NEIL KAPLAN 75: A Collection

The Legal Landscape of Cooperation: A Close Study of Jardine Engineering Corporation and Others v Shimizu Corporation

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I. LEGAL BACKGROUND & INTRODUCTION

Cooperation is an essential component in the successful performance of a construction project. The need for cooperation stems from the dynamic nature of the construction industry and the unpredictability of the issues that can arise on-site. Even the most meticulous negotiation and drafting of a contract may not clearly (or even expressly) allocate risk for the types of issues that arise. Thus in practice, the reasonable cooperation of commercial parties will often be the best way to mitigate the impact of unexpected issues when they arise. Conversely, the failure to cooperate can exacerbate losses, escalate to formal dispute proceedings, and may ultimately leave a project at a standstill. In an attempt to avoid these unfavourable scenarios, construction contracts will often expressly require the parties to act in accordance with a duty to reasonably cooperate with each other.[2]

Where parties fail to expressly provide for cooperation in the terms of contract these disputes are considered under other legal mechanisms. In subcontract relationships, this occurs through incorporation, construction of terms,[3] and perhaps most commonly, through the doctrine of implied terms.[4] These implied terms usually take the form of obliging cooperation or non-hindrance, meaning that they require the parties to take steps to facilitate the fulfilment of the contract or to not prevent its operation.[5] The approach to implying such terms into construction contracts remains sporadic.[6] Varying approaches and results pervade throughout different jurisdictions with one of the few points of consensus being the primacy of the parties' intentions.[7] A close study of individual judicial approaches to these disparities provides an opportunity to understand the competing logic at play.

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[2] Aidan Steensma, 'Implied Terms as to Prevention and Employer Delay in Construction Contracts' (2011) 1 *International Construction Law Review* 66.

[3] *Commonwealth Bank of Australia v Barker* [2014] HCA 32, [25] (French CJ, Bell & Keane JJ).

[4] *Davie v New Merton Board Mills Ltd* [1959] AC 604, 619 (Viscount Simonds).

[5] *Kenworth Engineering Ltd v Airport Authority* [2001] HKCFI 174 [54] (Kwan J).

[6] Steensma, above n 2.

[7] Ibid.

The spectrum of approaches to implied obligations of cooperation and non-hindrance generally occurs on three levels. First, whether an implied term of cooperation may be implied into a contract. Second, the manner in which that implication is to be made and third, the expression of that term. The first level is the one of most consistency as it is largely accepted that a requirement of cooperation or non-hindrance may be implied into a contract.[8] While one commentator notes that there are some critics of such an approach, concerned that, 'to imply a term requiring cooperation generally, with respect to all matters touching the contract, may go beyond what the parties had intended', the weight of authority suggests a general support for the implication of some form of cooperation.[9]

It is the second level, the dichotomy between implying an obligation in fact or law, where views begin to diverge. Terms implied in fact arise from the circumstances of the parties and are subject to the well-considered *BP Refinery Test,* requiring:

> (1) the term be reasonable and equitable, (2) it be necessary to give business efficacy to the contract, (3) it be obvious, (4) be capable of being clearly expressed and (5) it must not stand in opposition to any express term of the contract.[10]

By contrast, terms implied in law apply to all contracts of a particular class and are not subject to the requirements of business efficacy and obviousness.[11] However, there is limited consensus on whether implied terms of cooperation or non-hindrance are to be implied in fact or law.[12] This is problematic as it is unclear whether these terms are subject to the requirements of business efficacy and obviousness or if they are merely to be implied unless the parties' intentions indicate otherwise. This lack of clarity also creates confusion as to the precedential value of analogous cases for the purposes of implication. This is because when implying terms in fact there is little scope for considerations beyond the facts at hand.[13]

This uncertainty persists on the third level where the expression of an obligation of cooperation or non-hindrance is similarly unclear. Here there is inconsistency in authority as to whether an obligation of non-hindrance can be extended to an obligation to complete a task expeditiously.[14] While some authorities allow such an approach, others are more hesitant, finding such an implication to extend beyond the intentions of the parties.[15] Further, it is questionable, particularly in the case of sub-contract relationships,

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[8] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 (Vinelott J).

