect the medical gas installation works of the first plaintiff, who had not as yet commenced medical gas installation work in the casualty block, but was awaiting the completion of structural works by the defendant before it could commence its own works.

This suspension order caused delay and/or disruption to the defendant since the defendant had to stop all works within the casualty block for the period between 23 October 1989 and 4 January 1990 (74 days). The casualty block was on the critical path of the defendant's programme for the phase 3 works. During this period, all resources used for works within the casualty block remained idle or, where possible, were demobilized or redeployed.

As a result of this delay, 74 days' extension of time was granted by the architect to the defendant.

The suspension order given under the site memorandum indirectly caused delay and/or disruption to the works of the first plaintiff. The first plaintiff's medical gas installation works for phase 3 could not commence until after the completion of the necessary preceding builder's work by the defendant which was suspended by the said order for 74 days. This declaration is sought by the first plaintiff.

Declaration 5(b)

In a situation where a particular nominated sub-contractor's progress was indirectly delayed and/or disrupted by failure by the government to give possession of the site in accordance with cl 60 of the main contract conditions, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under

[1992] 2 HKC 271 at 289

the main contract because in the situation postulated the government was in breach of the main contract and such costs are recoverable by the main contractor pursuant to cl 60(2) or as damages for breach of contract; and

(a) same as 4(b)(a); or

(b) same as 4(b)(b) [implied term B]; or

(c) same as 3(c) [implied term D]; or

(d) same as 1(e) [implied term E]; or

[1992] 2 HKC 271 at 290

(e) same as 1(f).

The relevant facts

This declaration is sought with regard to the delayed possession of the phase 3 works and the facts are the same as those referred to under declaration 4(b). The failure by government to give possession of the casualty block to the defendant indirectly delayed and/or disrupted the second plaintiff. It was necessary for the defendant to strip-out the building fabric in the casualty block to allow access for the second plaintiff to dismantle the existing air-conditioning installation. The delay in the strip-out by the defendant caused a consequential delay to the second plaintiff's works. The second plaintiff was notified by the defendant on 21 June 1989 that commencement of phase 3 had been delayed to 1 July 1989. On 22 July 1989, the defendant noti-

fied the second plaintiff that the site area for phase 3 had been received on 22 July 1989 and that this was the actual commencement date of the phase 3 works. This declaration is sought by the second plaintiff.

Declaration 5(c)

In a situation where a particular nominated sub-contractor's progress was indirectly delayed and/or disrupted by any of the matters referred to in cl 76(1)(a)-(e) of the main contract conditions that nominated sub-contractor's time related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract because in the situations postulated the government would have been in breach of the main contract (other than in situations described by cll 76(1)(b) and (c)) and such costs are recoverable by the main contractor pursuant to cll 76(1)(a)-(e) or (other than as aforesaid) as damages for breach of contract and, in each case:

(a) same as 4(c)(a); or

(b) same as 4(c)(b) [implied term B]; or

(c) same as 3(c) [implied term D]; or

(d) same as 1(e) [implied term E]; or

(e) same as 1(f).

The relevant facts

This declaration relates to the congestion of reinforcement at levels LG4 and 5 of Block K. By letter dated 16 October 1985, the defendant requested the architect's representative for structural matters to issue instructions to deal with the problem of congestion of steel bars at these levels. By site memorandum dated 9 December 1985, the architect's representative instructed the defendant to make adjustments to the spacing of the vertical wall reinforcement at a certain grid line as designed and shown in various drawings, because the vertical rebars were too congested for concreting. The defendant was required to take down the erected column reinforcement at LG9 level and alter and crank to suit the site condition. These instructions caused delay and/or disruption to the defendant for similar reasons to those set out in relation to declaration 1. As a result of this delay, four days extension of time was granted by the architect to the defendant. These late instructions indirectly delayed and/or disrupted all the four plaintiffs. The late instructions delayed the construction of the defendant's structural work. With the exception of the installation of cast in conduits which were installed as the structure was constructed by the defendant, the plaintiffs could not commence their installation work for each floor level until after the structural concrete to the relevant part of the structure was cast and cleared, and temporary work removed. The four days' delay to the structure caused by the congestion of reinforcement therefore equally delayed the commencement of the plaintiffs' installation works. This declaration is sought by all four plaintiffs.

Declaration 6(a)

In a situation where a particular nominated sub-contractor was directly delayed and/or disrupted by a breach of the main contract by the government and/or its agent in the issue of late design information, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract because in the situation postulated the government:

(a) same as 3(a); or

(b) same as 3(b) [implied term B]; or

(c) same as 3(c) [implied term D]; or

(d) same as 1(e) [implied term E]; or

(e) same as 1(f).

The relevant facts

This declaration relates to the late information on medical gas pipework in the operating theatres and the facts referred to for declaration 4(c) are equally applicable to this declaration.

This declaration is sought by the first plaintiff.

Declaration 6(b)

In a situation where a particular nominated sub-contractor was directly delayed and/or disrupted by a breach of the main contract by the government and/or its agents in the late approval of the main contractor's design or material submissions, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract because in the situation postulated the government was in breach of the main contract and such costs are recoverable by the main contractor pursuant to cl 76(1)(a) or as damages for breach of contract; and

(a) same as 3(a); or

(b) same as 3(b) [implied term B]; or

(c) same as 3(c) [implied term D]; or

(d) same as 1(e) [implied term E]; or

(e) same as 1(f).

The relevant facts

This declaration relates to the late approval of angle poise lights for laboratories. Angle poise lights were to be provided for patients' bedhead units and also in laboratory areas. However, the architect's representative instructed the third plaintiff (through the defendant) that the equipment utilized for the patients' bedhead unit would not be suitable for the laboratories.

The third plaintiff was instructed on 16 June 1987 to provide samples of further types of lights for the laboratories. In July 1987, the third plaintiff (through the defendant) submitted samples to the architect for approval. This was required by virtue of the specification in the nominated sub-contract.

It was not until some 18 months later, namely, on 26 January 1989, that the architect's representative orally accepted one of the samples submitted. On 1 March 1989, the third plaintiff received (through the defendant) the written approval of the sample on behalf of the architect. This failure to approve the type of angle poise lights in the laboratories before 26 January 1989 caused delay and/or disruption to the defendant. The installation of these lights in the laboratories could not be achieved until the lights were approved and, given the late date of approval, this work could not be completed before 31 March 1989, the certified date of completion of

the phase 2 works. The delay caused by this late approval was concurrent with other delays for which extension of time was awarded to the defendant by the architect.

The failure to approve the type of lights in the laboratories until 26 January 1989 also directly delayed and/or disrupted the works of the third plaintiff in the laboratories. The late approval made it impossible for these lights to be ordered, delivered and installed by the third plaintiff before 31 March 1989, the certified date of completion of the phase 2 works. This declaration is sought by the third plaintiff.

