

Anything can happen

Focus on Legal by **Bernard G Lynch**

Disney has done it again. Their latest release has drawn the attention of many and is sure to be loved by some and hated by others. In true Disney fashion, it is both innovative and traditional, drawing from history as well as perhaps making history in itself. However, unlike other Disney productions this feature is definitely not for the kids.

I refer to the new Disney Conditions of Contract ("the Contract"). The Contract draws on old and familiar clauses commonly used in Hong Kong as well as presenting new terms, and new procedures for the administration of the Contract.

Perhaps the greatest innovation introduced by the Contract is the change in the traditional role of the Contract Administrator. The role of the Contract Administrator is performed by the Project Manager ("PM") acting for Disney ("the Owner"). Traditionally the role would have required that, with regard to particular duties, the PM would be required to act fairly and impartially between the Owner and the Contractor.

Under the Contract, the role of the PM seems no longer to be confined by the usual constraints requiring him or her to act fairly and impartially between the Owner and the Contractor.

Instead, Clause 2.3 of the Contract requires that the PM and his Assistants shall:

"...when exercising the duties and powers vested in them by the Contract, act on behalf of the Owner and in the best interests of the Owner, except that when the Project Manager is required to determine any matter pursuant to Clauses 44.7,... 48.2,... 54.2,... 54.5... he shall make a reasonable determination..."

The PM's duty to act on behalf of the Owner and in the best interests of the Owner is tempered by a duty requiring him (or her) to make a "reasonable determination" when he is required to "determine" a matter under the particular clauses listed in Clause 2.3 of the Contract.

However, possible confusion arises in the situations where the wording of the particular clause listed in Clause 2.3, does not actually

state that the PM is required to "determine" a matter, but instead says that the PM is required to "assess", "decide", "consider", and/or "review" a matter.

On the one hand, it is arguable that these duties of the PM are synonymous with the PM's duty to "determine", and thus the PM is required to make a "reasonable determination" or "reasonable assessment" (etc).

On the other hand, however, it is arguable that the PM's duty to "assess", "decide", "consider", and/or "review" are quite different from the PM's duty to "determine", and thus the PM should "assess" "decide" "consider" and/or "review" the matter in the best interests of the Owner. In support of this argument, is the fact that if the Contract had required that the PM should "determine" a matter, then the Contract could have clearly stated such using the word "determine". The fact that the word "determine" is not used in the particular clause, could mean that the Contract did not intend that the PM should "determine" the matter.

Unfortunately for the Contractor, this possible confusion applies to several of the clauses listed in Clause 2.3, including those clauses concerning extensions of time, completion, and valuation.

With regard to extensions of time, Clause 44.7 requires the PM to "assess, decide, grant and notify the Contractor of the extension". The clause makes no mention of the PM's duty to "determine" any extension of time. Concerning completion, Clause 48.2 requires the PM is to "consider" and/or to state his "opinion" on when the Works achieved Practical Completion, but the clause contains no express wording that the PM is to "determine" the date of Practical Completion. With regard to valuation, Clause 54.2 requires the PM to make an "assessment" of the Contractor's claim. It does not require him to "determine" any matter. Also with regard to valuation, Clause 54.5 requires the PM to "review" the Contractor's valuation of a variation and then "prepare and provide" the Contractor his own

valuation of the same. However, perhaps adding to the confusion, Clause 54.5 does in fact also require the PM to “determine” a matter. However, that matter is not an amount due to the Contractor, but merely the amount of adjustment, if any, to be made to the Schedule of Milestones.

The PM’s role and duties present a risk for the Contractor. If, on the one hand the PM is required to make a “reasonable determination” concerning extension of time, completion and valuation, the Contractor’s risk and entitlement would seem similar to that where the PM was acting in the more traditional role as Contract Administrator. However, if on the other hand, the PM is not actually required to make a “reasonable determination”, but to act in the Owner’s best interests concerning extension of time, completion and valuation, then the risk to the Contractor could be enormous.

Furthermore, even if the PM was required to make a “reasonable determination”, the Contractor may not be entitled to the same value under a “reasonable determination” as he would under a “fair assessment”. In addition, the PM’s duty to make a “reasonable determination” only applies to those matters under the clauses specifically listed in Clause 2.3. And, of course, in the situations where the PM was not required to make a “reasonable determination”, he would be under a duty to act “on behalf of the Owner and in the best interests of the Owner”.

Despite the PM’s duty to act in the Owner’s best interests, the Contract does not explain what those best interests are. Whilst it would be reasonable to consider that the Owner’s best interests would include a quality construction, completed according to programme and within budget, it would also be reasonable to consider that these three interests would be at odds with each other. Furthermore, the Owner’s best interests are not likely confined merely to these three matters, but could also include other matters ranging from the value of the Hong Kong Dollar, to Disney’s own worldwide reputation. However, whatever the Owner’s interests, it does seem logical that the interests themselves, as well as their priority vis a vis each other, could vary throughout the period of the project.

Of course, it would then reasonably be expected that the PM would seek the Owner’s directions, and be directed by the Owner, as to what its best interests were (at that particular

Bernard G Lynch

BSc LLB(Hons), Dip Arb, MRICS, FCIArb, Barrister (non-practising)

Senior Consultant of James R Knowles (Hong Kong) Limited. Bernard has considerable experience in claims preparation and in dealing with quantity surveying, contractual, and arbitration matters relating to both private and public sector projects at both the main contract and sub-contract levels.



time), and the PM would be under a duty to act in accordance with those interests. However, somewhat portentously, Clause 2.3 prevents the Contractor from making any enquiry as to whether the PM has sought, or been given, any directions of the Owner.

In summary, the Contract changed the traditional role of the PM acting as Contract Administrator. However, the full effect of the change is not clear. With regard to several terms in the Contract, it is debatable whether the PM should make a “reasonable determination” or make an “assessment” (or the like) in the best interests of the Owner. Furthermore, it is not clear exactly what the best interests of the Owner would be at any particular time.

On a wider ambit, looking at the Contract as a whole, it is onerous on the Contractor. Yet, in all fairness, the Contractor had known of the role of the PM and of the terms of the Contract at tender stage. The Contractor was given the opportunity to include costs in his tender for any possible risks associated with the performance of the Contract. Besides, the Contract contains new terms, and although some of these may appear confusing or ambiguous, the actual true meaning of the terms has not been determined by any arbitration or court. At this point in time, one can only speculate as to their true meaning.

At today’s date, the new Contract has already been in use for some time. From someone not directly involved, things at Penny’s Bay appear to be progressing well. Works are being constructed and it seems like the Contractors are receiving payment. The interests of all the parties involved seem satisfied.

But enough. This article is now at an end. However, the feature is still running at Penny’s Bay. And remember, this is Disney — anything can happen! ☑