

NEWSLETTERS

Disputes in Rights in Plants and Equipment

With the surge in bankruptcy and winding-up cases after the Asian Financial Crisis, contractors in construction industry have been suffering from cash flow problems due, in some cases, to non-payment by the employers/main-contractors. In such circumstances, the ways and means, by proprietary, security or contractual rights or protection, or otherwise, for ensuring the availability of plants and materials until final completion is especially essential to proper and timely undertaking of works of a construction project.

Fixed Materials

Materials delivered or brought on to the site by the contractor remain the property of the contractor until such materials become affixed to the land - the doctrine of "whatever fixed to the soil belongs to the soil" as restated in *Elwes v Maw* (1802) 3 East 38. Consequently, the contractor generally has no lien on fixed material and the only recourse is to sue the employer for sum due under the construction contract, even if the materials are fixed and subsequently severed. It may be difficult to determine with precision as to what constitutes an annexation sufficient for this purpose. It is a question which depends mainly on two circumstances as indication of intention, namely, the degree and object of annexation."The true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they are so intended lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel" - *Holland v Hodgson* (1872) LR 7 CP 328.

Unfixed Materials

Generally speaking, in the case of a contract for sale of goods and materials, the purchaser may pass title of such goods and materials without having made payment for them to a subsequent purchaser who received those goods and materials in good faith and without notice (except where such goods and materials are sold subject to a retention of title clause in the contract) - S.27 of Sale of Goods Ordinance (Cap.26) of the laws of Hong Kong. The delivery of materials to a construction site will appropriate them to the contract and normally pass the property to the person ordering the materials. A distinction, nevertheless, has to be drawn between a "contract for work and materials" and a "contract for supply of materials". The larger the relative proportion of work content in a contract, the higher the probability that such contract will be considered as one for work and material, especially where the contract provides a schedule for progress payments. Where the contract provides that the employer shall pay for unfixed materials delivered to the site on the certificate of an architect to the effect that they have in fact been delivered, the property in such materials may be deemed to be intended to pass to the employer on the issue of the certificate or on payment.

Retention of Title Clause

Under a contract of sale of goods and materials, the legal property in specific goods is transferred to the purchaser at such time as the parties to the contract intend it to be transferred, subject of course to the terms of the contract, the conduct of the parties and the circumstances of the case. Where a supplier contracts to supply materials for construction contracts, unless the contract expressly stipulates otherwise, the property will usually pass not later than the time when such materials are delivered. For the protection of the supplier, a clause in a contract for the sale of goods and materials, which provides for the full legal ownership in the materials to remain with the supplier until payment is made (this is often called retention of title clause), may be effective against a liquidator or trustee in bankruptcy. A supplier of goods and materials to the owner of the land may reserve in the contract a right of re-entry in the event of non-payment for the purposes of removing the goods and materials, and thereby acquiring an equitable interest which (subject to registration, if applicable, under the Companies Ordinance (Cap.32) of the laws of Hong Kong) may take priority over subsequent equitable interest in the land. One must, however, bear in mind that such equitable interest of the supplier may be ineffective against any person acquiring a subsequent legal interest in good faith for value and without notice. A clause in a main construction contract, stipulating that the property in unfixed materials was to pass to the employer when their value had been included in an interim certificate under which the main contractor had received payment, was held by the Court to be ineffective to transfer to the employer the property in a sub-contractor's materials where the property in them had not passed from the sub-contractor to the main contractor.

Vesting Clauses

It is common to have a clause which purports to vest materials and sometimes plant in the employer before they are fixed. The principal objects of such a clause are to provide a security to the employer for money advanced and to enable the employer to obtain the speedy completion of the works by another contractor in the event of default of the original contractor, by ensuring that plants and materials on site are ready for use and are free from claims for the original contractor, and the creditors or trustee in bankruptcy or liquidator of such contractor. The effectiveness of such vesting clause depends largely on its drafting and its context and, accordingly, extra care shall be taken when drafting such vesting clauses to ensure that the intentions of the parties to the contract can be achieved. Where the materials and plants have been vested in the employer, there are normally implied rights of the contractor to the use of the materials and plants for the purposes of the contract, and to the re-vesting and removal of unused materials and plants upon completion, with the rights and perhaps obligations on the part of the contractor to replace defective materials.