

Fundamental Legal Concepts Underlying Variation Concept and Vicarious Performance (**Subcontracting**)

It is an interesting thing to investigate legal concepts underlying certain fundamental features of construction contracts. As we are aware, most construction contracts do contain provisions for varying the scope and allowances for vicarious (shared / delegated) performance. This article focuses to fundamental legal concepts in respect of variation clause and subcontract provisions.

The prime purpose of this article is to show the reader how interesting and important the legal concepts behind fundamental aspects of variations and Subcontracting. Following two topics are analyzed in relation to variation concept and vicarious performance.

- A. The Rationale behind inclusion of a variation clause in a standard construction contract. (i.e. what are the legal considerations / concepts / basis in a variation clause / concept); and
- B. Legal concepts in relation to vicarious performance / subcontracting / delegation of scope or shared performance.

As we are aware, we have dealt with numerous variations and lot of issues pertinent to sub contacting matters. Perhaps, some of us may unaware about the basic fundamental legal concepts behind these simple aspects of construction contracts. After going through this article reader will have complete perception about these basic concepts.

A. Rationale (Legal arguments) behind inclusion of a Variation Clause in a Standard Construction Contract:

There are two legal principles behind legal concept of Variation. The first legal principle is the legal concept of variation. The second legal principle is that variation provision is designed to circumvent (evade) the lack of any implied authority on the part of architect / engineer to vary the contract on behalf of employer.

As per the first legal principle, the law considers that variation is an agreement supported by consideration to alter some terms of the contract. The key feature to note here is the need for an agreement. Unless the contract provides power for the employer or employer's agent to order a variation, the employer will be obliged to seek the agreement of the contractor in every var-

ied case. The need of variation clause agreed by parties to contract which empowers the Employer to instruct variation was discussed in case **Stockport MBC v. O'Reilly (1978)**. In this case it was confirmed the agreement shall have provisions to vary the works which is agreed by the parties.

At common law, there is no right to vary the contract. The contractor has the right to build what he has contracted to build. Contractor has full right to construct the subject building / project as per the given drawings / specifications and BOQ. Any omission with the view of saving to employer may rob some portion of contractor's profit. Any addition to the contract may prolong time schedule of the project and render him unable to undertake other jobs perhaps more lucrative to the contractor. It is for this reason most standard forms of building contracts, give the employer or his contract administrator the right to vary the works. Therefore, some sort of implied authority (agreed by the parties to the contract) is required to alter the contract works on behalf of the employer. This is the second legal principle of variation concept. This issue was broadly discussed in the case of **Vigers Sons. & Co. Ltd. v. Swindell (1939)**.

However, the scope of such clause is limited to variations which could have been within the original contemplation of the parties when the contract was made. Variations shall be within the original scope otherwise contractor can refuse the variation or can ask quantum merit payments for the varied works. This issue was addressed in **Blue Circle Industries Plc v. Holland Dredging Company (UK) Ltd (1987)**. In this case it was made clear that any variation outside the scope will require contractor's consent and entering into a new agreement.

Therefore, as explained above, the variation concept has two major legal aspects.

1. Agreement between parties to vary the scope; and
2. Requirement of empowering engineer / architect / contract administrator to vary the scope on behalf of employer.

Let us now, analysis the legal principles in respect of subcontracting.

B. Legal concepts in relation to vicarious performance / subcontracting / delegation of scope or shared performance.

The construction of a modern building is an extremely complex process. On the other hand, presently, construction industry is increasingly characterized by specialization. Therefore, it is highly unlikely that one main contractor will have all necessary skills and recourses to do all the works on a project and it is a common scenario that section of the work to be sublet to other specialist subcontractors. Subcontracting is a common term encountered to us in many of our day to day works and dealings. Therefore, it is an important thing to understand certain fundamental aspects of Subcontracting to evade certain risks and liabilities associated with shared performance.

There are various types of subcontracting methods available in construction industry which allows scope to be sublet to others. Some of predominantly use subcontracting ways are described below:

1. Domestic subcontractors:
These are the subcontractor who are selected and appointed by the main contractor under his full responsibility and liability.
2. Nominated subcontractors:
These are subcontractors who are selected by the employer / engineer and then subsequently appointed by the main contractor as his own subcontractors. As per the term of most standard forms of contracts after entering into an agreement with the nominated subcontractor, nominated party will become a domestic subcontractor of the main contractor. However, during the nomination process, main contractor has options to raise certain objections in respect of nomination if he feels the nominated party is incapable of carrying out the entrusted role.
3. Named subcontractors:
These subcontractors are also selected by the engineer / architect but for whom the full nomination is not required. They are most commonly used for projects let under Joint Contractors Tribunal ("JCT") intermediate form of contracts which has no provision for full nomination.
4. Statutory undertakers:
These are the parties who undertake certain service provisions such as supply of water / electricity and communication services. Statutory undertakers do provide their services under special contractual arrangements which exclude certain negligent scenarios in Tort.
5. Employer's Agents / Craftsmen / Artists:
These are the parties who are appointed and con-

trolled by the employer for execution of scopes such as provision of special security systems, communication systems and artworks etc. These parties perform their scopes under full liability of the employer. Therefore, employer is responsible for their deliverables in terms of time, cost, quality and HSE issues.

