Construction Agreement: A Valid Variation Order – Importance Of Variation Order In Writing

by

*William Ting Siew Chon**

A man hired a contractor to renovate his kitchen.

The contractor said to the man that he was nearly done.

The homeowner said "no way that you are – there is a giant hole in the granite countertop!"

Frustrated with how long the renovation had taken, the homeowner started yelling at the contractor and his assistant, who was standing in the hallway outside of the kitchen, to leave.

"Get out now!" the man shouted.

Trying to allay his anger, the contractor asked for the homeowner to calm down and let his assistant into the kitchen with the part he needed.

"No!" the man replied angrily. "I'm going to sue you!"

"You're not letting us finish the work. We're almost done, we just need to install one last thing, and you are preventing that." said the contractor.

"If we cooperate, we can have this house finished and avoid a costly legal battle where we'd both end up worse off.

"Now just let that sink in."[1]

This is a joke from the net (net here means internet not fishing net). Well, there are many ways and views of interpreting a sentence lest a construction agreement where both parties have different expectations to meet. Also, with the increasing costs, delays and loss of profits, the battle will turn fiery. Construction is an interesting place where much improvising decisions have to be made. These sudden changes often involve extra work, time and costs. Problems arise when the time has come for bill-check.

Therefore, it is very important to have the construction agreement properly and validly varied to incorporate all the changes. There are two categories of variations namely "contractual variation" and "extra-contractual variation".[2] This article focuses on the "contractual variation" and the importance of the procedural adherence.

Contractual Variation v. Extra-Contractual Variation OR Is There Variation At All?

Perhaps it would be helpful to distinguish these two types of variations at the outset. To understand this, reference could be made to the case of *Thorn v. London Corporation*:[3]

* *Messrs Tang & Partners, Sibu*

> Either the additional or varied work which was thus occasioned is the kind of additional and varied work contemplated by the contract, or it is not. If it is the kind of additional or varied work contemplated by the contract, he (the contractor) must be paid for it, and will be paid for it, according to the process regulated by the contract. If on the other hand, it was additional or varied work, so peculiar, so unexpected, and so different from what any person reckoned or calculated upon, that it is not within the contract at all; then, it appears to me, one of two courses might have been open to him; he might have said: I entirely refuse to go on with the contract – '*Non hoec in foedera veni*': I never intended to construct this work upon this new and unexpected footing. Or he might have said, I will go on with this, but this is not the kind of extra work contemplated by the contract, and I do it, I must be paid a '*quantum meruit*' for it.

Therefore, if the variation is incidental and part of the contract, then it is said to be contractual variation whereas if the varied work is totally different or departed from the original construction agreement, then it would be extra-contractual variation (or also called common law variation).

But it must be borne in mind that a work which is silent in the original construction agreement does not automatically constitute a "variation" if the "additional" work is incidental and necessary to carry out the original construction agreement.

Harbans Singh in "*Engineering and Construction Management: Post-Commencement Practice*" cites Keating in the authoritative text entitled "Building Contracts" where Keating stated:[4]

> Where the contractor must complete a whole work, such as a house or a railway from A to B, for a lump sum, the courts readily infer a promise on his part to provide everything indispensable necessary to complete the whole work. **Such necessary works are not extras for they are impliedly** included in the lump sum. Examples of the application of this principle are as follows:
>
> (i) Work not expressly specified: *Williams v. Fitzmaurice.*
>
> (ii) Work not taken out on the quantities supplied to the contractor for the tender: *Sharpe v. San Paulo Railway*.
>
> (iii) Unexpected labour caused by difficulties of the terrain: *Thorn v. London Corporation* or by the proposed method of carrying out the works.
>
> (iv) Work caused by the lawful and not unreasonable exercise by the employer of statutory powers existing at the time of entering into the contract: *Rigby v. Bristol Corp.*

Of course, reference to old English cases had received criticism. Hamid Sultan JCA, in the Court of Appeal case of *Government of Malaysia v. Syarikat Ismail Ibrahim Sdn Bhd & Ors*[5], says:

> ... Historically, a lump sum contract was meant for the employer to appoint a contractor for a lump sum price for all works to be done before the work is commenced. For example, say 500 years ago, when a person wants to erect a simple house agrees to appoint a contractor for construction of the house as per the agreed specification as well as the price. Constructing a house then was simple and straight forward with not too much of statutory control. In addition, such contracts will not have variation order and/or terms. However, constructions of buildings have been complicated and a lump sum contract does not bear the same meaning as 500 years ago. Variation orders, provisions and manner of calculations have become a necessity for just cause and reasons, inclusive of variations which are needed for the approval of authorities, etc. This was explained in a **limited sense** in *William v. Fitzmaurice* [1858] 157 ER 709.

It is true that *William v. Fitzmaurice* is difficult to be applied in the modern-day since nowadays there are many standard forms being applied where clauses on "variation" are very common and the mechanism is clearer. However, I am more inclined to the approach by Ir Harbans Singh KS in "*Engineering and Construction Management: Post-Commencement Practice*":

> It is important to take note the golden thread that appears to be running through all the abovementioned decisions, *ie*, the need for '*consensus ad idem*' between the contracting parties and the court's giving effect to this. Hence, the ultimate question is as to the actual intention of the parties when entering into the relevant contract. Did they or did they not intend the work in question to be part of the contract scope of works and the contract price?

