CONSENTING TO WHAT?

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There is nothing too difficult about the operation of the partial possession provisions in the standard JCT 2016 Design & Build form of contract.

PERFECT POSSESSION

The Employer gives the Contractor possession of the site, or part of the site in the case of a Section which he retains, until the date of issue of the Practical Completion Statement.

Subject to partial possession being required, the Employer is not entitled to take possession of any part of the Works until the date of issue of the Practical Completion Statement. (clause 2.3)

If the Employer wishes to take possession of part of the Works (partial possession), he has to obtain the Contractor’s consent (which shall not be unreasonably withheld). If he takes possession, the Contractor shall thereupon give notice identifying the part of the Works taken into possession and the date of such possession (‘Relevant Part’ and ‘Relevant Date’). (clause 2.30)

Partial possession triggers a number of things:

- deemed practical completion of the Relevant Part (clause 2.31);
- commencement of the Rectification Period (i.e. defects period) in respect of the Relevant Part (clause 2.32);
- any obligation of the Contractor to insure the Relevant Part under Option A shall terminate (clause 2.33);
- a proportionate reduction to the rate of liquidated damages (clause 2.34); and
- release of half of the Retention in respect of the Relevant Part (clause 4.18).

Partial possession – dead easy? Yes, if it happens in accordance with clause 2.30.

POSSESSION – MAYBE NOT

But what if it is not quite in accordance with clause 2.30? Take, for example, a situation that can arise in circumstances of delay. The Contractor is behind programme. He feels that his request for a 15-week extension of time is valid but knows he has to wait to find out. The Works are not in Sections and so there is one Date for Completion together with a rate of liquidated damages of £100,000 per week.

Feeling a bit exposed without the extension of time awarded, but wanting to give the Employer something of value, he proposes...
giving him phased beneficial use of parts of the Works. The Employer goes along with this and he gets beneficial use of several parts of the Works along the way. The Contractor is given an interim 5-week extension of time. The Employer has beneficial use of the whole of the Works by the extended Completion Date.

The Contractor says the Employer should issue the Practical Completion Statement. However, despite beneficial use, the Employer refuses to do so as there is outstanding work and snagging. He issues a certificate of non-completion.

10 weeks later, the Contractor finishes off the outstanding work and snagging. The Employer issues the Practical Completion Statement which shows that the date of Practical Completion of the Works was 10 weeks after the extended Completion Date.

The Employer promptly sets off £1m of liquidated damages against the next interim payment.

The Contractor disputes the Employer’s claim for liquidated damages and asserts that the phased beneficial use of the Works by Employer constitutes partial possession.

**EARLY USE**

The Employer says that as he and the Contractor did not engage in the partial possession process set out in clause 2.30, partial possession did not occur. Further, he says that the phased beneficial use was in accordance with clause 2.5 which states that “Notwithstanding clause 2.3, [see above], the Employer may, with the Contractor’s consent [which shall not be unreasonably withheld], use or occupy the site or the Works or part of them, whether for storage or otherwise, before the date of issue of the Practical Completion Statement” [underlining added].

Unlike partial possession, early use or occupation under clause 2.5 does not trigger any of the things that clause 2.30 triggers.

So, which is it - partial possession or early use?

**IMPRESA V COLA**

Consider what happened in Impresa Castelli SpA v Cola Holding Limited. Impresa was the Contractor engaged by Cola to build a hotel. The JCT contract incorporated similar partial possession and early use clauses. Cola claimed liquidated damages for delay. The whole hotel became operational in phases by agreement before overall Practical Completion. As there was an air-conditioning defect which affected the whole of the hotel, the Court felt that it made sense that Impresa should remain in exclusive possession, in effect making Cola a sub-licensee. Crucially, an interim line-in-the-sand agreement expressly provided that “No access to the building by the employer as provided hereunder shall be deemed to amount to Practical Completion for the purposes of the original agreement.” It was held that Cola’s early use of the hotel was not partial possession - Cola was entitled to liquidated damages.

**SKANSKA V ANGLO**

Consider what happened in Skanska Construction (Regions) Limited v Anglo-Amsterdam Corporation Limited, which was an appeal following an arbitration. Skanska was the Contractor engaged by Anglo to build an office block. The JCT contract incorporated similar partial possession and early use clauses. Skanska “handed over the keys to the works” to enable commencement of the office fit-out by Anglo’s fit-out contractor ICL. However, there

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i [2002] EWHC 1363 (TCC) ii [2002] All ER (D) 172 (Sep)
were air-conditioning defects and the contract definition of Practical Completion was quite strict. Anglo deducted liquidated damages for a period after the “handing over of the keys”. Anglo had not made an issue in the arbitration of Skanska not having given notice of partial possession. Neither did Anglo raise the early use argument in time. The Court held on appeal from the arbitration that the “irresistible conclusion is that Skanska handed possession of the Works to ICL . . . at the request of Anglo-Amsterdam” and, contrary to the arbitrator’s finding, that partial possession of the whole of the Works had occurred – Anglo was not entitled to liquidated damages.

PARTIAL POSSESSION OR EARLY USE?

Just a brief review of the Impresa and Skanska cases shows why a Contractor should carefully consider the risk of not seeking to operate the clause 2.30 partial possession process when he has an opportunity to do so. It is not that Contractor’s consent to clause 2.5 ‘early use by the Employer’ necessarily lacks merit – it can of course generate valuable goodwill.

However, only clause 2.30 gives proportionate relief from liquidated damages whereas clause 2.5 does not give any such relief. In the example given, the Contractor went down the goodwill route. Commercial negotiation has come to nothing and the Contractor has referred the matter to adjudication. Will the Adjudicator decide that the Employer’s beneficial use was partial possession and the Contractor is not liable for £1m of liquidated damages? Or, will he decide that such use was early use and the Contractor is liable for £1m of liquidated damages?

SPECIAL MEASURES

In addition to the matter of liquidated damages, the Contractor (in the example given) spent an extra £500,000 during beneficial use on maintenance, utilities, fire wardens, restricted access routes and restricted working hours (“Special Measures”). He is seeking a decision from the Adjudicator on this matter too.

The Contractor claims that the Special Measures are a payable Change within the meaning given in clause 5.1.2 (impositions by the Employer). Alternatively, the Contractor claims that the Special Measures are payable as they are a Relevant Matter under Loss and Expense clause 4.21.5 (impediment, prevention or default by the Employer). The Employer strongly disagrees and says that the Contractor brought the Special Measures on himself by falling so far behind programme – noting the proviso in clause 4.21.5 “except to the extent caused or contributed . . . by the Contractor”.

Will the Adjudicator decide that clause 5.1.2 or clause 4.21.5, or neither, entitle the Contractor to payment of the £500,000 spent on Special Measures?

Although some situations can be more straightforward than others, it is always advisable for a Contractor to carefully consider the
particular circumstances and, before giving consent, to gain an understanding of the likely consequences. For example:

- What is the Employer asking you to consent to?
- Would it be clause 2.30 partial possession or clause 2.5 early use?
- Are there grounds for an extension of time?
- Would there be a real possibility of liquidated damages?
- Could it involve a Change under clause 5.1.2 (impositions by the Employer)?
- Could there be a likelihood of incurring loss and expense?
- Could there be acceleration whether or not provision 4 of Part 2 of JCT Schedule 2 applies?
- Is there a strategic working relationship to consider?

Taking this approach, the Contractor is more likely to take a route which achieves a sensible early commercial outcome, avoids formal dispute resolution and maintains strategic relationships.
MORE INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com

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