In real essence, Subcontracting means vicarious (shared) performance. Some contracts permit the main contractor to perform their contractual obligations with the efforts of others subject to certain conditions and prior approvals process. In such situations, the main contractor can subcontract certain portion of the scope to others.

There are several advantages of Subcontracting to the main contractor as listed below:

1. Main contractor can shift certain degree of risk involved in some elements of the works by whole or part to someone else;
2. This will supplement the recourses of the main works contractor;
3. This will eliminate the need to provide constant flow of work for its own employees; and
4. Particular part of the work may of specialist nature (i.e. Enabling and piling works, specialist security systems, application of protective coatings etc). The main contractor may not possess necessary specialist skills / know how or equipments which otherwise specialist subcontractor do have.

However, there are certain dis-advances of Subcontracting should the major portion of the scope is subcontracted. Those disadvantages can be in terms of time, cost and quality perspectives as set out below:

1. The financial disadvantage is that subcontracted work may reduce the contractors profit marking opportunity;
2. The Subcontracting is the allowed tool for vicarious (shared) performance in most standard conditions of contracts. However, when considering the liability of the works (defects / quality) main contractor is fully liable for the quality of works. Liability cannot be transferred to subcontractors; and
3. There is an always a risk of subcontractor may not finish the works during the allocated time period. In such situations, main contractor may expose to liquidated damages as per the terms of the main contract.

When analyzing the fundamental aspects of Subcontracting, there are several areas to be investigated / analyzed as mentioned below:

1. Risks of certain scope subcontracted to Statutory Undertakers;

Necessary care should be taken when Subcontracting works to statutory undertakers since they do not provide their services under normal contractual relationships. They contractual relationships evade liability of economic loss due to negligence.

2. Advantage of shared performance versus risk of retained liability;

In subcontracting, although the shared performance is allowed, the associated liability still remains with the original main contractor. Therefore, main contractor will eventually become liable for time, cost and quality aspects of the sub contracted scope.

3. Prohibited shared performance due to special skill and knowledge of main contractor.

There are certain situations where Subcontracting or vicarious performance is not allowed due to special nature of the scope or else the specific considerations of the employer. These types of contracts are made because of the special skill or the knowledge of the contractor. In such situations, contractor is not allowed to delegate performance and has no right to sub contract the scope. Therefore, the contractual performance is considered as personnel and such intension shall have to be included to the contract at the time formation of the contract.

Following are some of the popular case examples elaborating fundamental aspects of subcontracting in order of the above:

1.1 Statuary undertakers do not provided their services under normal contractual relationships:

As we are aware, some of the scopes are entrusted / subcontracted to statutory undertakers such as water / electricity boards and telecommunication service providers. When these scopes are sub contracted to statutory undertakers, they do not provide their services under normal contractual relationships. Their contractual relationships are specific and do not cover certain legal liabilities in Tort normally covered under standard contractual relationships. These contracts exclude certain liabilities such as recovery of economic loss due to negligence.

The statutory undertakers such as electricity board do not liable for economic losses due to negligence due to consequence of power interruptions. However, in normal circumstances a general contractor may be liable for such negligent scenarios. This issue was confirmed in the case Milnes

v. Huddersfield Corporation (1886). In this case, it was clear that statutory undertakers never been liable for economic losses due to negligence.

1.2 Nonetheless, Statutory Undertakers are liable for violating the implied term "Fit for Purpose" implied by the Sale of Goods and Services Act 1982. This legal point was broadly discussed in Read v. Croydon Corporation (1938).

In this case, the defendant corporation owned and maintained two water wells for the purpose of supplying water to residents of the Borough. The adult plaintiff was a rate payer in the Borough, and infant plaintiff, his daughter, resided with him in the house in respect of which she paid the water rate. It was admitted that, as result of drinking water supplied from one of the wells, the infant plaintiff contracted typhoid. The infant plaintiff claimed damages in respect of her illness, and the adult plaintiff claimed certain special damages incurred as a consequence of that illness.

It was found upon the facts that the defendants had not been negligent in selection of gathering ground, nor in selection and supervision of its workmen, but they had been negligent in that, during the carrying out of certain work at the well, precautions in the form of continual analysis of water, searching inquiry into the antecedents of workmanship and supervision over them.

Plaintiff contented, inter alia, (1) the failure, on the part of the defendant's corporation, (2) that there was a contract for the sale of goods (3) that there was breach of that contract.

It was held in the Kings' Bench Division (1) the defendants were guilty of negligence at common law (2) where one person is by statue bound to supply water and another is entitled to receive it, there is no contractual relationship between these two, although the rights and obligations arising out of a statutory provision may be similar to, or identical with those arising out of an ordinary contract. Therefore, the supplied water shall be fit for its purpose and statutory undertakers became liable for consequences.