In short, when the "work" was not intended by the parties to be part of the construction agreement, then it is said to be a "variation". If such "variation" is not covered by the mechanism of "variation clause" or so different from the nature from the original construction agreement, then it would be "extra-contractual" variation.

Contractual Variation

Due to the nature of the construction works, most construction agreement envisages the mechanics of incorporating variation works.[6] These so-called variation clauses will spell out the substantive and complete procedural steps to constitute a valid variation order.

Perhaps we could start with an English case – *McAlphineHumberoak Ltd v. McDermott International Inc* 28 ConLR 76 where the Court of Appeal (Civil Division) held: "This contract contained elaborate machinery for adjusting the lump sum price in the event of any change in the scope of the work. By cl. 50 the parties agreed that the plaintiff's right to recompense for disruption and delay was covered elsewhere in the contract, and further agreed that each new drawing should constitute a change instruction, thereby starting the new machinery under cl. 35. In due course, the plaintiffs submitted VOs covering all aspects of the revised drawings including abortive costs in the drawing office. Whether or not these VOs were settled (to which we come to next)

it is impossible to hold that **the contractual machinery agreed between the parties has all been displaced. In so far as the plaintiffs are claiming under the contract, therefore, they must make good their claim under cl. 35.**

For a contractual variation to be valid, procedures have to be strictly adhered to. As pointed out by Sundra Rajoo and Harbans Singh KS in "*Construction Law in Malaysia*":

> For the variation order to be valid, it must meet both the procedural requirements as well as the legalities. Procedurally, the usual requirement is for the order to be in the form of an instruction issued by an authorised person. Such requirement will normally be treated as a condition precedent to the contractor's right under the contract to be paid for the varied work properly ordered (see *Taverner & Co Ltd v. Glamorgan* CC (1941) 57 TLR 243; see also *Antara Elektrik Sdn Bhd v. Bell & Order Bhd* [2002] AMEJ 0079; [2002] 3 MLJ 321).

As a starting point, reference is made to Mary Lim J (as she then was) in *Hasrat Idaman Sdn Bhd v. Mersing Construction Sdn Bhd*:[7]

> Where the claim is for both additional and original works as was the case here, it is important that the plaintiff must be able to show that the additional works were ordered by the defendant failing which there can be no valid claim.

As pointed out in the book "*Construction Law in Malaysia*":

> As to the form of the instruction, the preference is for it to be "in writing" (see clause 11 of the PAM Contract 2006 (With Quantities), clause 25.1 of the JKR Forms 203 and 203A (Rev1/2010), etc). Where oral instructions are issued instead, they may be effective only upon subsequent or retrospective confirmation by the authorised person or the employer.

In short, any form of "order" for "variation" has to be and must be in writing. An example of standard clause would be cl. 11.3 of the JKR Contract which provides:

> (b) If any **instructions, directions or explanation involving a variation order** are given to the Contractor or his representative upon the Works by the Superintending Officer's Representative or verbally by the Superintending Officer such instructions, directions or explanations **SHALL BE CONFIRMED IN WRITING by the Contractor to the Superintending Officer within seven (7) days**, and if not dissented from in writing by the Superintending Officer to the Contractor within a further seven (7) days shall be deemed to be Superintending Officer's Instructions. The Contractor shall forthwith comply with all Superintending Officer's Instructions. Provided always that electronic messages shall be treated as verbal instructions, directions or explanations.

However, with the development of the current use of technology, it is not uncommon for the parties involved to communicate through phone especially "WhatsApp" or "WeChat". Do messages constitute a written instruction? Dr Lim Hock Leng in the case of *Crest Realty v. Sarikei District Council*[8] provides an interesting observation: "In any case, it is to be noted that cl. 11.3 of the JKR Sarawak Form of Contract (2006 edition) provides: – Electronic messages shall be treated as verbal instructions, directions or explanations." Therefore, it is self-explanatory that all instructions, even if it is through phone messages, has to be written on paper.

Once variation is properly ordered, it is incumbent on the parties to carry out the duties as per the variation order. The additional work would then be measured in accordance with the terms of the original construction agreement and payment would be made accordingly.

However, one is curious to know what happens if the variation order is procedurally invalid. When a variation order is procedurally invalid, the author Harbans Singh in his book "*Engineering and Construction Management: Post-Commencement Practice*" commented that:

> Since the procedural pre-conditions pertaining to a properly written formal instruction represent a necessary requirement as to the contractor's obligation to effect the variation ordered and the employer's corresponding duty to adjust the contract sum accordingly, the non-fulfillment of such pre-conditions taint any change implemented with invalidity; therefore compromising the legality and the enforceability of such an action.

Conclusion

Construction disputes are common. However, these disputes could have been avoided if a construction agreement is properly drafted and the intention of both parties are communicated. When the circumstances give rise to the need to vary the works, both parties should again communicate and put all things down in writing and in order. This is especially important when the construction spans over years and you might not know who sits in the office tomorrow. In the absence of documents in writing, it is fairly difficult to trace the original intention of parties. Therefore, it is important to adhere strictly to the procedures laid down in the construction agreement.

Endnotes:

1. https://upjoke.com/renovate-jokes.
2. (Sundra Rajoo & Harbans Singh KS, 2012 p. 306).
3. [1876] 1 App Cas 120 (HL).
4. (K.S., 2003).
5. [2020] 1 LNS 40.
6. See PAM Conditions of Contract cl. 11; the IEM Conditions of Contract cl. 23.
7. [2015] 1 LNS 289; [2015] 11 MLJ 464.
8. [2020] 1 LNS 869.