

The Meaning of "Variation"

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The question as to exactly what constitutes a variation, entitling a contractor to additional time and money arises on many contracts.

The simple, but interesting recent case of *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd and GEC Alsthorn Ltd* (87 BLR 52), may prove of some assistance in resolving such queries.

National Powers plc employed GEC Alsthorn Power Plant Limited as main contractor to build a power station in the United Kingdom. Stein Industrie and GEC Alsthorn Ltd were employed as subcontractors, and Strachan and Henshaw Ltd were employed as sub-sub contractors responsible for the heat recovery system generators.

Strachan and Henshaw employed approximately 150 workers, and had to provide facilities for clocking in and for the workers to have their tea breaks.

It had been agreed in a pre-contract meeting that the clocking in facilities and tea cabins could be on the site, and Strachan and Henshaw initially erected them close to the heat recovery system generators so that their workman would not lose working time moving between the workplace and their clocking in facilities and tea cabins.

However, soon after erection the main contractor instructed the clocking in facilities and tea cabins to be moved to a position half a mile away from the heat recovery system generators.

Strachan and Henshaw raised a claim for £1.6 million in respect of the lost working time incurred by their workmen having to walk to and from the clocking in facilities and tea cabins to their workplace. They claimed, inter alia, that the instruction to

move the facilities was a variation entitling them to additional payment.

The matter went to arbitration, to court, and finally to the Court of Appeal, where it was finally held that under the particular form of contract employed the instruction was not a variation.

The form of contract concerned was the MF/1 General Conditions of Contract (1988 Edition) - Model Form of Contract recommended by Mechanical, Electrical and Consulting Engineers.

Clause 27.1 of these Conditions provide:-
"In these Conditions the term "variation" means any alteration of the Works whether by way of addition, modification or omission", and the term "Works" is defined in Clause 1.1 as *"all plant to be provided and work to be done by the Contractor under the Contract"*.

It was common ground that the clocking in facilities and tea cabins were not 'plant to be provided'. Therefore for the instruction to constitute a variation they had to form part of 'the work to be done by the Contractor under the Contract'.

However the Court of Appeal adopted a very narrow interpretation of this phrase and the variation provisions. In this respect they drew distinction between 'the work to be done by the Contractor under the Contract', and the manner in which the Contractor chose to carry out such works.

The Court considered that for a change under this form of contract to be a variation entitling the Contractor to additional payment it had to be a charge (additions, modification, omission) to the heat recovery system generators, and not the method by which such works were constructed, or the

contractor's own arrangements for his work force.

However, and most importantly, the Court recognised that there are many forms of contract which expressly provide that changes, not only to the permanent works, but also to the temporary works, or the contractor's method of construction will also constitute variations entitling a contractor to additional time and money.

In this respect it is submitted that had this case been decided under the Hong Kong Government with its very wide definition of the "Works" as "*the work or services*

including work or services to be carried out by Nominated Sub-contractors to be constructed, completed, maintained and/or supplied in accordance with the Contract and includes Temporary Works", and its variation clause providing for changes in the "*sequence, method, or timing of construction*", the result may well have been different, and the instruction to move Strachan and Henshaw's clocking in facilities and tea cabins (both Temporary Works), found to constitute a variation order.

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