Declaration 6(c)

In a situation where a particular nominated sub-contractor was directly delayed and/or disrupted by a breach of the main contract by the government and/or its agents in delays by tradesmen or others employed by the

government executing work not forming part of the main contract works, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract because in the situation postulated the government was in breach of the main contract and such costs are recoverable by the main contractor pursuant to cl 76(1)(d) or as damages for breach of contract; and

> (a) because, on a proper interpretation of the sub-contract, the relevant conditions of the main contract were *incorporated* therein whereby such costs are to be paid pursuant to cll 75(5), 76(1)(d), 90(2)(a) and 97 of the main contract or damages for breach of the main contract; or
>
> (b) because it was an implied term of the sub-contract that the sub-contractor should have *equivalent rights* to payment for complying with or as a consequence of an architect's instruction or other event as the contractor has under the main contract and such costs would be recoverable by the contractor pursuant to cll 75(5), 76(1)(d), 90(2)(a) and 97 of the main contract or damages for breach of the main contract [implied term B]; or
>
> (c) same as 3(c) [implied term D|; or
>
> (d) same as 1(e) [implied term E]; or
>
> (e) same as 1(f).

The relevant facts

This declaration relates to the late supply of sea water to the site. Sea water pump house at Telegraph Bay and the mains from the pump house to the site boundary were to be supplied by a separate direct contractor of the government. The original programme of the defendant indicated that commissioning and testing of the second plaintiff's phase 2 works was to

commence on or about 15 September 1987. The testing and commissioning of the second plaintiff's centrifugal chillers and cooling systems required sufficient quantities of sea water.

In the event, due to delays by the government's direct contractor, the sea water supply was not available until 27 July 1988, some 10 months later than originally planned. Following provision of the sea water supply on 27 July 1988 (with some interruptions during October 1988, the second plaintiff's testing and commissioning works continued with the sea water supply until the beginning of January 1989 when the supply was halted due to damage at the sea water pump house. The supply was not reinstated until October 1989. Between early January 1989 and the end of March 1989 (the certified date of completion of the phase 2 works), the second plaintiff had to rely on a temporary and inadequate domestic water supply to replace the estimated required volume of sea water of 188,000 gallons per day. This inadequate water supply caused stoppages and interruptions to the running of the air-conditioning installation and consequently further delayed and disrupted the second plaintiff's testing and commissioning works during this period.

The late and inadequate supply of sea water to the site by the Government's direct contractor caused delay and/or disruption to the defendant in that the air-conditioning installation could not be tested and commissioned at the time originally planned. The delay caused by this late supply of sea water was concurrent with other delays for which extension of time were awarded to the defendant by the architect. The late and inadequate supply of sea water to the site by the government's direct contractor also caused direct delay and/or disruption to the second plaintiff. The air-conditioning installation could not be tested and commissioned at the time originally planned and when the testing and commissioning could proceed, it had to be carried out in an out-of-sequence and disjointed manner. This declaration is sought by the second plaintiff.

Declaration 6(d)

In a situation where a particular nominated sub-contractor was directly delayed and/or disrupted by a breach of the main contract by the government and/or its agents in the late delivery of materials or plant by the government, that nominated sub-contractor's time related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract because in

the situation postulated the government was in breach of the main contract and such costs are recoverable by the main contractor pursuant to cl 76(1)(e) or as damages for breach of contract; and

[1992] 2 HKC 271 at 294

(a) because, on a proper interpretation of the sub-contract, the relevant conditions of the main contract were *incorporated* therein whereby such costs are to be paid pursuant to cll 75(5), 76(1)(e), 90(2)(a) and 97 of the main contract or damages for breach of the main contract; or

(b) because it was an *implied term* of the sub-contract that the sub-contractor should have *equivalent rights* to payment for complying with or as a consequence of an architect's instruction or other event as the contractor has under the main contract and such costs would be recoverable by the contractor pursuant to cll 75(5); 76(1)(e), 90(2)(a) and 97 of the main contract or damages for breach of the main contract [implied term 8]; or

(c) same as 3(c) [implied term D]; or

(d) same as 1(e) [implied term E]; or

(e) same as 1(f).

The relevant facts

This declaration relates to the late supply of fume cupboards. The second plaintiff was required to connect up the exhaust air system installed by the second plaintiff to fume cupboards and safety cabinets to be supplied and installed by the government under a direct contract.

The connection of the exhaust air systems should have been completed prior to the commencement of the second plaintiff's testing and commissioning, originally planned to start in mid-September 1987. This would have required the delivery and installation of the fume cupboards and safety cabinets to have been completed by the government's direct contractor no later than August 1987, and even earlier if these connections were to be carried out by the second plaintiff in an economic manner at the same time as the installation of ducting in each relevant area.

In the event, the fume cupboards and the safety cabinets were not supplied until February 1988, requiring the second plaintiff to connect up exhaust air systems and carry out its testing and commissioning on this part of the air-conditioning installation works at a later date and out-of-sequence. The late supply of the fume cupboards and safety cabinets by the government's direct contractor caused delay and/or disruption to the defendant in that the air-conditioning installation in the relevant areas could not be completed, tested and commissioned at the time originally planned. The delay caused by this late supply of equipment was concurrent with other delays for which extensions of time were awarded to the defendant by the architect.

The late supply of the fume cupboards and safety cabinets also caused direct delay and/or disruption to the second plaintiff. The air-conditioning installation in the relevant areas could not be completed, tested and commissioned at the time originally planned and had to be carried out at

[1992] 2 HKC 271 at 295

a later date and out of sequence. This declaration is sought by the second plaintiff.

Declaration 6(e)

In a situation where a particular nominated sub-contractor was directly delayed and/or disrupted by a breach of the main contract by the government and/or its agents in the late delivery of possession of all or parts of the site to the main contractor, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract because in the situation postulated the government was in breach of the main contract and such costs are recoverable by the main contractor pursuant to cl 60(2) or as damages for breach of contract; and

(a) same as 4(b)(a); or

(b) same 4(b)(b) [implied term B]; or

(c) same as 3(c) [implied term D]; or

(d) same as 1(e) [implied term E]: or

(e) same as 1(f).

The relevant facts

This declaration relates to the delayed possession of the phase 3 works and the facts referred to for declaration 4(b) are equally applicable to declaration 6(e). This declaration is sought by the third plaintiff.

Declaration 6(f)

In a situation where a particular nominated sub-contractor was directly delayed and/or disrupted by a breach of the main contract by the government and/or its agents by the suspension of the main contract works or any part thereof, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract either:

(a) same as 2(a); or

(b) same as 2(b); or

(c) same as 2(c); or

(d) same as 2(d); or

(e) same as 2(e) [implied term B]; or

(f) same as 3(c) [implied term D]; or

(g) same as 1(e) [implied term E]; or

(h) same as 1(f).

The relevant facts

This declaration relates to suspension of works for asbestos removal. The facts referred to for declaration 4(a) are equally applicable to declaration 6(f). This declaration is sought by the second and third plaintiffs.

Declaration 7(a)

In a situation where a particular nominated sub-contractor was indirectly delayed and/or disrupted by a breach of the main contract by the government and/or its agents in the issue of late design information, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract because in the situation postulated the government was in breach of the main contract and such costs are recoverable by the main contractor pursuant to cl 76(1)(a) or as damages for breach of contract; and

(a) same as 3(a); or

(b) same as 3(b) [implied term B]; or

(c) same as 3(c) [implied Term D]; or

(d) same as 1(e) [implied term E]; or

(e) same as 1(f).

