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# Construction life-cycle's execution phase - How to ensure performance under a construction contract

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# Common Construction Disputes

- **Variation**
- **Valuation of Variations**
- **Defects**
- **Extension of Time Claims**
- **Liquidated Damages**

# Common Construction Disputes

- **Claims under Common Law**
- **Claims for Loss and Expense**
- **Quantum Meruit Claims**
- **Demonstrating and Presenting Claims**

# Variation

## What is a Variation?

- *Dictionary*
  - *"Any change to the works as detailed or described in the contract documents."*
    - *Engineering Contract Dictionary*
  - *"Alterations, additions or omissions in work, materials, working hours, work space, etc."*
    - *Building Contract Dictionary*

- A valid variation cannot change the scope or nature of the works to be executed
  - *Blue Circle Industries PLC v Holland Dredging Company (U.K.) Ltd. (1987) 37 BLR 40*

Held: Construction of an island was not a valid variation to the works, it was wholly outside the scope of the original contract.

- Sometimes, defined in the Contract itself
  - HK Private Standard Form of Building Contract (2005 Edition):
    - “(i) an alteration to the type, standard or quality of any of the materials or goods comprising the Works;*
    - (ii) The addition, substitution or omission of work; and*
    - (iii) The removal from the Site of materials or goods and the demolition and removal of work except where provided for in the Contract or where the materials, goods or work are not in accordance with clause 8.1;*



*Or the imposition of an obligation or restriction instructed by the Architect regarding:*

- (iv) access to the Site or use of any parts of the Site;*
- (v) limitation of working space;*
- (vi) limitation of working hours; or*
- (vii) the sequence of carrying out or completing work;*

*or the addition or alteration to or omission of such obligations or restrictions imposed by the Contract."*

- Government's General Conditions of Contract for Building Works (1999 Edition):

*"Such variations may include:*

- (a) additions, omissions, substitutions, alterations, changes in quality, form, character, kind, position, dimension, level or line;*
- (b) Changes to any sequence, method or timing of construction specified in the Contract; and*
- (c) Changes to the Site or entrance to an exit from the Site."*

- Clause 1.1.74 of the MTRC Conditions of Contract for Civil Engineering and Building Works Construction (98 edition):

*"...any changes in or modification to the works or any part thereof..."*



# Conclusion

- no one definition
- depend on the express provisions of the contract in each case and the type of work being executed

# Valuation Principles

- Common construction contracts used in Hong Kong provide for 3 valuation rules:
  - (i) apply BQ rate if work is of similar character and executed under similar conditions;
  - (ii) where work not executed under similar conditions, apply a rate derived from work of similar character; and
  - (iii) when the first two valuation rules cannot apply, a fair valuation should be made.

# Valuing Variation

## Binding Contract Rates

**Are the parties bound by the rates where they are very high or very low?**

- problem - where the rate is very high or very low or as a result of error.
- how should the quantity surveyor or engineer value the works?



- *Dudley Corporation -v- Parsons and Morrin Ltd (1959) CA, 8 April*

BQ: 750 yard<sup>3</sup> - £1.2/yard<sup>3</sup>

Output: 2,230 yard<sup>3</sup>

Engineer: 750 yard<sup>3</sup> at £1.2/yard<sup>3</sup>

1,480 yard<sup>3</sup> at £24/yard<sup>3</sup>

Held: (CA) Engineer was wrong. In such circumstances the rate in the Bills of Quantities must be used, even if it is unrealistically low.



- *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd 2000 BLR*

- ICE Clause 52(1)(b) -

*"Where works is not of a similar character or is not executed under similar conditions... the rates and prices in the bill of quantities shall be used as the basis of valuation so far as may be reasonable failing which a fair valuation shall be made." (similar to HK Government GCC Clause 61(c))*

concerns reasonableness of **using** the rates and prices in the bills for the works in question, **not** the reasonableness of those prices or rates themselves.