[9] Steensma above n 2; *see Mackay v Dick* (1881) 6 App Cas 251 (Lord Selbourne).

[10] *BP Refinery (Westernport*) *v President, Councillors and Ratepayers of the Shire of Hastings* [1977] 16 ALR 363, 376 (Lord Simon).

[11] *Forefront Medical Technology (Pte) Ltd v Modern-Pak Private Ltd* [2006] 1 SLR 927 [42] - [44] (Leong J).

[12] Steensma above n 2.

[13] Julian Bailey, *Construction Law Volume I* (Informa Law by Routledge, 2nd ed, 2016) 191; *Knight v The Gravesend and Milton Waterworks Co* (1857) 2 H&N 6.

[14] see Julian Bailey, *Construction Law Volume I* (Informa Law by Routledge, 2nd ed, 2016) 213.

[15] Ibid.

whether a lack of cooperation due to circumstances beyond a parties control falls within the ambit of such an implied term.[16] These ambiguities result in implied obligations of cooperation taking on a myriad of forms, as illustrated in *Scottish Power v Kvaerner Construction Regions,* where an obligation to cooperate, provide appropriate information and not-hinder were all implied into the same contract.[17]

With these different strands of legal approach in mind, this commentary's purpose is to evaluate the approach of Neil Kaplan to these controversial issues. It is in celebration of Neil Kaplan's 75th Birthday that I have the pleasure of providing this commentary on his 1992 decision of *Jardine Engineering Corporation Ltd & Ors v Shimizu Corp* ('*Jardine*').[18] Neil has contributed immensely to the development of the law over the course of his distinguished career as an advocate, a judge, an arbitrator, and a member of innumerable professional organizations. The significance of Hong Kong to the international arbitration world is a testament partly to his diligence, having been championed on a number of occasions as "the father of arbitration in Hong Kong".[19]

Jardine concerned the payment of damages to subcontractors delayed by no fault of their own. Within the judgment Kaplan deftly approached a number of the aforementioned controversial issues, including the incorporation of terms between independent free standing contracts, the implication of terms from a standard form contract and the implication of a duty not to prevent in circumstances where a party was in involuntary breach. *Jardine* therefore provides a useful waypoint from which we may view the wider legal approach to incorporation and implying terms in the context of obligations of cooperation.

II. CONTEXT OF THE DISPUTE

a. Factual Background

The case involved a main contract between the defendant, Shimizu Corporation and the Hong Kong Government for the construction of extensions and improvements to the Queen Mary Hospital.[20] It was a government standard form contract entered into on 13 May 1985,[21] and the work involved the erection of two buildings (Blocks J & K) and associated infrastructure across four contractually stipulated phases.

The main contract reserved specialist trades and building services to be performed by nominated subcontractors. The defendant was to instruct these subcontractors. The government solicited offers from

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[16] Steensma above n 2.

[17] *Scottish Power PLC v Kvaerner Construction (Regions) Ltd* 1999 SLT 721 (Lord McFadyen); Steensma above n 2.

[18] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271 (Kaplan J).

[19] see Chiann Bao and Felix Lautenschlager (eds.), *Arbitrators' Insights – Essays in Honour of Neil Kaplan*, Sweet & Maxwell 2012, 17; Vince Chong, "The Father of Hong Kong Arbitration", *The Hong Kong Lawyer*, December 2012, 15-24.

[20] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 274 (Kaplan J).

[21] *Standard Government Articles of Agreement and General Conditions of Contract for Architectural Works* (1977 Ed).

those subcontractors willing to enter into a subcontract using the *Building Development Department's* standard form contract,[22] and instructed the defendant to enter into a subcontract under these terms. Thus, the defendant entered into four subcontracts, each subcontractor being a plaintiff to the case, of which Jardine Engineering Corporation was the first.[23] They were required to execute work in phases 2 and 3 of the project. The Hong Kong Government, through their architect, had granted the defendant time extensions under the main contract due to a number of issues including, water seepage, additional drainage work and inclement weather. These time extensions had been passed on by the defendant to each of the subcontractors. In accordance with the time extensions, phase 2 was completed on 31 March 1989, 339 days later than originally specified, while phase 3 was completed on 20 January 1991, 726 days later than originally specified.

