Extensions Of Time – More Bad News For Architects

Granting extensions of time ('EOTs') for completion of projects is always an important decision for contractors and employers. In a recent Court of First Instance case, Metrowell Holdings Ltd v Perrin Development Ltd1 liability was imposed on an architect following his grant of an EOT which was found to have adversely impacted third-party rights under subsequent purchase and sale agreements for the project. In this regard, Metrowell Holdings relied upon another fairly recent case decided in the Court of Final – Global Time Investments v Super Keen Investments Ltd[2] . Their importance warrants a review of Global Time Investments along with Metrowell Holdings as together they confirm some very bad news for architects.

Turning to *Global Time Investments* first as a Court of Final Appeal ('CFA') case, several issues were litigated including one going to the validity of the architect's certificate itself. The facts throw up the bygone days of flip-sell agreements and rapidly escalating property prices. The parties were developers who entered into a series of provisional agreements for the sale of the site which is now the Kut Kee Building in Central. Simpson Development Investments Ltd ('Simpson'), the original owner, entered into a Sale and Purchase agreement to sell the building upon completion to Grand Million Development ('Grand Million') for HK$256 Million. Grand Million subsequently entered into a provisional sales agreement with Global Time Investments Ltd ('Global') to sell the building for HK$405m. A third provisional agreement was entered into between Global and Super Keen Investments Ltd ('Super Keen') for HK$600m.

The first agreement provided for completion within 14 days after the issue of the Occupation Permit ('OP'). The OP was required, under Clause 14, to be issued by June 30, 1995 subject to the 'usual architect's extension'. It is this telling reference of course that provides the nexus to the building contract and the EOT itself. The second and third agreements entitled the purchasers to rescind the contract within seven days of Grand Million becoming entitled to exercise any rights of rescission to end the contract. Grand Million was further obligated to provide notice in writing to Global of any such rights to rescind and whether or not such notice was provided, Global then had the right to rescind the agreement. A similar provision was provided in the third agreement between Global and Super Keen.

By June 1995, the value of the property had fallen and the building was far from completion. On the June 29, the day before the OP was to be issued, Simpson produced a certificate from the architect granting the contractor a 294-day EOT. Grand Million, who was still in a position to earn a profit, did not dispute the certificate. Global and Super Keen, who rather stood to lose a substantial amount of money did. Both Global and Super Keen then rescinded their agreements and demanded return of their deposits. Grand Million completed its purchase and was then sued by Global who was sued by Super Keen for its deposit. Global and Super Keen maintained their right of rescission by challenging the validity of the architect's certificate granting the EOT.

For the purpose of determining whether the certificate was a valid grant of an EOT under Clause 14 of the sale agreement, the court needed to construe the meaning of 'the usual architect's extension'. On this point Lord Hoffman concluded:

> "I think it is clear enough that they meant an extension of time for completion of the building contract, granted by an architect pursuant to provisions usually found in building contracts".

There are numerous difficulties that arise for the parties in this scenario. First, under most purchase and sale agreements time is 'of the essence', especially in volatile markets. This means there is extra strictness in looking at any delays – and when delays do in fact occur the contract can be ended. In contrast, time is not of the essence under building contracts with EOTs routinely being made without giving rise to any right to rescind the contract. Second, architect's certificates are subject to arbitration by the parties and are therefore not conclusive in any case. This is particularly relevant for parties to such sales contracts that are not privy to the building contract, and they are in no position to dispute the architect's decision even if they wanted to. Third, conflicting interests between the owners and contractors and between the

owner/vendor and the purchasers further complicate the determination of rights to EOTs. Thus it can be seen this situation is not a happy one.

Apart from these niceties in Hong Kong conveyancing practice, *Global Time Investments* threw up another issue that could also instructively be mentioned here as it reveals just how tough the courts appear to be at the moment in dealing with architects. Thus the CFA went on to examine whether the certificate itself was validly issued under the terms of the building contract. Some facts were relied upon by the CFA in its reasoning more than others. In particular, the architect who issued the extension, Gordon Yeung & Associates, seemed to be unaware of his nomination as architect under the building contract. To the CFA it seemed that it was not the intention of the parties to the building contract that the architect fulfil such a role. Some confusion was also found as to whether the EOT itself was requested on behalf of the employer or contractor. It did not help the architect that the employer and contractor were also closely connected.

Troubled by these facts, the CFA ruled that the architect identified in the building contract did not in fact even act as the architect under the contract as contemplated by the parties to the sales contract. As for the parties to the building contract though they would be estopped or barred from claiming that the architect was not the architect because they named him in their agreement. However, this was not the case for the parties to the sales contract and the architect's extension did not end up falling within the scope of his 'usual ... extension' found in Clause 14. It was on this basis in part that the CFA was able to conclude that the certificate too was then not validly issued for purposes of the sales contract because there was no 'usual architect's extension' within the meaning of the clause. So no architect and no certificate although readers will be forgiven if this strikes them as a little artificial. The legal upshot of this was that both Global and Super Keen were entitled to rescind.

Turning to *Metrowell Holdings*, as in *Global Time Investments*, completion under various third party purchase and sale agreements was subject to EOTs validly granted by the architect. Of course, in times of rapidly rising or falling property prices such let outs will always be of interest to at least one of the parties as they were in the other case. What is perhaps of more concern to architects trying to weigh the effect of *Metrowell Holdings* is not simply that certifiers must be wary of the effect their decision-making under the contract might have upon third parties but also how far such third parties are prepared to go in actually challenging EOTs that have been made. Thus, in *Metrowell Holdings*, not only was negligence alleged against the architect but also wrongful interference with contractual relations and conspiracy as well. These are very serious allegations indeed and one would hope will only be raised in the most extraordinary cases.

Although the *Metrowell Holdings* case did not involve a full trial, (being decided instead on an interlocutory basis) the Court of First Instance made three rulings in total: 1) a duty of care existed on the part of the architect in certifying toward the third parties largely on two bases: assumption of responsibility and proximity; 2) it was neither unjust nor unreasonable to impose a duty of care on the architect; and 3) the claim of conspiracy would not be struck out as being unsupported upon the evidence. The significance of the duty of care findings goes to establishing a cause of action in tort or negligence law.

In coming to these findings Justice Chu managed to distinguish two earlier decisions, *Leon Engineering & Construction*,[3] and *Pacific Associates Inc v Baxter*[4] to enable the comments of Lord Hoffman in *Global Time Investments* to be applied.

Summing up, both *Global Time Investments* and *Metrowell Holdings* place architects in an untenable position. Not only must they make all the right decisions balancing the employer's and contractor's interests under the building contract but now too must also be careful how any decision they might take will affect third parties as well. Viewed objectively it sets too high a standard for architects. As it turns out it is unfortunate that there will not be an opportunity to overturn *Metrowell Holdings* on appeal or qualify the Court's rulings in a full trial as the company has gone into liquidation and there is no point in the architects challenging it any longer. So architects have been given some undeserved bad news with both cases, and in my view they should be re-examined.

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1 *Metrowell Holdings Ltd v Perrin Development Ltd [2001] 4 HKC 446 (HC).*
2 *Global Time Investments v Super Keen Investments Ltd [2000] 4 HKC 419 (CFA).*
3 *Leon Engineering & Construction Co Ltd v Ka Duk Investment Co Ltd [1989] 2 HKC 318.*
4 *Pacific Associates Inc v Baxter [1990] 1 QB 993.*

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