- ICE Clause 55(2) -

*"Provided that there shall be no rectification of any error, omission or wrong estimate in any description of rate inserted by the Contractor in the Bills of Quantities." (similar to HK Government GCC Clause 59(3))*

- effect: make the rates immutable and not subject to correction and it bound both parties equally.

- *Aldi Stores Ltd v Galliford (2000)*

Polluted material      £44.6/m<sup>3</sup>

Unpolluted material   £8.5/m<sup>3</sup>

Arbitrator:    £44.6m<sup>3</sup> - £8.5m<sup>3</sup> = £36.1m<sup>3</sup>

The Judge viewed that arbitrator had arrived at a 'fair valuation' of the additional work.

The question was, whether the arbitrator had made findings of fact to support his approach.

- Held (CA): No finding that the circumstances and conditions under which additional work had been carried out had changed/that the BQ rate had been affected by any significant increase in quantities. Therefore no basis for arbitrator to depart from the contract rates.

# Conclusion

Where express provisions so provide, both parties are bound by the rates contained in their contract for the valuation of variations or re-measurable work regardless of whether those rates are 'unreasonably high' or 'unreasonably low' or even based on a mistake.

# What is a fair valuation?

*Weldon Plant Limited v The Commissioner for New Towns (2000) BLR.*

- Question of Law to Appeal:

“Whether on the facts found by the arbitrator, Clause 52(1)(b) of the ICE Conditions permits a fair valuation to be made which excludes [profit and] an allowance for overheads on the basis that the contractor has to establish that it either incurred additional overheads or that it was denied overhead recovery.”

- For Fair Valuation within the meaning of Clause 52, contractor should be paid its profit on the costs of deploying its resources and obtain a contribution from the costs of the business it undertakes towards its fixed/running overheads.
- Unlike time-related overheads, it is not necessary to prove that they have actually incurred.
- Clause 52 is intended to secure that Contractor should not lose as a result of having to execute a variation.
- Held: The contractor will be able to recover in a valuation of a variation, those elements included in the contract rates or prices for overheads and profit.



# Conclusion

- Where unreasonably high or unreasonably low rates are incorporated into a construction contract, both parties are bound by those rates regardless as to whether such are the result of an error or mistake.
- In the absence of any other compensatory provisions, a fair valuation under a construction contract is intended to compensate the contractor for any adverse financial effect upon it resulting from the variation. This may include taking account of genuine claims from sub-contractors for which the main contractor is liable as a result of the variation. A fair valuation should include allowances for overheads and profit.