The Subcontracting is different from assignment. In Subcontracting, performance can be delegated / shared but liability cannot be shared and transferred to subcontracted party.

2.0 In Subcontracting (vicarious performance) scope can be delegated but liability still remains with the main contractor.

This issue was highlighted in famous case called *Stewart v. Reavell's Garage* (1952). In this case owner took his car to a garage to realign its breaks. At the garage, relying on the garage owner's suggestion, the vehicle owner agreed to subcontract the work. The sub contractor did a bad job and subsequently the brakes failed and vehicle owner injured due to an accident.

It was held that although the defendant was entitled to perform vicariously, their liability was not transferred. It was made clear that Subcontracting is only vicarious performance and not an assignment.

3.1 Exceptions to Vicarious Performance / Contractual obligations are of such a nature that only contracted party must performance scope.

The famous court case *Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd* (1993) illustrates this issue. This is an English contract law concerning assignment and privity of contract.

M/s Stock Conversions Ltd, the lessee of a building, used a JCT standard form contract to hire M/s Lenesta to remove asbestos.

Clause 17(1) of the subject contract said "The employer shall not without written consent of the contractor assign this contract." Lenesta subcontracted another firm to do the job. More asbestos was soon found, and a third business was contracted. Then Stock Conversions Ltd assigned the building lease to Linden Gardens. Linden Gardens sued the contractors for negligence and breach of contract. The lessee assigned its right of action to Linden Gardens, and more asbestos was found, without Lenesta ever having consented. The Court of Appeal found the assignment was effective. Lenesta appealed

The House of Lords held that a true construction of clause 17(1) prohibited assignment without consent and that since a party to such a contract might have a genuine commercial interest in ensuring that contractual relations with the party he selected were preserved, there was no reason for holding the contractual prohibition on assignment as being contrary to public policy.

3.2 Exception to vicarious performance / Prohibited vicarious performance (another case)...

There is another English case *Davies v. Collins* (1945) which illustrates the same point. In the event, the contracts specifying that "every care will

be exercised" in carrying out obligation concerned, will tend to prohibit, by implication, vicarious performance.

Some contracts permit the main contractor to perform their contractual obligations with the efforts of others whereas certain other contracts may prohibit doing so thus making the contractual obligations as personnel performance. These contracts predominantly rely on the special skill and knowledge of the contracted party. Therefore, contractor does not have the right of performing by another if there is a prohibition in the contract. The contract can be personnel, if it is made with the contractor because of his skill or special knowledge. It is a matter of the construction of the contract whether or not the contractor has the right of securing vicarious performance.

In addition to the above mentioned basic concepts of subcontracting, it is worth to clarify certain common misunderstandings of subcontracting in relation to assignment and novation:

As previously described, subcontracting is the tool used for vicarious / shared performance in most standard forms of contracts. This concept of Subcontracting should not be misinterpreted with assignment / novation. Subcontracting is totally different from assignment / novation which are explained below in relation to their primary definitions.

Under common law, a contract between party A and B can transfer benefits of the said contract to party C without the consent of the party C. This type of an arrangement is called an Assignment. One common example is; at present days this assignment is used when a building is sold to future buyers. The Employer can assign his rights in extended (collateral) warranties taken from suppliers and sub contractors to future buyers through Assignment in respect of potential defects.

The other misconception is novation is also not a form of subcontracting and moreover, it has no relationship with subcontracting.

If a contract between party A and B require certain burden of the said agreement to be transferred to party C this cannot be done without the consent of the party C. This requires the consent of party C and this type of agreement consented by all three parties is called a novation agreement. Novation agreements are used for in many instances in present days in construction industry.

The most common types of novation agreements are:

1. Switch novation: This is not a traditional form of novation. This type of novation is used to deal with certain special situations. This is commonly used in design and build contracts to transfer the Employer's designers to design and build contractor in consideration of certain benefits of doing so.
2. Novation *abi initio*: Certain owners may transfer their interest of the project to other Employers / Parties due to certain reasons which are beyond their control. In such situations, the subject project can be novated to the new owner. Then new employer can act as if he was there from the inception. This is a traditional form of novation. In this type of novation agreement, benefits as well as liabilities of the original agreement / project is transferred to the new owner.

Therefore, as explained above, the novation also has no relationship with subcontracting.

In summary, as explained above, in subcontracting care should be given to following aspects:

1. Subcontracting has its own advantages and disadvantages;
2. Subcontracting is the tool used for vicarious performance but liability of the sublet scope remains with the original party;
3. Statutory undertakers do provide their services under special contracts and they exclude many economic losses in Tort;
4. There are certain situation where vicarious performance is not allowed due the special nature of the sub let scope; and
5. Subcontracting should not be mixed with assignment and novation which are totally different concepts.

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