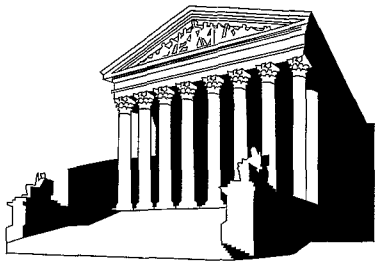
Crouch case overruled



In a recent decision of the House of Lords, May 20, 1998, the English House of Lords has overruled one of the most significant cases on certificates. *J A McInnis* looks at these two cases and the implications locally.

Background

In 1984, in Northern Regional Authority v Derek Construction Co [1984] QB644, the English Court of Appeal considered the wording of the JCT 1963 standard form giving the arbitrator power to open up, review and revise any certificate, opinion, decision of the architect.

In a well-known passage in the *Crouch* case, L J Brown-Wilkinson, said: "In an action questioning the validity of an architect's certificate or opinion given or expressed under ... the main contract ... the court's jurisdiction would be limited ... In no circumstances would the court have the power to raise such certificate or opinion solely on the ground that the court would have reached a different conclusion since to do so would interfere with the agreement of the parties."

The wording of the JCT 63 form is materially identical to the HKIA/RICS local private form and courts in Hong Kong followed *Crouch* in several cases including *Prestige Pools International v Yan Oi Tong (1985)* 2 HKC 116 and *Hsin Chong Construction Co v Hong Kong and Kowloon Wharf and Godown Co* (1988) HKLR 987.

Criticism of Crouch Case

While the courts began initially by following the *Crouch* case it soon became clear that it was widely disapproved of and criticised by commentators and often distinguished in the courts. I N Duncan Wallace QC regularly criticised the case over the last 14 years and charted the adverse effect it was having on lower courts decisions.

Once again, there were many cases that increasingly distinguished the *Crouch* case and thus overcame the necessity to follow it as a matter of legal precedent.

Of particular note was a recent trend not to follow *Crouch* in cases where there was unfairness as suggested in *Balfour Beatty Civil Engineering v Docklands Light Railway* (1996) 78 BLR 42 and *John Barker Construction v London Portman Hotel* (1996) 12 Const L J 277. The critical commentary and *London Portman Hotel* (1996) 12 Const LJ 277. The critical commentary and judicial reluctance to follow *Crouch* was a factor in the decision to overrule the case and, as a matter of interest, Nolan LJ, in the House of Lords, expressly acknowledged the assistance he had received from Duncan Wallace's writings.

The Beaufort Developments Case

The case that overruled *Crouch* was *Beaufort Developments (NI) V Gilbert-Ash (NI)* (1998) CILL 1386. The case arose again under a JCT form of contract, only this time JCT 80 with a special schedule for Northern Ireland. The dispute arose out of the late completion of an office block. Shortly put, the contractors said the architect was responsible for the delay while the employer said rather it was the contractor and the architect who was responsible. A certificate for a large sum of money was given by the architect, but the employer set-off the whole sum as well as claimed additional damages. The contractor sought to arbitrate the dispute, but the employer took the matter to court and sued both the contractor and the architect. Hence the parties chose different forums - the contractor arbitration and the employer of the courts.

This always poses jurisdictional problems. The contract sought and obtained a stay or stopped the court case from proceeding with an order of a master of the court. The master's decision was affirmed twice on appeal including the Court of Appeal of Northern Ireland. On the final appeal to the House of Lords, the issue of the House had become whether an arbitrator under the JCT standard form of building contract had an exclusive power to review decisions and certificates of the architect. In other words, whether the arbitrator had powers the courts did not have.

The House of Lords said no. It overturned, whether the arbitrator under the JCT standard form of building contract had an exclusive power to review decisions and certificates of the architect. In other words, whether the arbitrator had powers the courts did not have. The House of Lords said no. It overturned the decisions below, allowed the employers appeal and held that courts had the same powers of architects to open review and revise certificates and decisions which are not stated to be conclusive.

In so doing the *Crouch* case was overruled and expressly state to be wrongly decided. The reasoning of the law lords proceeded

on several bases, but only two will be mentioned here. Firstly, because JCT 80 states that no certificate itself is conclusive evidence that any works, materials or goods to which it relates in the contract – with the exception of the final certificate – it followed that no interim certificates could be conclusive either. As such there was no reason, and it cold not be expected that the contract would so provide, for the court to be given a specific power to open up and review the interim certificates. The court could thus rely upon its inherent jurisdiction to do so. Secondly, an old chestnut of a decision was revived. Thus the law lords returned to a long neglected case, Robins v Goddard which dates back to 1905, to support their decision. The Robbins case had held that the presence of the an interim certificate was no impediment whatsoever to rearguing the issue in court. Clearly it contradicts *Crouch* in this respect and with the approval given to it by the law lords will likely now be returned to prominence once again.

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Effect of the *Beaufort Developments* Case

1. *Crouch* has been overruled.
2. If *Beaufort Developments* is adopted in Hong Kong prior cases following *Crouch* such as *Prestige Pool International Low v Yan Oi Tong* (1985) 2 HKC 116 and Hsin Chong Construction Co may be considered wrongly decided.
3. However, the impact of the case will be less in Hong Kong given the mandatory stay provisions in the Arbitration Ordinance but would still be very significant whenever the arbitration clause has been deleted from the contract.
4. It is an open question what effect the decision will have upon adjudicators and experts.

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