# Common Construction Disputes

- **Defects**
- **Extension of time claims**
- **Liquidated damages**



# Defects

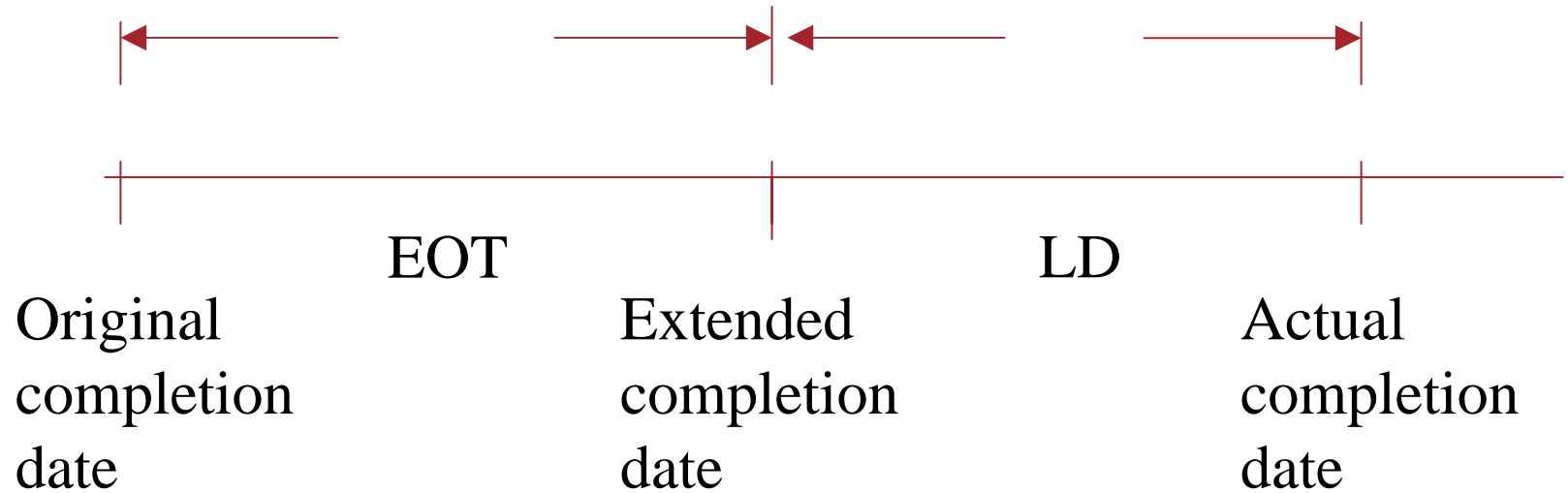
## Types

- Patent defects
- More litigious:
  - Poor design or improper execution
  - Minor defects used as a reason (or excuse) to withhold payment
  - "Latent" defects (beware of the limitation periods)

# Defects – Measure of damages

- Cost of reinstatement / make good
- Exception - *Ruxley Electronics v Forsyth*
  - unreasonable to award damages based on the cost of reinstatement of the pool
  - Disproportionate to the benefit to be obtained
  - No diminution in value
  - Entitled to [reasonable] damages in the sum of £2,500, not £21,560

# Typical construction project showing the relationship between EOT and LD



# Extension of Time

- Contract administrator assesses EOT
- EOT is a defence to pay LD for delay
- Two distinct purposes:
  - (a) Contractor benefits (e.g. if delay by neutral causes, force majeure)
  - (b) Protect the Employer against delays for which he is partly responsible

# Extension of Time

- EOT provisions only comes into play when the delayed work affects the critical path
- Common approaches:
  - (a) An exhaustive list of events qualifying for an EOT [1986 standard private form]
  - (b) A 'cover all' phrase e.g. 'reasons beyond the control of the Contractor'
  - (c) Combination of (a) + (b)
- EOT and LD provisions will be construed contra proferentem against the Employer
  - *Peak Construction v. McKinney Foundations (1970) 1 BLR 111*



50. (1) (a) As soon as practicable but in any event within 28 days after the cause of any delay to the progress of the Works or any Section thereof has arisen, the Contractor shall give notice in writing to the Architect of the cause and probable extent of the delay.

Provided that as soon as the Contractor can reasonably foresee that any order or instruction issued by the Architect is likely to cause a delay to the progress of the Works or any Section thereof the Contractor shall forthwith give notice in writing to the Architect and specify the probable effect and extent of such delay. Such notice shall not in any event be given later than 28 days after the Architect has issued the relevant order or instruction.

- (b) If in the opinion of the Architect the cause of the delay is:
- (i) inclement weather and/or its consequences adversely affecting the progress of the Works, or
  - (ii) the hoisting of tropical cyclone warning signal No. 8 or above, or
  - (iia) a Black Rainstorm Warning, or
  - (iii) an instruction issued by the Architect under Clause 5, or
  - (iv) a variation ordered under Clause 60, or
  - (v) a substantial increase in the quantity of any item of work included in the Contract not resulting from any error in firm quantities or from a variation ordered under Clause 60, or
  - (vi) the Contractor not being given possession of the Site or any Portion or part thereof in accordance with the Contract or is subsequently deprived of it by the Employer, or

- (viii) the Architect suspending the Works in accordance with Clause 54 in so far as the suspension is not occasioned by the circumstances described in Clause 54(2)(a) to (d), or
- (ix) any utility undertaking or other duly constituted authority failing to commence or to carry out in due time any work directly affecting the execution of the Works, provided that the Contractor has taken all practical steps to cause the utility undertaking or duly constituted authority to commence or to proceed with such work, or
- (x) delay on the part of any Nominated Sub-contractor for any reason specified in sub-clause (b)(i) to (ix) of this Clause and which the Contractor has taken all reasonable steps to avoid or reduce, or
- (xi) any special circumstance of any kind whatsoever,

then the Architect shall within a reasonable time consider whether the Contractor is fairly entitled to an extension of time for the completion of the Works or any Section thereof.