The relevant facts

This declaration relates to the combined services drawings for the casualty block at level 1. The defendant's programme for the phase 3 works required all the necessary architectural details for level 1 of the casualty block to be submitted to it by the architect by day 49 (ie 8 September 1989) in order to allow for combined services drawings approval by the architect. Combined services drawings are a critical part of the coordination and installation process. They combine all services in each area showing the respective layouts of each, and are the basis for the nominated sub-contractor's final working drawings. The combined services drawings and final working drawings had to be approved by the architect's representative prior to execution of the respective building services installation works and associated builders work.

By a site memorandum dated 11 October 1989, the architect's representative provided the defendant with the layout of level 1 of the casualty block excluding room 0139 (the lithotripter suite) which was still in abeyance. (This machine is designed to deal with gall stones.)

[1992] 2 HKC 271 at 297

By a letter dated 16 February 1990, the defendant informed the architect's representative that it required all level 1 information by 28 February 1990 in order to prevent further delay. By a site memorandum received by the defendant on 12 June 1990, the architect's representative provided architectural details of the level 1 lithotripter suite to the defendant. The defendant then shortly afterwards submitted its combined services drawings for approval which was given on 29 June 1990. This issue of late design information caused delay and/or disruption to the defendant as works to the lower ground, level 2, level 3 and level 4 areas had to proceed ahead of works to level 1 which had to be deferred and be constructed totally out of sequence. As a result of this delay, 72 days' extension of time was granted by the architect to the defendant. The issue of this late design information indirectly delayed and/or disrupted all four plaintiffs, who required combined services drawings for level 1 before they could complete their final working drawings and commence their installation works in that area. The four plaintiffs were also reliant on prior building works by the defendant, including the lithotripter suite, before they could carry out and complete their following works. According to the phase 3 programme of works, the majority of the plaintiffs' installation works in phase 3 were programmed to be carried out between 1 September 1989 and 10 March 1990 with completion of all works by 1 June 1990. The defendant sent to the architect an installation programme for the lithotripter area on 23 July 1990 indicating completion by about 22 November 1990, although even at that stage some information on the final layout was still outstanding. This declaration is sought by all four plaintiffs.

Declaration 7(b)

In a situation where a particular nominated sub-contractor was indirectly delayed and/or disrupted by a breach of the main contract by the government and/or its agents in the late approval of the main contractor's design of material submissions, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract because in the situation postulated the government was in breach of the main contract and such costs are recoverable by the main contractor pursuant to clause 76(1)(a) or as damages for breach of contract; and

(a) same as 3(a); or

(b) same as 3(b) [implied term B]; or

(c) same as 3(c) [implied term D]; or

(d) same as 1(e) [implied term E]; or

(e) same as 1(f).

[1992] 2 HKC 271 at 298

The relevant facts

This declaration relates to delays to the approval of aluminium windows.

Delays to the approval of the aluminium windows caused delay and/or disruption to the defendant as the manufacturer and installation of the aluminium windows could not commence until approval was received. The architect accepted that as a result of this delay, 47 days' extension of time was due to the defendant. This extension of time was assessed as running concurrently with other awards. The delays to approval of the aluminium windows also indirectly delayed and/or disrupted the second and third plaintiffs. The aluminium windows were not installed until April 1988, some seven months later than the planned start of the second plaintiff's testing and commissioning work. The buildings were required to be fully enclosed for testing and commissioning operation, and this should have been achieved prior to the start of testing and commissioning originally scheduled for September 1987. It was also the originally planned intention that all building works would be completed on each level before the testing and commissioning started on that level. The delay in installation of the windows also delayed insulation to ductwork at the periphery of the buildings which could not be installed until the buildings were enclosed and the effects of weather on the insulation material thereby controlled. In addition, the delays to the approval of the aluminium windows affected the approval of the third plaintiff's working drawings for equipotential bonding connections to every window frame, thus causing delay and disruption to the third plaintiff's work.

This declaration is sought by the second and third plaintiffs.

Declaration 7(c)

In a situation where a particular nominated sub-contractor was indirectly delayed and/or disrupted by a breach of the main contract by the government and/or its agents in delays by tradesmen or others employed by the government executing work not forming part of the main contract works, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract because in the situation postulated the government was in breach of the main contract and such costs are recoverable by the main contractor pursuant to cl 76(1)(d) or as damages for breach of contract; and

(a) same as 6(c)(a); or

(b) same as 6(c)(b) [implied term B]; or

(c) same as 3(c) [implied term D; or

(d) same as 1(e) [implied term E]; or

(e) same as 1(f).

The relevant facts

This declaration relates to delays by the government fire services department. Due to the late provision of drawings by the architect to the ninth plaintiff, the defendant could not request a fire services inspection until 20 January 1989. However, at this time, the fire services department could not carry out the inspection of the fire services system. The fire services department did not carry out its inspection until 16 February 1989.

Due to delay by the fire services department in carrying out inspection of the fire services system, the defendant suffered delay and/or disruption to the progress of the works.

As a result of the aforesaid delay, 27 days' extension of time was granted by the architect to the defendant.

The sub-contract obligations of the fourth plaintiff could not be completed until the fire services department's inspection had been carried out and the fourth plaintiff was thus also directly delayed by the late inspection. When the fire services department's inspection was finally carried out, the department raised a series of comments which were passed to the fourth plaintiff on 8 February 1989. The fourth plaintiff wrote to the defendant stating that the majority of these comments required additional work to be carried out under the fourth plaintiff's sub-contract. The need for such work would have become apparent, and its execution would have been effected earlier, had it not been for the 27-day delay in holding the fire services department's in-

spection. The fourth plaintiff was thus also indirectly delayed and disrupted by the late fire services department's inspection. This declaration is sought by the fourth plaintiff.

Declaration 7(d)

In a situation where a particular nominated sub-contractor was indirectly delayed and/or disrupted by a breach of the main contract by the government and/or its agents in the late delivery of materials or plant by the government, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract because in the situation postulated the government was in breach of the main contract and such costs are recoverable by the main contractor pursuant to cl 76(1)(e) or as damages for breach of contract; and

(a) same as 6(d)(a); or

(b) same as 6(d)(b) [implied term B]; or

(c) same as 3(c) [implied term D]; or

(d) same as 1(e) [implied term E]; or

(e) same as 1(f).

[1992] 2 HKC 271 at 300

The relevant facts

The parties have been unable to agree upon a suitable example in relation to this declaration. I will have to consider the consequences of this at the later part of this judgment.

Declaration 7(e)

In a situation where a particular nominated sub-contractor was indirectly delayed and/or disrupted by a breach of the main contract by the government and/or its agents in the late delivery of possession of all or parts of the site to the main contractor, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract because in the situation postulated the government was in breach of the main contract and such costs are recoverable by the main contractor pursuant to cl 60(2) or as damages for breach of contract; and

(a) same as 4(b)(a); or

(b) same as 4(b)(b) [implied term B]; or

(c) same as 3(c) [implied term D]; or

(d) same as 1(e) [implied term E]; or

(e) same as 1(f).

