

**The Hong Kong Institute of Surveyors
"Latest on Delay and Variation – Implications of the
Walter Lily and Maeda cases"**

5 May 2015

Damon So, Partner

Projects (Engineering & Construction) Practice



Walter Lily v Mackay [2012]

- High Court of England & Wales
 - Mr Justice Akenhead
- Facts:
 - Mr and Mrs Mackey's house
 - five floors, a courtyard with swimming pool, basement with library with leather bookcases and a lift
 - JCT from (1998) (private without quantities)
 - issues relating to design and workmanship, delays and global claims for loss and expense

Ascertainment of extension of time

- Prospective vs retrospective
- Knowledge of what actually happened
- Based on factual and expert evidence
- Balance of probabilities
- Clause 25: cannot be purely retrospective
- What critically delayed the works as they went along

Concurrent delay

- Defined as a period of delay which is found to have been caused by two or more factors, at least one of which is a Relevant Event and another is not.
- JCT Form: requires determination of a Completion Date which is "fair and reasonable having regard to any of the Relevant Events".



Scottish v English

- Scots: reasonable apportionment
 - *City Inn Ltd v Shepherd Construction Ltd*
- English: full entitlement
 - *Henry Boot v Malmaison* (by agreement)
 - *De Beers v Atos Origin*
 - Contractor entitled to the time contract allows to complete the Works
 - *Adyard Abu Dhabi v SD Marine*
 - "Adopts" Henry Boot

Decision

- Contractor should be entitled to a full eot
- Otherwise the contractor would not be compensated for an act of prevention
- Nothing in the wording of the eot clause to support the existence of the suggested proviso
- Not implied by reference to fair and reasonable
- Scots approach inapplicable in England
- NB on facts Judge considered that there was no concurrent delay

Global Claims

- Or "total" cost claim
- Not terms of art or statutorily defined terms
- What it usually means:
 - numerous potential or actual causes of delay or disruption
 - total cost on a job
 - net payment from employer
 - claim for balance by inference to the causes of delay and disruption relied on



Back to basics

- What needs to be proved:
 - events occurred which entitled contractor to loss and expenses;
 - those events caused delay and/or disruption; and
 - such delay or disruption caused it to incur loss and/or expense
- Standard of proof:
 - balance of probabilities
- No requirement of impossibility to prove cause and effect which is not the fault of the contractor
- Subject to contractual restrictions

Free-style claim

- No set way of proving the three elements
- E.g. proof by admission or detailed factual evidence linking events to amounts of delay and loss
- Nothing wrong in principle but added evidential difficulties
- No transfer of burden of proof to defending party



Free-style claim (Cont'd)

- Defending party can raise issues or show other causes, e.g. tender price too low
- Particular elements not proved or irrelevant may be taken out
- Not necessarily defeat the whole claim
- Left with loss attributable to events entitling contractor to recover loss for



Global claim justified?

- In any event impracticable or very difficult to relate loss to event
- A complete mess from the administrative side
 - both Ds and professional team
 - little design to start with
 - hundreds of variations
 - hopelessly late provision of information and instructions
 - discord between Ds and most of professional team most of the time



Maeda Corporation v HK Government [2013]

- Facts:
 - contractor at tender considered that the quantity provided in the BQ for an item was low
 - contractor priced the item
 - contractor then transferred to the price sums out of different items
 - included miscellaneous items of costs, on costs, contingency and risk
 - contractor's assessment of the position proved correct and the quantity significantly increased
 - the Engineer fixed a new rate under GCC59(4)(b)

GCC Clause 59(4)(b)

Should the actual quantity of work executed in respect of any item be substantially greater or less than stated in the Bills of Quantities ... and if in the opinion of the engineer such increase or decrease of itself shall render the rate for such item unreasonable and inapplicable, the engineer shall determine an appropriate increase or decrease of the rate for the item using the Bills of Quantities rate as the basis for such determination and shall notify the contractor accordingly."

Arbitrator

- Nicholas Denny QC
 - agreed with the Engineer
- Increase rendered rate unreasonable and inapplicable
- Looked at tender build-up of original rate
- Fixed a new rate



Appeal

Maeda

- Proper approach to re-rating under GCC59(4)(b)
- Should not look at tender build-up
- Only where work activity changed as a result of increase
- Unrelated fixed costs should not be taken into account



The proceedings

- Oct 2011: Deputy Judge L Chan
 - Refused leave to appeal
- Oct 2012: Court of Appeal
 - "serious doubt" vs "obviously wrong"
 - upheld Deputy Judge L Chan
- Sept 2013: Court of Final Appeal
 - "no doubt"
 - refused leave to appeal against the Court of Appeal