- (c) Notwithstanding the powers of the Architect under the provisions of this Clause to decide whether the Contractor is fairly entitled to an extension of time the Contractor shall not be entitled to an extension of time for the completion of the Works or any Section thereof if the cause of the delay is:

# Extension of Time

**Table 1**

Contractor's duty for successful EOT claim	HKIA Form	Government Form
Written application by the Contractor to the Architect	✓	✓
As soon as practicable but in any event within 28 days		
<ul style="list-style-type: none"> <li>• of the commencement of an event <b>likely to cause</b> delay or when it becomes apparent</li> <li>• <b>after the cause of delay has arisen</b></li> </ul>	✓	✓
Completion of the works beyond the completion date	✓	✓
One or more of the specified events	✓	(so long as the cause of delay is not a suspension under clause 54(2)(a) to (d) or a shortage of plant or labour)
Which the Architect accepts	✓	✓
The Architect's findings can be reviewed if the Contractor provides further and better particulars within time	✓	✓
The Contractor to revise the programme if EOT is granted		✓
Contractor duty to mitigate	✓	

# Extension of Time

**Table 2**

Architect's duty with EOT claim	HKIA Form	Government Form
As soon as practicable but in any event within 60 days after receipt of the particulars	✓	
Within a reasonable time		✓
Estimate the length of the delay beyond the completion date	✓	✓
Notify the Contractor in writing	✓	✓
Fair ( <b>and reasonable</b> ) entitlement to EOT for completion of the Works	✓	✓
Shall make a subsequent review if requested	✓	✓



# Practical Tips

- Comply strictly with the procedures to protect EOT entitlements (i.e. notice requirement)
- As the Contractor has the burden of proof to justify ground for EOT, should keep good records of events, e.g. diaries, construction programmes, sub-files etc
- Set out EOT claims clearly including:
  - basis of claim
  - details of claim
  - evaluation of claim (if necessary)
  - supporting documents (if necessary)



# Liquidated Damages

- Genuine pre-estimate of loss
- Typical clause

*'If the Contractor fails to complete by [date stipulated in the contract], he shall allow the Employer to deduct liquidated damages at a rate of [HK\$10,000] per day (or week) for the period during which the works are not completed.'*

- Replace the Contractor's normal liability to pay general damages (i.e. the Employer's actual loss)

# Liquidated Damages

	<b>Advantages</b>	<b>Disadvantages</b>
<b>Employer</b>	<ul style="list-style-type: none"><li>• relief from proving actual loss</li><li>• need not have suffered loss</li></ul>	<ul style="list-style-type: none"><li>• settle for less than actual loss</li></ul>
<b>Contractor</b>	<ul style="list-style-type: none"><li>• precise indication of liability</li></ul>	<ul style="list-style-type: none"><li>• pay excessive amount</li></ul>

## Grounds for defending a LD claim

- (a) Sum demanded is a penalty
- (b) LD provision is void for uncertainty
- (c) Procedure for a LD claim is not complied with
- (d) Time is set at large
- (e) Concurrent delay

## (a) Sum demanded is a penalty

- Genuine pre-estimate of loss
- Not to punish the Contractor
- Test:

*Whether the sum is an extravagant and unconscionable amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach*

- Burden of proof on the Contractor to challenge
- Considerations:
  - Substantial costs of quantum expert
  - if actual loss suffered by the Employer is lower than LD