The relevant facts

This declaration relates to the delayed possession of the phase 3 works. The facts referred to the declaration 5(b) are equally applicable to declaration 7(e). This declaration is sought by the second plaintiff.

Declaration 7(f)

In a situation where a particular nominated sub-contractor was indirectly delayed and/or disrupted by a breach of the main contract by the government and/or its agents by the suspension of the main contract works or any part thereof, that nominated sub-contractor's time-related and/or disruption costs are recoverable by the nominated sub-contractor, provided that they are not due to default by the nominated

sub-contractor and provided also that the main contractor is in principle entitled to recover payment under the main contract, either

(a) same as 2(a); or

(b) same as 2(b); or

(c) same as 2(c); or

(d) same as 2(d); or

[1992] 2 HKC 271 at 301

(e) same as 2(e) [implied term B]; or

(f) same as 3(c) [implied term D]; or

(g) same as 1(e) [implied term E]; or

(h) same as 1(f).

The relevant facts

This declaration relates to suspension of works for asbestos removal. The facts referred to declaration 5(a) are equally applicable to declaration 7(f). This declaration is sought by the first plaintiff.

The construction argument

It is clear that under cl 76 of the main contract, the defendant can be compensated 'for direct loss and/or expense for which he would not be reimbursed by a payment made under any other provision in the contract by reason of the regular progress of the works or part thereof having been materially affected by' one or more of five specified grounds. The relevant grounds for this case are late instructions, delay by others engaged by the government and late delivery of material or plant.

Clauses 72 and 73 of the main contract specifically deal with variations. Clause 1 of the sub-contract deems that the sub-contractor shall have notice of all of the provisions of the main contract save in relation to the defendant's detailed prices.

By cl 4 of the sub-contract, the sub-contractor has to observe, perform and comply with all the provisions of the main contract on the part of the defendant to be observed, performed and complied with so far as they relate to the sub-contract work. By cl 8(A) of the sub-contract, the sub-contractor has to commence the sub-contract works within seven days of receipt of an order in writing from the defendant but this clause is rendered redundant by the appendix to the sub-contract which specifies (in the case of the fourth plaintiff as an example) a commencement date of 27 May 1985 with specified completion dates of the various phases. Clause 8(B) of the sub-contract allows the defendant to grant fair and reasonable extensions of time if the works are delayed. The delays have to be for any of the matters under cl 9(A) or (B) (variations and complying with architect's instructions) or 'shall be within any of the cases in which the contractor could obtain an extension of the period or periods for completion under the main contract'. It is clear from these provisions that the sub-contractor can get extensions of time but no money, but the main contractor can get time and, under cl 76, money as well. It is basically the above provisions which have led Sir Lloyd to state in his written submission:

> It is clear that, comparing the structure of the presented form of nominated sub-contract with the main contract, there are substantial and inexplicable
>
> *[1992] 2 HKC 271 at 302*
>
> lacunae between the terms of the main contract and of those of the sub-contract.

In order to circumvent these lacunae, Sir Lloyd has made a number of submissions as to how I should construe the sub-contract in such a manner as to fill these lacunae. His formulation is clearly set out in the declarations themselves to which reference should be made.

If his argument on the construction of the sub-contract failed, then he turned to an argument which was based on the proposition that, on a proper construction of the sub-contract, the relevant conditions of the main contract were incorporated therein, leading to the conclusion that the plaintiffs' loss and expense was payable pursuant to certain provisions of the main contract which have been set out in the declarations. In relation to his argument as to the construction of the sub-contract, he points out that variations are to be valued under the provisions of cl 10 which provides:

> The price of the sub-contract works (hereinafter referred to as 'the sub-contract sum') shall be the sum named in or determined by the provisions of part III of the appendix to this sub-contract or such other sum as shall become payable by reason of any authorized variations. The value of all authorized variations shall be determined by the surveyor for the time being under the main contract (or, if none, the architect) in accordance with the applicable provisions (relating to the ascertainment of prices for authorized variations) laid down in the main contract: save that where the sub-contractor has, with the agreement of the contractor and the architect, annexed to this sub-contract a schedule of prices for measured work and/or a schedule of day work prices, such prices shall be allowed to the sub-contractor in determining the value of authorized variations.

He then asked what would be the position if an instruction does not directly change the physical work to be executed by the nominated sub-contractor but merely has the effect of changing the circumstances in which the works have to be carried out. He submitted that such an instruction has to be valued under cl 10 of the sub-contract. Clause 72 of the main contract deals with the architect's right to vary the works. The architect is given power to order, and the defendant is obliged to carry out, any of the following things:

> (a) increase or decrease the quantity of any work included in the contract;
>
> (b) omit any such work;
>
> (c) change the character or quality or kind of any such work;
>
> (d) change the levels, lines, position and dimensions of any part of the works; and
>
> (e) execute additional work or extra works.

Clause 72 goes on to provide that 'no such variation shall vitiate or invalidate the contract but the value (if any) of all such variations shall be taken into account in ascertaining the amount of the final contract sum.'

[1992] 2 HKC 271 at 303

Clearly, variations must mean the same in the sub-contract as they do in the main contract. I do not feel able to conclude that a variation which does not directly change the physical nature of the works to be executed by a sub-contractor can be valued under cl 10. Mr Lloyd then argued that, on a proper construction of the sub-contract, as the sub-contract works were part of the works under the main contract, the sub-contractor is entitled to have the amount of such costs included in payments directed by the architect to be made under cll 73(1), 75(5), 90(2)(a) and 97 of the main contract.

Mr Lloyd also relied upon the form of tender which appears at p 173 in the case of the fourth plaintiff. The fourth plaintiff stated that having inspected the site, examined the drawings and the contract conditions, they offered to execute, complete and maintain the works, etc, for HK$7,620,179 'or such sum as may be ascertained in accordance with the sub-contract conditions and relevant conditions of the main contract.'

Mr Lloyd attempted to attach significance to the last few words of the tender that I have just quoted, but I am quite satisfied that Mr Clayton is correct when he said that those words really say no more than that the contract sum is as specified, or is as ascertained, after the valuation of variations.

I find the interpretation contended for by Mr Lloyd impossible to accept. Clause 75(5) of the main contract entitles the main contractor to have included in any interim payment such amount as the architect may consider due to the main contractor. Clause 75 relates to claims for additional payments pursuant to any clause in the main contract conditions. There is clearly no provision in the main contract which enables the main contractor to add on to such claims a sum representing the sub-contractor's loss and expense.

I am not prepared to give to the sub-contract the somewhat strained interpretation for which Mr Lloyd contended. It is put slightly differently in the different declarations, for instance, in some, reference is made to cl

57, which relates to suspension of work. Under that clause, the defendant can claim the extra costs involved but no provision is made for the sub-contractor's position.

I fully understand the 'merits' basis of Mr Lloyd's approach under this head, but I am not prepared to construe the sub-contract in this way in 'order to achieve the result he seeks. One has to appreciate that both the main contract and sub-contract are free standing integral contracts. These two contracts are not ex facie classic back-to-back contracts for if they were, this whole case would have been unnecessary.