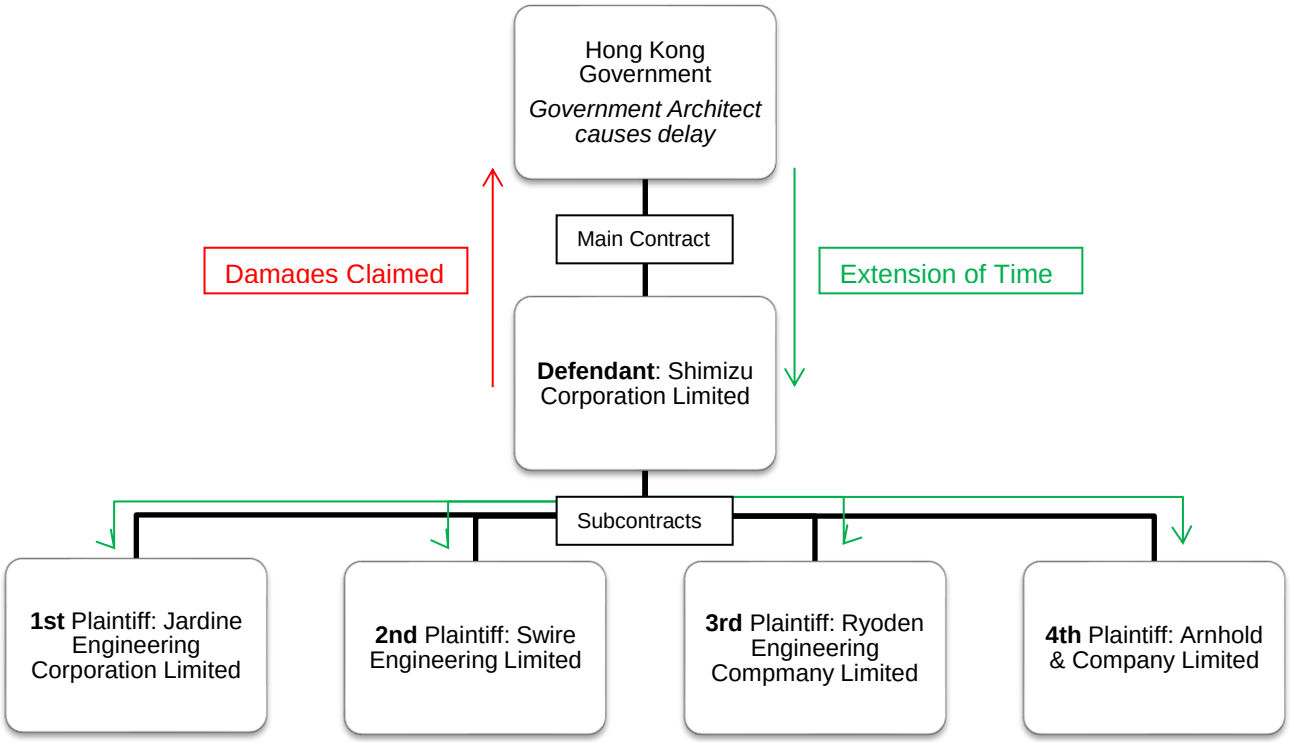

Figure 1.1: *Relationship Between Parties*

b. Declarations Sought and Procedure

The plaintiffs sought seven declarations based on a range of facts. Generally, the declarations were that they were entitled to damages arising from extensions of time granted under the main contract and

[22] *Standard Form of Nominated Sub-contract* (1978 Ed).