Analysing GCC Clause 59(4)(b)

*Should the actual quantity of work executed in respect of any item be **substantially greater or less than stated in the Bills of Quantities** ... and if in the opinion of the engineer such increase or decrease of itself shall render the rate for such item unreasonable and inapplicable, the engineer shall determine an appropriate increase or decrease of the rate for the item using the Bills of Quantities rate as the basis for such determination and shall notify the contractor accordingly."*

A three stage process

1. Establish whether there was any increase or decrease in the quantities
2. Form an opinion as to whether the change has caused the rate to become "unreasonable or inapplicable"
3. If the rate is unreasonably high or unreasonably low when applied to the changed quantity fix a new rate, using the Bill rate as the basis

Stage 2 test

- Whether increase of itself rendered the rate unreasonable and inapplicable
- The test required consideration of how the rate was built up
 - The sum transferred reflected a work and cost
 - Distinction between fixed cost and "pure" profit
 - Rate was unreasonable and inapplicable
 - Confidentiality – no answer
 - Relevance – self evidently relevant
 - Change in work element – not where composite rate

Stage 3 new rate

- Limited evidence
- Took direct costs, indirect costs, risk, temporary works, sponsor costs
- Added overheads and profits
- Transferred costs?



Henry Boot v Alstom [2000]

- Question: was whether the Arbitrator was right that *Henry Boot* applied only to varied work
- Error in pricing of rate
- By variation the extent of the work subject to rate increased
- Alstom (Employer) sought to re-rate

The decision

- ICE Conditions of Contract
 - Materially the same as GCC 61(1)
- April 2000 English C of A
- Determines
 - No rectification of errors
 - Reasonable to use an "unreasonable" rate
 - Rates sacrosanct (even if deliberately over priced)
 - Trigger is change in content of work itself
 - Desirable to have certainty

HKHA v Leighton Contractors, Reyes J 22 April 04

- Type A gatesets varied to Type B
- Named Suppliers
- L relied on quote plus profit
- Type B price much higher
- HA: little change in physical work: little change in rate
- L: look at rate structure: cost + profit

Reyes J

- Rule 2: based on contract rate as may be reasonable
- Named Suppliers not an extraneous fact
- Can use similar rate structure
- Type B plus profit

Boot distinguished

- Known error in Maeda's rate
- Boot was valuation of a variation
 - Contract referred to error in rates
 - Valuation exercise qualitatively different



And finally ... Fok JA

*"in conclusion, ... accept ... that the facts of the present case are unusual in that this was **not simply profit loading** by an uplift in a rate but involved a **specific transfer of a fixed preliminary cost ...**"*

What if there was simply a profit uplift?

Significance

- Inconsistency
- Disclosure

Preparation of tender build-up

Damon So
Partner
Direct line: 2840 5018
E-mail: damon.so@hoganlovells.com

www.hoganlovells.com

Hogan Lovells has offices in:

Abu Dhabi	Colorado Springs	Houston	New York	Silicon Valley
Alcazar	Denver	Jeddah*	Northern Virginia	Singapore
Amsterdam	Dubai	London	Paris	Tokyo
Baltimore	Düsseldorf	Los Angeles	Philadelphia	Ulaanbaatar*
Beijing	Frankfurt	Madrid	Rio de Janeiro	Warsaw
Berlin	Hamburg	Miami	Riyadh*	Washington DC
Brasov	Hanoi	Milan	Rome	Zagreb*
Budapest*	Ho Chi Minh City	Moscow	San Francisco	
Caracas	Hong Kong	Munich	Shanghai	

Hogan Lovells or the "firm" refers to the international legal practice comprising Hogan Lovells International LLP, Hogan Lovells US LLP, Hogan Lovells Worldwide Group (in Swiss Venere), and their affiliated businesses, each of which is a separate legal entity. Hogan Lovells International LLP is a limited liability partnership registered in England and Wales with registered number OC32829. Registered office and principal place of business: Abchurch House, Holborn, London, EC1A 3DF. Hogan Lovells US LLP is a limited liability partnership registered in the District of Columbia.

The word "partner" is used to refer to a member of Hogan Lovells International LLP or a partner of Hogan Lovells US LLP or an employee or consultant with equivalent standing and qualifications, and to a partner, member, employee or consultant in any of their affiliated businesses who has equivalent standing, background and qualifications from legal disciplines and other applicable law to the former firm of Hogan & Heron LLP and Lawch, LLP. Where case studies are included, results achieved do not guarantee similar outcomes for other clients. New York State Notice: Attorney Advertising.

© Hogan Lovells 2015. All rights reserved.
* Associated offices #54025