So my conclusion on this aspect of the case is that I do not propose to construe the sub-contract in the various ways put forward in order to fill the lacunae identified by Mr Lloyd. I do not think it will be helpful to deal

[1992] 2 HKC 271 at 304

with each and every one of the instances referred to in the helpful written arguments.

The next way the matter was put was on the basis of incorporation. It is said that, on a proper interpretation of the sub-contract, the relevant conditions of the main contract are incorporated therein, whereby the various items claimed are to be paid pursuant to clauses in the main contract.

Reliance was based upon *The Annefield* [1971] P 168 and *Aughton v MF Kent Services* 1991 57 BLR 1. Both of these cases concerned an attempt to incorporate an arbitration clause. Both attempts failed. Useful guidance was given by the two courts as to the correct approach in such cases.

However, it is interesting to note the observations of the learned editor of *The Building Law Reports* in relation to the *Aughton* case, which appears at p 3 of the report. He there said this:

> The wholesale incorporation of clauses from main contracts into sub-contracts, and from sub-contracts into sub-sub-contracts, is often attempted without careful consideration as to how it is to be done successfully. At times, clauses can be treated as modified; the description of the parties and provisions for payments and programmes may sometimes require very little change at all (but only if truly 'back to back'). To read 'contractor' for 'sub-contractor' does not make the clause ineffective.

In both of these cases, the arbitration clause could only be got in by incorporation. There was clearly no scope in either of these cases for arguments based on implied terms.

I have concluded that it would be most unwise to accept Mr Lloyd's invitation to incorporate into the sub-contracts certain conditions of the main contract in order to fill the identified lacunae. Although clearly connected contracts, they are nonetheless separate and integral contracts. I believe that it would set a dangerous precedent in the context of, at least, this case to countenance such a construction. If I held it to be permissible to incorporate some main contract terms into the sub-contract, why should not others be so incorporated if appropriate?

I make no apology for not setting out the detailed submissions made to me on construction and incorporation. It seems to me that this case should stand or fall on the implication of terms into the sub-contracts and on whether, in the events that have happened, the defendant is in breach of its sub-contracts with the plaintiffs. If there are indeed lacunae which no one could have intended, then the court can, under established principles, remedy the situation by supplyinq the presumed intention of the parties. It would seem a little strange to conclude that it would not be right to imply any of the terms suggested, but on the other hand, subject the sub-contract to an interpretation, whether on its own or by incorporation, which achieves

[1992] 2 HKC 271 at 305

the result which cannot be achieved by the presumed intention of the parties. I now turn to consider the whole question of implication of terms.

Implied terms

As is apparent from the terms of the declarations sought, Mr Lloyd contends for various implied terms in order to achieve the result which he says must represent the presumed intention of the parties. I set these out below but will hereafter refer to them as implied terms A, B, C, D and E.

> Implied term A
>
> That the contractor should pay the sub-contractor any expense or loss which the sub-contractor should reasonably have incurred in complying with or occasioned by an instruction issued under cl 9(B) of the sub-contract.
>
> Implied term B

> That the sub-contractor should have equivalent rights to payment for complying with or as a consequence of an architect's instruction or other event as the contractor has under the main contract.
>
> Implied term C
>
> That if the progress or completion of the sub-contract works was materially affected by the architect not having issued an instruction at a time reasonable in all the circumstances, then the sub-contractor shall be entitled to recover any expense or loss reasonably incurred or caused thereby to which he would not otherwise be reimbursed under the sub-contract.
>
> Implied term D
>
> That the contractor should pay or indemnify the sub-contractor against any expense or loss which the sub-contractor should reasonably have incurred by reason of any breach of the main contract by the government, if and to the extent such loss and expense is not otherwise recoverable from the contractor under the sub-contract.
>
> Implied term E
>
> That the contractor should not hinder or prevent the sub-contractor from carrying out the sub-contract works with due expedition, economically and in accordance with the sub-contract.

Terms A and B were abandoned but I recite them for convenience.

The law

In *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* default (1977) 16 ALR 363, 376, the Privy Council helpfully set out the principles upon which the court will act in implying terms:

> (1) the term must be reasonable and equitable;
>
> (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
>
> *[1992] 2 HKC 271 at 306*
>
> (3) it must be so obvious that 'it goes without saying';
>
> (4) it must be capable of clear expression; and
>
> (5) it must not contradict any express term of the contract.

The business efficacy test comes from *The Moorcock* default (1889) 14 PD 64, where Bowen LJ said:

> In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen ...

In *Reigate v Union Manufacturing Co (Ramsbottom)* default [1918] 1 KB 592, 605, Scrutton LJ said:

> A term can only be implied if it is necessary in a business sense to give efficacy to the contract, that is, if it is such a term that it can be confidently said that if at the time the contract was being negotiated, someone had said to the parties, 'What will happen in such a case?', they would have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear.'

In *Shirlaw v Southern Foundries (l926) Ltd* default [1939] 2 KB 206, MacKinnon LJ employed the test of the officious bystander who, when suggesting a term to the parties, would have been suppressed with a testy 'of course'. In the same year as the *BP* default case, Lord Wilberforce gave further guidance in *Liverpool City Council v Irwin* default [1977] AC 239, where he said about implied terms:

> To say that the construction of a complete contract out of these elements involves a process of 'implication' may be correct; it would be so if implication means the supplying of what is not expressed. But there are varieties of implications which the courts think fit to make and they do not necessarily involve the same process. Where there is, on the face of it, a complete, bilateral contract, the courts are sometimes willing to add terms to it, as implied terms: this is very common in mercantile contracts where there is an established usage: in that case the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain. In other cases, where there is an ap-

> parently complete bargain, the courts are willing to add a term on the ground that without it the contract will not work -- this is the case, if not of *The Moorcock* default (1889) 14 PD 69 itself on its facts, at least of the doctrine of *The Moorcock* default as usually applied. This is, as was pointed out by the majority in the Court of Appeal, a strict test -- though the degree of strictness seems to vary with the current legal trend -- and I think that they were right not to accept it as applicable here. There is a third variety of implication, that which I think Lord Denning MR favours, or at least did favour in this case, and that is the implication of reasonable terms. But though I agree with many of his instances, which in fact fall under one or other of the preceding heads, I cannot go so far as to endorse his principle; indeed, it seems to me, with respect, to extend a long, and undesirable, way beyond sound authority.

The present case, in my opinion, represents a fourth category, or I would rather say a fourth shade on a continuous spectrum. The court here is simply

[1992] 2 HKC 271 at 307

concerned to establish what the contract is, the parties not having themselves fully stated the terms. In this sense, the court is searching for what must be implied.

Mr Clayton contended that no term to be implied into the sub-contract could be reasonable or equitable if it permitted contractual recovery by the sub-contractor in circumstances other than where the main contractor can recover such costs from the government under the main contract. This point has now been covered by the terms of the declarations sought as has his point that the sub-contractor should not be able to recover against the main contractor, if, for example, the main contractor was required to rectify defective sub-contract works pursuant to cl 56, the main contract.

