



Pinsent Masons

# **Dealing with Ground Condition Risks**

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## Roadmap for this evening



- Ground condition risks
- The allocation of risks
- Disputes relating to ground conditions
- Arguments to get around one-sided risk allocations
- Conclusions

## Why look at Ground Conditions Risks?



- Unforeseen ground conditions can have a major effect on time and cost of project
- Particular risk for civil engineering projects: large foot prints
- The risk is not insurable
- Often Employers carry out some site investigations but rarely full investigations
- Lack of accurate information at tender stage
- Quick tender periods: limit tenders' ability to assess risk
- Consequence either risk priced too high or too low

# Risk Allocation – general propositions



- Where should the allocation of risk fall ?
  - Those in the best position to bear the risk?
  - Those in the best position to understand the risk?
  - A person who can control the risk – but does not bear it – has little incentive to ensure the risk does not eventuate
  - What happens if neither party can control the risk ? Should the party with the greater ability to know about the risk take it?

# The allocation of Ground Condition Risk: outside Hong Kong



- The allocation of ground conditions risk is a matter for the contracting parties to decide
- Internationally
  - Most FIDIC forms place the risk of ground conditions on Employer
  - UK ICE form places the risk of ground conditions on Employer
  - NEC3 form places the risk of ground-conditions on Employer
- In China
  - The MOC form places the risk of ground conditions on Employer

# Allocation of Ground Condition Risk in Hong Kong



- Employers tend to allocate ground condition risk to contractors
- Most Hong Kong standard forms do the same
- Most tenders contain a site investigation (SI) but say, its not the Employer's liability
- Tender periods are short – therefore contractors
  - Fail to fully review the SI report
  - Have insufficient time to carry out any further site investigations
  - In practice tend to under price the risk

# Should Hong Kong employers consider altering standard risk allocation?



- Does the Hong Kong approach to risk allocation matter?
- What happens when a minor risk eventuates?
- What happens when a major risk eventuates?
- The risk of expensive disputes
- The risk/opportunity of reversing risk allocation

# Risk allocation is silence an answer?



- Silence may be an implied allocation to the Contractor (Nuttal –v- Lynton and Barnstaple Railway Co. [1899]).
- Unallocated risks tend to breed disputes
- Unallocated risks tend to open door to further legal arguments

## Reversing express risk allocation: warranty of accurate information



- Where a party provides information that other party to rely on in producing tender, they may be an implied warranty of accuracy.
- Bacal Construction (Midland) Ltd –v- Northampton Development Corporation [1975] sand and clay turns out to be rock.
- Employers try to exclude this warranty
- Such attempts not necessarily effective where information sufficiently important

# Reversing risk allocation: misrepresentation



- Misrepresentation
  - representation by other side pre contract
  - representation was factually wrong
  - party relied on representation to either contract
- Damages unless person making representation can show he had reasonable grounds to believe and did believe at time of contract, was true [Misrepresentation Ordinance]
- What if party could have checked?
- Excluding liability for misrepresentation: Section 4 of Misrepresentation Ordinance

# Reversing risk allocation: negligent misstatement



- How is negligent misstatement different from misrepresentation?
- Does the Employer owe tenders duty of skill and care in production of tender documents? Morrison-Knudsen International Co. Inc v Commonwealth of Australia (1972)

# Reversing risk allocation: deemed inspection



- “The Contractor shall be deemed to have examined and inspected the Site ... and its surroundings and to have satisfied himself, before submitting his Tender, as regards ..., the nature of the ground and sub-soil”
- What does deemed mean?
  - Rebuttable presumption?
  - Legal fiction?
- Linked to exclusion of liability
  - Needs clear wording
  - Contractor shall be deemed to have informed himself as to the site ...  
And any failure ... Shall not relieve him of responsibility
  - Reasonableness

# Reversing the risk allocation: frustration



- What is frustration?
- Can it apply here?
- What about mistake?
- Effect of risk allocation

# Reversing the risk allocation: impossibility



- Can you contract to do the impossible?
- The contractual impossibility clause
- The argument of the desperate? No, a contractual solution!
- Effect of impossibility – variation or relieved performance

# Reversing the risk allocation: impossibility



- What is impossibility?
  - Absolute physical impossibility
  - Legal impossibility
  - Commercial impossibility
- The relevance of the contractual framework and contract documents
- Impossibility does succeed

# Ground conditions risks: concluding thoughts



- Is traditional Hong Kong risk allocation in line with international best practice?
- Does it represent best solution for engineers?
- Does it represent best solution for employers?
- Government Design and Build 1999: an interesting development