[23] The four plaintiffs within the dispute were, Jardine Engineering Corporation Ltd, Swire Engineering Ltd, Ryoden Engineering Company Ltd and Arnhold & Company Ltd.

passed through to each of the plaintiffs.[24] Significantly, these declarations were confined to only those situations where the defendant could pass their costs on to Hong Kong Government.[25] Further, the plaintiffs had already referred their claims to arbitration at the date of the judgment. However, in the interest of expediting the arbitral proceedings and saving time and costs, these seven declarations were referred to the Hong Kong High Court to resolve the outstanding legal issues. Later in the judgment, Kaplan noted that the Tribunal would likely be presented with disputes beyond the factual scope of the seven declarations, and therefore would not be bound by his decision.[26] However, he trusted that the Tribunal would follow the spirit of the judgment.[27]

This case's success can therefore be largely attributed to the cooperation of each of the parties. As Kaplan later noted in his 1993 judgment as to costs, had it not been for the defendant's restraint from ordering a stay in proceedings and the consensus agreement on the facts, this expedited process would not have been possible.[28] The Hong Kong Government did not provide the same level of cooperation as despite having a significant interest in the dispute, as the other party to the main contract, it refused an invitation to participate.[29] This appears to have been a missed opportunity to partake in proceedings of direct relevancy to the Government and to provide submissions of the other main contractor's position. Regardless, the course of proceedings highlights the efficiency with which disputes can be resolved when engaged with in a cooperative manner.

c. Issues

First, between the parties it was no issue that clause 76 of the main contract allowed the defendant to claim for compensation against the Hong Kong Government for expenses incurred in the delay. This clause provided that the defendant would be compensated for:

> '…direct loss and/or expense for which he would not be reimbursed by a payment made under any other provision in the contract by reason of the regular process of the works or part thereof having been materially affected by…' relevantly 'late instructions, delay by others engaged by the government or late delivery of material or plant.'[30]

However, there was no such clause in the standard form subcontracts between the defendant and the subcontractors. The central issue was therefore whether a nominated subcontractor could claim

[24] A full outline of the material facts of each declaration can be found in: *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 274-301 (Kaplan J).

[25] Ibid 312.

[26] Ibid 315.

[27] Ibid 277, 315.

[28] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1993] HKEC 162 (Kaplan J).

[29] Ibid.

[30] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 301 (Kaplan J).

compensation against the main contractor, in addition to an extension of time for a delay that was not the main contractor's fault.[31]

The plaintiffs made three submissions to fill this lacuna within the subcontract. First, they submitted that several clauses within the main contract and subcontract could be construed as providing for compensation to the subcontractor.[32] Second, they submitted that Clause 76 of the main contract between the Hong Kong Government and the defendant could be incorporated into the subcontract.[33] Third, they submitted that implied terms of the contract gave rise to their rights to compensation.[34]

III. CONSTRUING AND INCORPORATING TERMS

a. Construing Terms

In their first argument, the plaintiffs' attempted to construe clauses 10 and 72 of the main contract as providing for compensation from the Government to the subcontractor.[35] Clause 10 of the main contract provided that the price for the works under the subcontracts would be determined by the sum named within the contract or by variations to the work made by the Government Architect.[36] Under clause 72, the Government Architect was empowered to make changes to the quantity, quality or kind of work, execute additional work, change dimensions, or omit work.[37] Thus, the plaintiffs argued that where the Architect provided an instruction that did not directly vary the works but changed the circumstances in which they were to be completed, it could be valued under clause 10. Kaplan, in looking towards the parties' intentions that the contracts be freestanding, rejected such a strained interpretation,[38] and did so in relation to a number of other clauses that the plaintiffs' argued to have the same effect.[39]

Kaplan's approach to this question employed the usual judicial pragmatism of prioritising parties' intentions in contractual arrangements and maintaining the greater freedom of contract enjoyed by parties to an agreement. A key factor in his decision was the importance of providing commercial certainty to contractors in the region. In this consideration, Kaplan was unapologetic in his dismissal of the plaintiffs' argument that either the main contract or the subcontract can be construed as providing compensation for

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[31] Ibid 301.

[32] Ibid.

[33] Ibid 302.

[34] Ibid 306-312.

[35] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 303 (Kaplan J).

[36] Ibid 302.

[37] Ibid.

[38] Ibid.