Mr Clayton concentrated his attack on the allocation of financial risk and submitted that the court should not imply terms which would re-allocate this. I agree that the court should be wary of rewriting the contract and changing the financial risks undertaken by the parties. However, I am satisfied that the terms of the declarations sought do not achieve that result. The implied terms are designed to ensure a back-to-back situation which will not leave the main contractor exposed.

I accept, of course, that I should not imply any of the terms if it were merely reasonable to do so. I have to be satisfied that it is necessary for such a term to be implied in order to give the contract business efficacy and to comply with the other preconditions set out in the *BP* case. Mr Clayton also submitted that such a term should not be implied into a standard form contract. For this proposition, he relied on *Chandler Bros Ltd v Boswell* 1936 3 All ER 179, 182 and 184, and on the Australian case of *Codelfa Construction v State Rail Authority of NSW* 1989 149 CLR 337, 346-7, 356 and 374.

In *Chandler*, the defendant contractor had contracted to divert a road for a county council and, as incidental to that purpose, to make a tunnel. The work of excavating for the tunnel was sub-contracted to a firm called Chandler Bros. This firm was later turned into a limited company and a receiver was appointed by the debenture holders. The receiver elected to complete the sub-contract, but, hampered by lack of money, he was unable to proceed with the work at the speed the contract required. The head contract contained a clause giving the engineers of the county council, if they were dissatisfied with any sub-contractor, authority to require his removal. The sub-contract, which contained many provisions in similar terms to those in the head contract, contained no clause providing for the contingency of the engineers giving a notice under the above clause. The engineers duly served such notice and the Court of Appeal held that 'as the parties had the head contract before them when they entered into the sub-contract, they must be taken to have had in contemplation the possibility of the engineers giving such a notice, and a term could not be implied in the sub-contract giving the contractor power, as between him and the

[1992] 2 HKC 271 at 308

sub-contractor, upon such a notice being given, to put an end to the sub-contract.' At p 182 Greer LJ said this:

> We are not here concerned with the question as to whether a term should be implied if an order of the government puts an end to the contract, or in some other way which was not contemplated by the parties at the time they entered into the contract, the agreement should come to an end. We have nothing to do with any contention of that sort. The question here is whether, in the events which have happened, namely, a requirement to the engineer under the head contract that the services of the sub-contractor shall be dispensed with, the parties had impliedly contracted that in that event there should be no remedy by either the sub-contractor or the contractor, and that they should both be in the same position as in the case of *Horlock v Beal* default , where something happened which was not within the contemplation of the parties. But here the thing which is said to have happened which justified the contractor putting an end to the sub-contract is something that was contemplated by the parties.

...

It is not possible to say that the event that happened in this case was not actually present to the minds of the parties at the time of making it, because it seems to me quite clear that they had before them, and used for the purposes of the sub-contract, clauses by transposition which were in the original contract, and they omitted to include cl 54, showing quite clearly that they had in their contemplation, as I take it, all the clauses of the head contract and intentionally refrained from making any reference to what was to happen if cl 54 were put into operation by the head engineer.

At p 186, Greene LJ made clear:

> The implication of terms into contracts is a thing which can only be done with the very greatest caution, and when the court is compelled to imply a term which by the force of the circumstances attending the contract was apparent on the face of it. In the present case, it was said that it was competent for the court, and in fact that the court was compelled, to imply into this bargain a term making a provision for a particular event, namely, the event of the county council, through its engineer, ordering the removal of the sub-contractor from the job. I find it quite impossible to imply any such term into this contract. It is to be observed that all the cases to which we have been referred, in which what I might conveniently call the principle of *Appleby v Myers* default , one of the earlier cases, has been applied, are cases where the particular event to provide for which the court found itself entitled to imply a term was one the possibility of which was not within the contemplation of the parties to the contract.

Accepting that *Chandler* default was correct on its facts, I do not discern from the two ex tempore judgments any indication that a term can *never* default be implied into a standard form contract. Obviously the more express terms the parties apply their mind to, the less scope there can be for implication, but if they have, for whatever reason, omitted a term, which makes the contract unworkable, the court may step in and fulfil the parties' presumed intention.

[1992] 2 HKC 271 at 309

In my judgment, the distinction between *Chandler* and the present case is that in *Chandler*, the court found that, on the face of the contract, the possibility in question was one which they had in fact contemplated. The case before me is surely a case where the possibility was not within the contemplation of the parties to the contract. No evidence was put forward showing that this point had been discussed. I cannot accept, on the agreed evidence before me, that the sub-contractor knowingly and willingly agreed to forego any claims for loss and expense caused in the circumstances posited by the agreed facts and in circumstances where, for the very same cause, the main contractor was entitled to claim his losses against the government.

In *Codelfa*, Mason J in the High Court of Australia made some general observations on implied terms at p 346. He said:

> The implication of a term is to be compared, and at the same time contrasted, with rectification of the contract. In each case, the problem is caused by a deficiency in the expression of the consensual agreement. A term which should have been included has been omitted. The difference is that, with rectification, the term which has been omitted and should have been included was actually agreed upon; with implication the term is one which it is presumed that the parties would have agreed upon had they turned their minds to it -- it is not a term that they have actually agreed upon. Thus, in the case of the implied term, the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision for it. Rectification ensures that the contract gives effect to the parties' actual intention; the implication of a term is designed to give effect to the parties' presumed intention.

For obvious reasons the courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue. And then there is the difficulty of identifying with any degree of certainty the term which the parties would have settled upon had they considered the question.

At p 356, Mason J added this:

> My reluctance to imply a term is the stronger because the contract in this case was not a negotiated contract. The terms were determined by the Authority in advance and there is some force in the argument that the Authority looked to Codelfa to shoulder the responsibility for all risks not expressly provided for in the contract. It is a factor which, in my

> view, makes it very difficult to conclude that either of the terms sought to be implied is so obvious that it goes without saying.

At p 374, Aickin J dealt with this problem where he said:

> The second problem, which does not seem to have been expressly adverted to in the authorities is the manner in which the doctrine of implied terms should
>
> *[1992] 2 HKC 271 at 310*
>
> be applied in the case of 'contracts of adhesion' where the terms are not the result of negotiation (except as to price) but are provided in a standard form designed by one party upon which the other must tender. In the present case, the only questions for negotiation were the price and one aspect of the mode of performance of part of the work.

It does not however follow that there is no room for implied terms in the case of standard form contracts, but undoubtedly it will be more difficult to imply the existence of unexpressed terms in such cases. The calling for tenders by a government authority upon its own standard form of contract suggests that it contains the only terms on which it is prepared to contract, and that a tender on the basis of different terms would be instantly rejected. It must, however, remain possible that there is some matter to which neither party has adverted but to which both would readily assent if it were brought to their attention. In the case of standard form contracts, however, it seems much more likely that, although neither party had considered the point raised, they might not have readily agreed upon a common solution to the new problem. They must however be considered to be 'reasonable men' and not subject to such human failings as pride of authorship or sudden caution induced by a possibility which they had not contemplated.