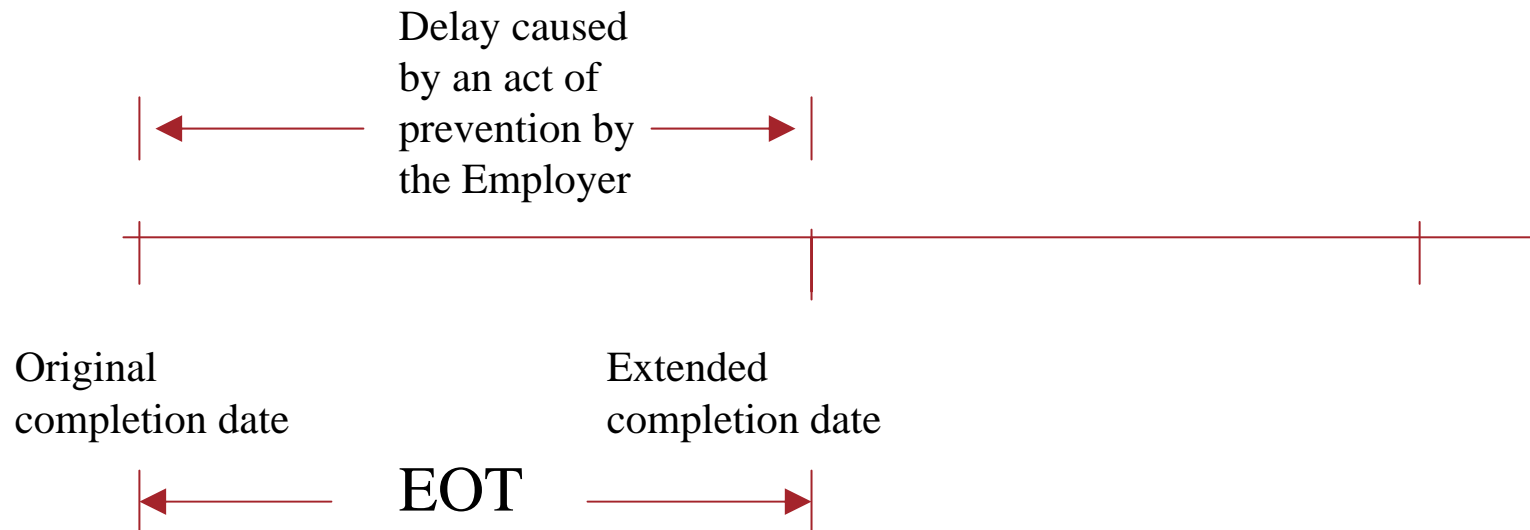
## (b) LD provision is void for uncertainty

- LD run from a fixed or ascertainable date (i.e. the completion date as extended)
- Court will not award LD for breach of a vague obligation, e.g. complete “within a reasonable time”
- Be aware of including a LD clause which states that LD shall be ‘nil’ (i.e. risk that the Employer may not be entitled to damages for late completion)

## (c) Procedure for a LD claim is not complied with

- Has the procedure for deducting LD been followed? (i.e. issue of certificate of non-completion and notice of intention to deduct LD)
- Court has adopted a restrictive approach in interpreting LD clauses

## (d) Time is set at large



**Scenario 1:** If act of prevention by Employer qualifies for an EOT, time for completion is extended to the extended completion date.

**Scenario 2:** If act of prevention by Employer but there is no EOT provision to cover for such act, time is set at large and Contractor is only required to complete within a reasonable time. The Employer cannot deduct LD.

## (e) Concurrent delay

- Critical delay for which the Employer is responsible
- And this delay overlaps with the Contractor's delay for critical events
- Contractor is arguably entitled to an extension of time in such circumstances



## Liquidated Damages – worthwhile to challenge?

- Even if the LD clause is held to be unenforceable, Employer can still recover general damages for breach of Contract
- Unlike LD, Employer has the onus to prove actual loss suffered due to Contractor's default
- Actual Loss < LD – worthwhile
- Actual Loss > LD – not worthwhile



# Common Construction Disputes

- **Contractual Claims**
- **Claims under Common Law**
- **Quantum Meruit Claims**



# Contractual Claims



# Contractual Claims

- Breach of contract
  - Express terms
  - Implied terms
- Contractual claims for Loss and Expense