[39] Attempts were made to construe clauses 73(1), 75(5), 90(2)(a) & 97 as similarly providing for compensation to the plaintiffs.

subcontractors, noting that the contracts are 'free-standing' and not that of a typical 'back-to-back' nature.[40] Thus, his hesitancy to construe either the main contract or subcontract as filling this lacuna, in the absence of plain intention, highlights the significance of the conscious decision by commercial parties that the contracts be independent.[41]

b. Incorporating Terms

The next issue concerned an area of some legal ambiguity, whether a clause providing for compensation could be incorporated from the main contract into the subcontract. Throughout his analysis, Kaplan emphasised the bearing of intention upon incorporation,[42] again drawing on the 'free standing nature' of the two respective agreements and being wary of setting a 'dangerous precedent' of allowing incorporation between these contracts.[43] He recognised the commercial danger of such an incorporation; 'if I held it to be permissible to incorporate some main contract terms into the subcontract, why should not others be so incorporated if appropriate?'[44] Thus, Kaplan's decision has been cited for the principle that where obligations from a main contract are to be incorporated into a free standing subcontract, it will usually be a requisite that they be done so expressly.[45] This highlights the important factual distinction between *Jardine,* in which there was no express intention to incorporate between free standing contracts, and a back-to-back contract situation. In the latter, the intention to incorporate is plainly laid out by virtue of the subcontracts' direct reflection of the main contract's terms, or by an explicit statement that the contracts are 'back-to-back.[46] Kaplan's drawing of a distinction between these two scenarios properly preserved the principles underlying the incorporation of contractual terms, without unduly expanding them at the expense of commercial certainty.

IV. IMPLIED TERMS

The case in Kaplan's eyes, predominantly turned on the doctrine of implied terms, which was the issue of most legal complexity. Kaplan again adopted a measured approach, achieving what is the 'logical outcome' in the case, while resisting the temptation to unnecessarily expand this body of legal principles. In affirming the largely uncontroversial test of *BP Refinery,* Kaplan first addresses the dichotomy between terms implied in fact or law, appreciating that the situations in which terms may be implied are shades on

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[40] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 303 (Kaplan J).

[41] Julian Bailey, *Construction Law Volume III* (Informa Law by Routledge, 2nd ed, 2016) 1522.

[42] Ambiguity and general terminology may be insufficient for an incorporation*; see The Annefield* [1971] 1 Lloyds Rep 1 (Denning, Phillimore & Cairns LJJ); *See also Aughton v MF Kent Services* (1991) 57 BLR 1 (Gibson & Megaw LJJ).

[43] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 304 (Kaplan J).

[44] Ibid.

[45] Julian Bailey, *Construction Law Volume III* (Informa Law by Routledge, 2nd ed, 2016) 1520.

[46] *Tridant Engineering Corporation Limited v Mansion Holdings Ltd* [2000] HKCF 1, [17] (To J).

'a continuous spectrum.'[47] From the commencement of his analysis Kaplan appears to approach the implication as requiring terms implied by law, likening this case to Lord Wilberforce's 'fourth category' wherein the Court is seeking to find 'what the contract is' where terms are not fully stated', as opposed to implying terms in fact.[48] Thus, Kaplan appears to favour Lord Wilberforce's approach in *London Borough of Merton v Leach* as finding a non-hindrance obligation to be implied in law and therefore not subject to the test of business efficacy, over other English authority.[49]

Having established his position on the manner of implication, albeit with some later references to business efficacy,[50] Kaplan turns to approach to the conundrum of implying terms into standard form contracts. Here, his approach established a narrow set of circumstances where terms may be implied.[51] This reflects a necessary balance between ensuring relief in circumstances where implied terms are plainly required, and the reality that standard form contracts should contemplate a wide breadth of scenarios.[52] Kaplan appeared to largely mirror Aickin J's reasoning in the seminal Australian contract case, *Codelfa Constructions Pty Ltd*, that while the existence of a standard form contract narrows the potential for existence of unexpressed terms, it does not entirely prevent the possibility.[53] In doing so, Kaplan noted the UK authority of *Chandler,* in which implied terms within a subcontract were prevented by their presence in the main-contract, as their presence alone indicated that they could not be said to have remained unconsidered by the parties. This, he found, was distinguishable as a finding on the facts and in any event did not indicate 'that a term can *never* default be implied into a standard form contract.'[54] Following from this, Kaplan noted the English authority of *Neodox v Swinton and Pendelbury,* in which a term obliging cooperation in the form of the provision of instructions was implied into a standard form contract.[55] Kaplan therefore found that the principles of implied terms that pertain to negotiated contracts pertain to standard form contracts, however, in narrower circumstances.[56] He further ensured that this