I respectfully agree with the above observation. There is, of course, no general rule that terms cannot be implied into a standard form contract. The same principles apply to standard form contracts as they do to negotiated contracts. The scope for implication of terms will clearly be more limited in the former category of contracts. As an example of a term implied into a standard form contract, one should note *Neodox v Swinton and Pendlebury Borough Council* default (1958) 5 BLR 34. The matter came before Diplock J (as he then was) in the form of a special case stated by an arbitrator. The first question was:

> Whether as alleged by the claimants ... it was an implied term of the said contract that the respondents by their engineer would give the claimants all the details and instructions necessary for the execution of the works in sufficient time to enable the claimants to execute and complete the works in an economic and expeditious manner and/or in sufficient time to prevent the claimants being delayed in such execution and completion.

Diplock J held that it was impossible to imply a term in the words set out in the question. He held that the correct term to be implied was 'that details and other instructions necessary for the execution of the works should be given by the engineer from time to time in the course of the

[1992] 2 HKC 271 at 311

contract and should be given within a time reasonable in all the circumstances'. At p 40, Diplock J dismissed the alleged implied term holding that the expression 'and/or' in the middle of it would be enough to put it out of court. At p 41, the learned judge said this:

> It is clear from these clauses which I have read that to give business efficacy to the contract, details and instructions necessary for the execution of the works must be given by the engineer from time to time in the course of the contract and must be given in a reasonable time. In giving such instructions, the engineer is acting as agent for his principals, the Corporation, and if he fails to give such instructions within a reasonable time, the Corporation are liable in damages for breach of contract.

Implied term E is based upon *Mackay v Dick* default (1881) 6 App Cas 251, 263, where Lord Blackburn said:

> I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.

Mr Lloyd drew some comfort from the observations of Bridge LJ (as he then was) in a case cited by Mr Clayton. In *Shell (UK) Ltd v Lostock Garage Ltd* default [1977] 1 All ER 481 -- a solus agreement case -- the de-

fendant agreed Shell was in breach of an implied term of the agreement not to discriminate against them. Bridge LJ emphasized the contractual absurdity point when he said at p 494:

> Suppose that an oil company concludes a five year solus agreement with A at a normal rate of rebate. If, on the very next day, the company were to conclude two other five year solus agreements with B and C, A's nearest competitors, giving them in each case a rebate at a rate 10p per gallon higher than the rate of rebate given to A, this would make it manifestly impossible for A to trade on the terms expressly agreed. To say that in those circumstances A must still be bound by his contract would be an absurdity. Obviously the parties as reasonable men cannot have intended such an absurdity. Accordingly, it seems to me to follow that the necessary foundation for the application of the classic doctrine on which terms are implied in contracts is here present. That doctrine, as I understand it, requires that terms should be implied to prevent contractual absurdities which reasonable parties cannot have intended.

In relation to the officious bystander test, Mr Lloyd put the imaginary conversation in this way:

> Bystander: What is to happen if the sub-contract works are held up due to lack of instruction from the architect?
>
> Defendant: We get paid -- you do not.
>
> Plaintiffs: You must be joking!

The correct answer according to the plaintiffs is: 'Obviously we both get paid -- we were in the same boat together.'

Mr Lloyd submitted that this must have been the presumed intention because it is so obvious that it went without saying. At the end of the argument the five implied terms which I have set out above reduced to 3. Mr Lloyd put his case on the basis of terms B, D and E. Implied term B achieves 'equivalent rights'. Implied term D provides that the defendant

should pay or indemnify the plaintiff against loss or expense caused by breach of the main contract which is not otherwise recoverable under the sub-contract. Implied term E provides that the defendant should not hinder or prevent the plaintiff from carrying out the works. Implied term E can be gleaned from *Mackay v Dick* 1881 6 App Cas 251, 263; *Holland Hannen & Cubitts (Northern) v Welsh Health Technical Services Organisation* 1981 18 BLR 80; and *London Borough of Merton v Leach* default (l985) 32 BLR 51. In relation to implied term E, Mr Clayton, whilst not effectively arguing against its implication, was at pains to emphasize that the defendant was not in breach of this implied term and to this point I will return shortly. Although implied terms B and D are expressed in different language, they do intend to achieve virtually the same result. (For a useful analysis of the law on implied terms, see Ch 5 of *The Interpretation of Contracts* by Kim Lewison, Sweet & Maxwell (1989).)

Conclusions on implied terms

Applying the principles which I have endeavoured to set out, I have come to the conclusion that I should not imply terms B or D. I feel it impossible to conclude that these terms comply with the necessary conditions for the implication of terms. I agree such terms would be fair and reasonable but the contract works without them, albeit to the prejudice of the plaintiffs.

I cannot see how it can be correct to imply these terms if, as I do conclude, the defendant is in breach of term E as well as liable to the plaintiffs under the principle in *Wells v Army and Navy Co-operative Stores Ltd (1903)* default Hudson's Building Cases (4th Ed), p 354 (see below). It cannot be necessary to imply these terms in a situation where the plaintiffs are in a position to claim relief in some other way.

The fact that this route may be more administratively inconvenient is, in my judgment, wholly irrelevant. Furthermore, to imply terms B or D would be a serious rewriting of the parties' bargain, a fortiori, because this form of sub-contract is imposed by the government and because the government will have to foot the bill if the plaintiffs enjoy equivalent rights.

It seems to me a far preferable approach to consider whether the defendant is in breach of term E or under *Wells* and, if so, declare accordingly. It is true that if the defendant is in breach of term E or under *Wells,* the effect of a finding of loss and damage will be that they will pass those claims up to the government whose fault the delays were, but this will have been achieved without strained interpretation of the contract and without the implication of anything but the clearest and most well-established term to be implied in contracts

of this nature. This result will have been achieved by conventional methods and without re-allocating the financial risks undertaken by government or these parties. The fact that these claims will ultimately rest with the government is wholly consistent

[1992] 2 HKC 271 at 313

with government's obligation in the main contract to reimburse the defendant for loss and expense caused by the works being affected by the matters complained of. The government cannot complain at having to comply with the terms of the main contract, especially cl 76.

Implied term E does not run foul of any of the principles cited. It is supported by *Mackay v Dick* default and *Leach* and by passages in *Chitty* Vol 1, paras 911-912, as well as by passages in the latest edition of *Keating* pp 48-52. Save as to his general points, Mr Clayton made no attack on the terms of implied term E.

If a claim can be sustained under implied term E and *Wells*, it follows that the defendant's answer to the officious bystander's question is wrong. The answer should be, 'We get paid under the contract. You have to sue us for breach and we pass that up to government. Effectively, we both get paid, albeit by different routes.'

As to implied term E, Mr Clayton submitted that there should be some evidence of a failure to co-operate by the main contractor himself, ie the other party to the contract. He submitted that the act of prevention must be a breach of contract by one party to the contract. Mr Clayton submitted that there was no deliberate breach on the part of the defendant as it was all involuntary on its part. He further submitted that the defendant's want of control of these circumstances was enough to show no breach of the term. Because there was no evidence of a breach of this term, Mr Clayton submitted that I should not imply it, because to do so would be to imply a term in relation to a factual situation which did not exist and which would therefore be hypothetical and academical.

