The Final Chapter

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Last month I promised to report on the Appeal in the case of Henry Boot Construction Ltd v. Alstom Combined Cycles Ltd, probably the most important case for quantity surveyors to have come before the courts in the last twenty five years.

In the Surveying Newsletter, Volume 8, Issue 7, which was published in July 1999, I set out the facts of the case, but for ease I will repeat them briefly here.

Alstom employed Henry Boot to carry out some civil engineering works at a power station in Wales in the UK. The power station comprised four combined cycle turbines. Each turbine comprised a Turbine Hall, a Heat Recovery Steam Generator and a Cooling Tower.

During pre-contract negotiations Boot submitted a price of GBP250,880 (which could be broken down to a rate per linear metre) for temporary steel sheet piling to trench excavation in the Turbine Hall area, and this price was incorporated into the contract.

During the course of the works the Engineer issued variation orders instructing temporary steel sheet piling to trench excavation in the Heat Recovery System Generator area and the Cooling Tower area.

The issue was how the additional temporary steel sheet piling was to be valued, and the reason why it became an issue at all was because Boot's price of GBP250,880 had been calculated in error in that it was in reality for both the Turbine Hall and the Heat Recovery Steam Generators, although the contract was clearly entered into on the basis that it was for the Turbine Hall alone. Therefore if the rate in the Bills of Quantities was used to value the variation order, it would produce a very large profit for Boot, because the rate was really twice what it was intended it to be.

Boot of course argued that the additional works must be valued at contract rates regardless of the consequences, whereas the employer argued that a fair valuation should be made thus disregarding the contract rate, because the rate contained an error.

The matter went initially to arbitration, where the arbitrator agreed with the employer that a fair valuation should be made. However Boot appealed on the basis that the arbitrator had misinterpreted clause 52 of the ICE Conditions of Contract which provides the rules for the valuation variations and in particular misinterpreted the words 'so far as may be reasonable' in clause 52(1)(b).

The relevant part of question formulated for the court to decide was:

"**Whether it is right not to make a valuation under clause 52(1)(b) of the ICE Conditions 6th Edition (which would otherwise have been based upon a rate or price) on extraneous grounds such as that it was not reasonable to use such a rate or price because it contained or was based upon a mistake or that it was not feasible on the information provided by the contractor to make a valuation based upon the rate or price**."

Full details of the judgment of His Honour Judge Humphrey Lloyd QC can be seen in my article in July, but in short he held that the word reasonable referred to the nature of the works being carried out, not the rate itself, and on this basis the Engineer could not avoid the use of a rate because it may be considered high or low or have been based on a mistake.

Before the Court of Appeal, comprising Lord Justice Bedlam, Lord Justice Ward and Lord Lloyd, Alstom argued that it would not be reasonable to use a rate contained in the bill of quantities if the rate were itself unreasonable and that the arbitrator had been correct in rejecting the use of the rates in the bills of quantities and instead arriving at a fair valuation. They contended therefore that the judge had been incorrect in his decision.

The decision of the Court of Appeal is of great importance, not just because of the principles concerned, but also because the clauses being referred to are almost identical to those in the Hong Kong Government General Conditions of Contract. The decision is summarized below:

> **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))

The effect of this clause is to make the rates immutable and not subject to correction, and that it bound both parties equally.

> **ICE 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 for valuation so far as may be reasonable failing which a fair valuation shall be made." (similar to HK Government GCC Clause 61(c))

The operation of this clause calls for a comparison between the work covered by the variation order and the work priced in the bill of quantities to see whether it is reasonable to use the rate for the works priced in the bills of quantities but it does not enable the engineer to open up or disregard rates on the grounds that they were inserted by mistake. The clause is concerned with the reasonableness of using the rates and prices in the bills for the works in question and not the reasonableness of those prices or rates themselves:

The arbitrator's rejection of the use of the Contract rate for valuation because he considered it was not reasonable to enlarge the ambit of the mistake, was incorrect because he took into account an irrelevant consideration, i.e. the reasonableness of the rate itself.

> **ICE Clause 52(2)** giving the Engineer power to depart from Contract Rates where the nature or extent of the variation renders the rates unreasonable (similar to HK Government GCC Clause 61 proviso), and ICE Clause 56(2) giving the Engineer power to depart for Contract Rates where a substantial change in quantity of itself renders them unreasonable (similar to HK Government GCC Clause 59(4)(b))

Both these clauses are bound by the same principles.

As Bedlam LJ put it, it is the use of the rates in the changed circumstances brought about by the variation or substantial change in quantities that must be reasonable, not the rates themselves.

- To allow the engineer to open up the rates would be contrary to the principle of competitive tendering, and would have far reaching consequences. If the engineer were free to open up the rates at the request of one party or the other because they were inserted in the bill of quantities by mistake, it would undermine the basis of competitive tendering, and would create uncertainty in the administration of construction contracts.
- Finally it was considered that the purpose of the conditions was to create

> certainty, 'to enable the parties to know where they stand' and 'to know with reasonable certainty what the effect of a variation may be'. That certainty should not be undermined by giving the Engineer power to disregard contract rates that he did not consider reasonable.

So the decisions of Judge Lloyd in the original case have been upheld, despite strong dissent from one of the judges in the Court of Appeal. The principles set are very clear and should be of great benefit to both contractors and quantity surveyors/ engineers in reducing the number of disputes that arise in the valuation of variations and substantial changes in quantities.

(Adopted from the HKIS Newsletter 9(6)b July 2000)