# Express Terms of Contract

- Terms and conditions in contract
- General Conditions
- Special Conditions
- Specifications
- Order of precedence
- Damages vs termination

# Common Implied Terms of Contract Required of Employer

- The employer to do all that is necessary on his part to bring about completion of the contract eg:
  - give possession of site within reasonable time
  - obtain planning permission or building regulation consent in sufficient time to enable the contractor to proceed without delay

# Common Implied Terms of Contract Required of Employer

- The employer would not hinder or prevent contractor from carrying out the contract works in a regular and orderly manner and in accordance with the terms of the contract
- Instructions should be given to the contractor at such time and in such manner so as not to hinder or prevent the contractor from performing his duties under the contract

# Claims for Loss and Expense



# Claim for loss and expense

- When:
  - The Employer breaches the contract
  - The Contractor will have a contractual right to claim for damages
  - Damages must be direct loss and expenses, cannot be too remote

# What is 'direct' loss and expense?

- It means damage that flows naturally from a breach without other intervening causes and independently of special circumstances

# Government Form General Conditions of Contract for Building Works (1999 Edition)

- Clause 63:
  - “If.... the Surveyor is of the opinion that the Contractor has been or is likely to be involved in expenditure for which the Contractor would not be reimbursed by a payment under any other provision in the Contract by reason of the progress of Works...having been materially affected...then the Surveyor shall ascertain... the Cost incurred.... ”

# Government Form General Conditions of Contract for Building Works (1999 Edition)

- When:
  - Late instructions
  - Variations ordered
  - Opening up for inspection
  - Delay caused by Employer's other contractor / supplier
  - Late delivery of material, plant or equipment by Employer

# Government Form General Conditions of Contract for Building Works (1999 Edition)

- Definition of “Cost” under Government Form:
  - Expenditure reasonably incurred
  - Include:
    - Site overheads
    - Off-site overheads
    - Depreciation of constructional plant
  - Exclude: Profit

# HKIA Form

Clause 24 (old edition):

- 'If... the **Architect is of the opinion** that the Main Contractor has been involved in direct loss and/or expense for which he would not be reimbursed by a payment under any other provision in the Contract by reason of the regular progress of Works...having been materially affected...then the Architect shall ascertain... the amount of such direct loss and expense.'

Clause 27 (2005 Edition)

- 'If, in the **Contractor's opinion**, he has incurred or is likely to incur direct loss and/or expense because the progress of the Works has been or is likely to be delayed... and the Contractor intends to claim additional payment for this, he shall follow the procedures set out in clause 28...'

# When can contractor claim loss and expense/ expenditure under HKIA and Government Forms?

## HKIA Form

- Architect's late instructions
- Variations
- Opening up for inspection any work covered up or testing of any work on materials

## Government Form

- Architect's late instructions
- Variations ordered in accordance with Clause 60
- Opening up for inspection any work covered up or testing of any work, material or workmanship

# When can contractor claim loss and expense/ expenditure under HKIA and Government Forms? (cont'd)

## HKIA Form

- Architect's instruction to resolve an ambiguity between the contract documents
- Architect's instruction to increase works significantly
- Architect's instructions to postpone work

## Government Form

- Delay caused by person/ company engaged by the Employer in supplying materials or executing work directly connected with but not forming part of the Works

# When can contractor claim loss and expense/ expenditure under HKIA and Government Forms? (cont'd)

## HKIA Form

- Antiquity
- Delay or disruption caused by a nominated sub-contractor or supplier
- Delay or disruption caused by a Specialist Contractor

## Government Form

- Late delivery of materials, plant or equipment by the Employer

# When can contractor claim loss and expense / expenditure under HKIA and Government Forms? (cont'd)

## HKIA Form

- The failure of the Employer to supply or supply on time materials, goods, plant or equipment
- The failure of the Employer to give possession
- Any other delay or disruption for which the Employer is responsible

## Criteria for Successful Monetary Claim under Government Form

Written application

- By the Contractor
- To the Surveyor
- Within 28 days
- Progress of the works materially affected
- One or more of the specified event
- Involving expenditure for the Contractor
- Which the Contractor is not reimbursed for under contract
- Which the Surveyor accepts