I note that there is nothing in the sub-contract which states that the granting of extra time excludes any claim for damages. One would need to find very clear contractual intent to arrive at that conclusion. In *Trollope & Colls v Singer* default Hudson's Building Cases (4th Ed), Vol 1, p 849, it was held that a contractor was entitled to damages for delay caused by the non-supply of drawings, details and information, in addition to receiving under the contract an extension of time for completion.

Clause 69(4) of the main contract makes clear that extensions of time are deemed to be in full satisfaction for loss caused by delay 'except as provided elsewhere in the contract'. Thus loss and expense is payable to the defendant in addition to extensions of time.

It seems to me that, on the facts of this case, the defendant had been placed in the most unfortunate position of having committed a breach of contract. It certainly has to pass on the architect's instructions which it had received to the plaintiffs, but if the effect of this is to break the term of the sub-contract, that is an unfortunate consequence that the defendant will have to live with. The defendant has been put in involuntary breach of contract by the actions of government. I agree with Mr Lloyd's analysis that if the work is suspended, that is an interference with the sub-contractor's

[1992] 2 HKC 271 at 314

right not to be hindered in carrying out the sub-contract works in the time specified in the sub-contract. I am satisfied that this is not merely an obligation to use best endeavours not to interfere. The contract provided for the works to be carried out by specified dates which were not achievable by reason of the very substantial delays that occurred. If the sub-contract had provided that extensions of time were exhaustive remedies, then it might be argued that such a term could not be implied because it was inconsistent with express terms. However, that is not the case here. It is to be noticed that there is no clause in the sub-contract which is equivalent to cl 59 of the main contract which provides that the defendant 'shall proceed (with the work) with due expedition and without delay except as may be expressly sanctioned by the architect or be wholly beyond the control of the contractor.'

The defendant is amply protected by being able to pass liability back to government and by the terms of the declarations themselves are not liable in principle to the plaintiffs unless they can actually do so. I should add that I find nothing in *Luxor (Eastborne) Ltd v Cooper* [1941] AC 108 (upon which Mr Clayton relied) which runs counter to the views I have expressed.

However, I think there is some force in Mr Clayton's criticism of term E in relation to the inclusion of the words 'due expedition' and 'economically'. This term should be in the following form:

> That the contractor should not hinder or prevent the sub-contractor from carrying out the sub-contract works in accordance with the sub-contract.

To include the words I have omitted could well lead to an internal conflict in this clause. The time for performance is that provided for by the contract provisions and nothing else.

Breach of contract

As his final position Mr Lloyd submitted that, on the agreed facts, it is clear that (subject to causation and remoteness) the defendant is in breach of contract by depriving the plaintiffs (however unintentionally) of their rights to have the time within which to execute and complete the sub-contract works as are set out in part III of the appendix of the sub-contract. This cause of action is based on the principle enunciated in *Wells* (supra), at p 354, where Vaughan Williams LJ said:

> In my judgment, 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.

If a party is given 100 days to complete a piece of work and the other party tells him to suspend work for 10 days, then he has only been given 90 days

to complete the work. True it is that he will get an extension of time for 10 days and this is designed to assist the employer because without the extension of time the liquidated damages clause would go on the doctrine of employer's prevention. The extension of time provision is very much to the benefit of the employer. However, on this factual scenario, the extension of time does not cure all the damage suffered because although it gives 10 days' extension, it does not compensate the contractor for the extra 10 days' cost involved. A 100-day contract becomes a 110-day contract and this, in all probability, would be a more expensive proposition. If this is correct and subject to causation and remoteness, I do not see why the plaintiffs cannot recover it as a matter of law. It is suggested that the *Wells* approach and implied term E is a less satisfactory approach because it circumvents, as it were, the contractual mechanism. It would be far neater, submitted Mr Lloyd, if the matter could be dealt with under the express terms of the sub-contract or under implied term B or D. However, as I can see no answer to the claim based on *Wells*, I propose to grant the declarations based upon it as well as on term E (as amended).

Declarations

Save as to declaration 7(d), upon which there are no agreed facts and in respect of which I do not think it right to grant a declaration, I propose, subject to the further legal argument referred to below, to grant the declarations on the basis of implied term E as amended by me and on the basis of breach of contract. I do not propose to base any of these declarations on what I might term the construction arguments or on implied terms B or D. I am quite satisfied that, on the basis of the agreed facts, it would be right to grant the declarations, the precise form of which will have to be discussed at a later stage.

It seems correct to me to emphasize that this judgment is based on the various agreed factual situations. I do not doubt that in due course in this dispute, and in other similar disputes, different factual situations may arise which have not been directly covered by these declarations. However, I believe that the spirit of this judgment is clear and that any arbitrator will be faithful to it if a new factual situation arises during the course of this or any other arbitration.

The terms of the declarations as drafted would seem to prevent the plaintiffs recovering damages unless the defendant can recover from government. But if the defendant is in breach of contract, I raise the question as to whether it would be right to make recovery contingent upon the defendant recovering over against government. I can see how this part of the declaration was necessary when one was dealing with equivalent rights, but as I have not based my decision on terms B or D, I think the parties would have to give consideration to these observations and address me on them when they have had an opportunity to digest this judgment. A

possible scenario is that the parties would continue with arbitration up to an award. It is not clear to me how the parties intend this proviso to affect the enforcement of any such award in their favour.

In the light of the somewhat unusual nature of these proceedings, I propose to hear counsel on the precise terms of the order and on costs if these matters cannot proceed by way of agreement. I would like to pay tribute to the clear, concise and helpful written and oral submissions placed before me by both sides which greatly assisted completing the argument well within the allotted time.

Supplementary judgment dated 10 March 1993

On 22 December 1992, I handed down judgment in this matter. I said that I would hear the parties on the precise terms of the declarations to be granted in the light of the matters contained in my judgment. I also said that I would hear the parties as to costs. On 19 February 1993, I duly heard Mr Nunn for the plaintiffs and Mr Bateson for the defendant on all outstanding matters. I gave Mr Nunn leave to amend his originating summons so as to make it clear that he was claiming the declaratory relief in the final form submitted to me towards the end of the hearing. Fortunately, Mr Nunn and Mr Bateson were able to arrive at substantial agreement as to the terms of the declarations which were appropriate in the light of my judgment. There were some minor differences upon which I ruled but the final version now appears as an appendix to this judgment. On the question of costs I made no order as to costs because this was clearly a test case with implications for these plaintiffs far beyond the facts of this case and project. I also took into account that the procedure which was adopted could not have been utilized without the consent and co-operation of the defendant. Not only did the defendant decline to apply for a stay in favour of arbitration but the defendant agreed all the facts without which this procedure could not have been utilized. The justice of this case clearly required me to exercise my discretion in making no order as to costs.

I wish to add that the Hong Kong government, who are clearly interested in this matter as the possible ultimate payer, were invited to join these proceedings, but declined. I cannot help but observe that this decision was unhelpful and ill advised. They will now have to accept whatever consequences ensue from the result of this case and the terms of the declarations made.

[An appendix to the supplementary judgment dated 10 March 1993 set out the terms of the declaration made.]