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[47] *See* BP *Refinery (Westernport) v President, Councillors and Ratepayers of the Shire of Hastings* [1977] 16 ALR 363 (Lord Simon); *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 307 (Kaplan J).

[48] *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 (Vinelott J).

[49] *Livepool City Council v Irwin* [1977] AC 239 (Lord Wilberforce); *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 (Vinelott J); *contrast with BP Refinery (Westernport) v President, Councilors and Ratepayers of the Shire of Hastings* (1978) 52 AJLR 20 (Lord Simon).

[50] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 306-307 (Kaplan J).

[51] Ibid 306.

[52] Such logic is similarly reflected in: *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 346 (Mason J), 374 - 375 (Aickin J); *See also University of Glasgow v Whitfield* (1988) 42 BLR 6; Julian Bailey, *Construction Law Volume III* (Informa Law by Routledge, 2nd ed, 2016) 1520.

[53] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337. 374 [13] (Aickin J); *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 309 (Kaplan J).

[54] *Chandler Bros Ltd v Boswell* (1936) 3, 6 All ER 179, 182 (Greer LJ).

[55] *Neodox v Swinton and Pendelbury Borough Council Default* (1958) 5 BLR 34, 41 (Diplock J).

[56] Arthur McInnis, *NEC: A Legal Commentary* (Thomas Telford, 2001) 80; *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 310 (Kaplan J).

narrow exception is not exploited in practice as he paralleled the logic of Mason J in *Codelfa* and highlighted that in the case of implying terms into standard form contracts, the breadth of issues considered by the parties would make it less likely that any novel issue raised would lend itself to swift unanimous agreement on an approach.[57]

Thus, in turning to the application of principle, the plaintiffs presented Kaplan with five potential implied terms. The defendant, who warned against a re-allocation of financial risk, disputed these terms.[58]

> Implied Term A
>
> That the contractor should pay the subcontractor any expense or loss which the subcontractor should reasonably have incurred in complying with or occasioned by an institution issued under cl 9(B) of the subcontract.
>
> Implied Term B
>
> That the subcontractor should have equivalent rights to payment for complying with or as a consequence of an architect's instruction or other event as the contractor has under the main contract.
>
> Implied Term C
>
> That if the progress or completion of the subcontract works was materially affected by the architect not having issued an instruction at a time reasonable in all circumstances, then the subcontractor shall be entitled to recover any expense or loss reasonably incurred or caused thereby to which he would not otherwise be reimbursed under the subcontract.
>
> Implied Term D
>
> That the contractor should pay or indemnify the subcontractor against any expense or loss which the subcontractor should reasonably have incurred by reason of any breach of the main contract by the government, if and to the extent such loss and expense is not otherwise recoverable from the contractor under the subcontract.
>
> Implied Term E
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> That the contractor should not hinder or prevent the subcontractor from carrying out the subcontract works with due expedition, economically and in accordance with the subcontract.[59]

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[57] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 310 (Kaplan J); *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 356 (Mason J).

[58] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 307 (Kaplan J).

[59] Ibid 305.