# Claims under Common Law



# Types of Commons Law Claims

- Quantum Meruit
- Breach of duty under the law of tort -  
Negligence
- Misrepresentation – false statement of fact made during pre-contractual negotiations and is the one inducing cause of the contract

# Quantum Meruit Claim



# What does 'quantum meruit' mean?

- 'the amount he deserves'
- 'what the job is worth'
- i.e. claim for a reasonable sum

# Examples where quantum meruit claim arises

- An express agreement to pay a reasonable sum
- No price fixed under contract
- A quasi-contract
  - A quasi-contract may occur where there are failed negotiations
  - If work is carried out while negotiation as to the terms of the contract are proceeding by agreement is never reached upon essential terms, the contractor is entitled to be paid a reasonable sum for the work carried out

# Examples where quantum meruit claim arises (cont'd)

- Work outside a contract
  - Where there is contract for specified work but the contractor has carried out works outside the contract at the Employer's request, the contractor is entitled to be paid a reasonable sum the works done on the basis of an implied contract
  - Usually on a cost plus profit basis



# Evaluating Quantum Meruit Claim

- No hard and fast rules to evaluate quantum meruit claims
- Court will take into account all circumstances
- Some general principles/guidance from case laws

# Evaluating Quantum Meruit Claim (cont'd)

## ***Costain Civil Engineering Ltd v Zanen Dredging and Contracting Co Ltd (1996)***

This case demonstrate how quantum meruit should be assessed for work carried out which falls outside the contract scope

- fair commercial rate for the work done
- not determined just by reference to the cost to the party
- may be determined by reference to the financial advantage to the party instructing the additional work

# Evaluating Quantum Meruit Claim (cont'd)

## ***Brenner v First Artists' Management (1993)***

- A claim for quantum meruit presupposes that no contract exists
- Yardstick - what is a fair and reasonable remuneration or compensation for the benefit accepted, actually or constructively
- Agreed price for certain services may be given as evidence of the appropriate remuneration but is not itself conclusive
- In some case the Court may apply an hourly rate to the time involved in performing the services and may make a global assessment

# Evaluating Quantum Meruit Claim (cont'd)

## ***ERDC Group Ltd v Brunel University (2006)***

- No hard and fast rules
- It was not appropriate to base the valuation on costs of the Contractor
- Actual costs plus an appropriate profit
- Take into account the Contractor's tender rates and prices

# Demonstrating and Presenting Claims



## Any claim must show

- Amount of money (and time) claimed
- Contract clauses which provide for the payment of the additional sums sought
- Reasons for additional payment

*Important: Maintain a systemic and organised filing system so that supporting documentation can be traced easily*

# Presentation of a formal claim

## Introduction

- Should give sufficient information to familiarize the recipient with the claim and contract details
- General contract information
  - *History and relevant details*
  - *Basis of claim*
  - *Quantification*
  - *Appendices*



# History and details

- Full details of all matters forming part of the claim
- Relevant event should be described in sufficient detail to demonstrate the contractor's entitlement and responsibility for the costs
- Each separate issue set out in logical format Causes and effects – originating event, then what happened
- Notices and particulars given

# Basis of claim

- Contract provisions relied upon
- Contractual analysis
- Explanation of basis of claim



# Quantification

- Summary of the amount
- Break-down of the individual areas of claim based on the history already given
- Each head of claim to be calculated with explanation as to methods and basis used

Attach relevant documents referred to in the claims

- Programmes
- Diagrams
- Photographs
- Schedules
- Financial data
- Measurement sheets etc

# Conclusions

In making a claim, one will need to

- identify the claim
- identify which head does the claim fall under
- consider whether remedies are available under the contract or common law
- if claim is made pursuant to the contract, then whether necessary steps have been undertaken
- consider necessary documentary evidence (correspondence) in substantiating the claim
- consider whether there is any documentation which may assist in the valuation of loss and/or damages

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