Ultimately, Kaplan accepted implied term E, based on the *Mackay v Dick* default, implying a duty not to prevent.[60] The implication of similar terms to implied term E has occurred multiple times since in the jurisdiction,[61] and has been described as 'not unusual in a construction contract.'[62] Here Kaplan appears to be motivated by the potential absurdity of finding that within the sub-contract it was intended that the defendants be indemnified for a delay but not the plaintiffs.[63] However, in implying the term Kaplan adjusted its wording, removing the words 'due expedition' and 'economically' so that it now read:

> That the contractor should not hinder of prevent the subcontractor from carrying out the subcontract works in accordance with the subcontract.[64]

The decision to omit this wording is an important one reflecting a more 'conservative approach,' as Kaplan highlighted 'the time for performance is that provided for by the contract provisions and nothing else.'[65] Kaplan therefore appears to implicitly reject the proposition that an implied duty to prevent should be extended to executing works in a regular and orderly way.[66] Thus Kaplan appears to confirm, in accordance with earlier authorities, that such a duty not to prevent is implied in law, rather than fact.[67] However, in failing a further implication of ‘due expedition’ on the basis that it could not be said to be required for business efficacy, Kaplan implicitly finds that to go beyond a duty to not prevent and require ‘regular and orderly’ performance requires consideration of the circumstances at hand. Thus, in the current case, where it would have been incongruous and difficult to assert that the parties intended there be an additional obligation of orderly completion of work beyond that of the contractual deadlines, such a term cannot be implied.

Further, in addressing implied term E in the context of cooperation, Kaplan correctly notes that there is nothing in *Luxor (Eastborne) Ltd v Cooper,* preventing term E being implied.[68] *Luxor* held that obligations, which could be fulfilled independent of the cooperation of the other party, could not come within the ambit of an obligation of cooperation.[69] However, Kaplan is correct to not apply that principle in an unduly wide

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[60] *Mackay v Dick* (1881) 6 App Cas 251 (Lord Selbourne).

[61] *Greatworth Industrial Ltd v Chevalier (Construction) Co Ltd* [2005] HKEC 2136, [45] - [46] (Muttrie J).

[62] *Kenworth Engineering Ltd v Airport Authority* [2002] HKEC 42, [54] (Kwan J).

[63] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 311 (Kaplan J); *see also Shell (UK) Ltd v Lostock Garage Ltd* [1977] 1 All ER 481 (Denning, Ormond & Bridge LJJ).

[64] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 314 (Kaplan J).

[65] Ibid.

[66] Steensma above n 2; *contrast with: Allridge (Builders) Ltd v Grand Actual Ltd* (1997) 55 Con LR 91, [121] (Hicks J).

[67] *Rosehaugh Stonehope (Broadgate Phase 6) plc v Redpath Dorman Long Ltd* (1990) 50 BLR 69 (Nourse, Stocker & Bingham LJJ).

[68] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 314 (Kaplan J); *Luxor v Eastborne* [1941] AC 108 (Lord Romer).

[69] *Luxor v Eastborne* [1941] AC 108, 154 (Lord Romer).

manner, as on the facts it was apparent that under the main contract the government architect had full control over the time of completion of the contract.

Kaplan similarly rejected implied terms B and D, both of which directly entitled the plaintiffs to gain compensation from the government. The plaintiff had submitted that these were the implications of the most administrative ease and indeed they had the same practical effect as implied term E. However, again Kaplan found that there were no grounds to find these terms as necessary for the business efficacy of the contract.[70] Without them the contract would still operate, 'albeit to the prejudice of the plaintiffs.'[71] While Kaplan considered both terms reasonable, he adhered to earlier English authority in requiring more than mere reasonableness to imply in fact.[72] Thus, it is clear in discerning the appropriate implied term, Kaplan turned his mind to ensuring he avoided a 'strained interpretation of the contract', noting that the mere fact a particular finding may be more administratively convenient was 'wholly irrelevant.'[73] He focussed, instead, upon a result to be achieved by conventional means, preferring to consider an involuntary breach under implied term E, over a re-allocation of financial risk in implied terms B and D.[74]

V. BREACH OF IMPLIED TERM E

> That the contractor should not hinder of prevent the subcontractor from carrying out the subcontract works in accordance with the subcontract.[75]

Utilising implied term E, the defendant was held to be ‘strictly liable’ under each of the declarations with the exception of declaration 7(d) where the facts remained in contention.[76] However, Kaplan notes that under the terms of the declaration this strict liability only extended to the extent that the defendant was able to pass its costs on to the government through the main contract.[77] Contrary to the approach of several other authorities, which restricted the breach to voluntary conduct,[78] neither the fact that the breach was involuntary nor the fact that an extension of time was granted was held to exclude breach under implied term E.[79] In making this evaluation, Kaplan confined himself to consideration of the facts at

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[70] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 312 (Kaplan J).

[71] Ibid.

[72] *Liverpool City Council v Irwin* [1977] AC 239 (Lord Wilberforce).

[73] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 312 (Kaplan J).

[74] Ibid.

[75] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 314 (Kaplan J).

[76] Steensma above n 2.

[77] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 314 (Kaplan J).

[78] *Downer Connect Pty Ltd v McConnell Dowell Constructers (Aust) Pty Ltd* [2008] VSC 443, [23] (Harper J); *Ductform Ventilation (Fife) Ltd v Andrews-Weatherfoil Ltd* (1995) SLT 88 (CSOH); *Scottish Power PLC v Kvaerner Construction (Regions) Ltd* 1999 SLT 721 (Lord McFayden).

[79] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 314-315 (Kaplan J).

hand, implicitly acknowledging that this is an evaluation based solely on the circumstances before him.[80] Kaplan noted that there was nothing in the subcontract to suggest an interpretation to the contrary. Kaplan therefore held that there was a breach by the defendant in deprivation of the time provided to the plaintiffs to execute and complete the works under the main contract[81]. Here, in line with the decision of *Wells,* it could not be said that the damage was entirely remedied by an extension of time as regardless of the length of the project, the associated costs were extended.[82] Kaplan's use of this path to find in favour of the plaintiffs was sensible and clearly to be preferred. It aligned with the parties' intentions, did not engage any clear legal barriers, and unlike many of the other propositions put forward by the plaintiffs, did not involve a circumvention of the main contract's mechanisms.[83]

VI. CONCLUSION

A close study of *Jardine* therefore reflects Kaplan's sound approach to areas of significant legal controversy. While many of the areas discussed, including incorporation in standard form contracts and implied terms in the context of cooperation are far from settled law, Kaplan's findings provide a useful base for a deeper understanding of these areas. Ultimately, the direct significance of Kaplan's 1992 judgment can be seen in the declarations upon which the parties settled, annexed to Kaplan's 1993 judgment as to costs.[84] Further, there is no doubt that the judgment's legal clarity has assisted tribunals and courts alike with those construction disputes arising from 'time to time.'[85] Kaplan's restraint in approaching the two free standing contracts reflects a commitment to the parties manifested intentions without diminishing the commercial certainty that parties expect when negotiating and concluding separate (albeit concurrent) contracts. Such a trait is no doubt of value to many contractors in the region. However, as was noted by Counsel for the plaintiffs' pithy example of the officious bystander test, a finding that the plaintiffs were prevented from recovery was at face value seemingly illogical.

> Bystander: What is to happen if the sub-contract works are held up due to a lack of instruction from the Architect?
>
> Defendant: We get paid - you do not.
>
> Plaintiffs: You must be joking[86]

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[80] *Scottish Power PLC v Kvaerner Construction (Regions) Ltd* 1999 SLT 721 (Lord McFayden); *see also* Gareth Parry & Scott Johnston, *Scottish Engineering Contracts* (Thomas Telford 2003), 151.

[81] Ibid 314.

[82] Ibid; *Wells v Army and Navy Co-Operative Stores Ltd* (1903) *Hudsons Building Cases 354* (Vaughan Williams LJ).

[83] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 315 (Kaplan J).

[84] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1993] HKEC 162 (Kaplan J).

[85] *Jardine Engineering Corporation Ltd & Ors v Shimizu Corporation* [1992] 2 HKC 271, 274 (Kaplan J).

[86] Ibid 311.

Kaplan therefore avoids this illogicality through a sound approach in implying a duty not to prevent.[87] In doing this Kaplan has made valuable contributions as a waypoint for consideration of several areas of legal controversy, particularly the doctrine of implied terms in the context of cooperation.

[87] Ibid 313–314.