

Henry Boot Construction Ltd Alstom Combined Cycles Ltd

A Most Important Case.

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The extent to which the rates in the Bills of Quantities are applicable to value the works, particularly where there are variations or substantial increases (or decreases) in quantities, is a common source of argument between contractors and contract administrators.

The problem is, of course, at its most acute where the rate concerned is very high or very low either deliberately so, or because an error has been made.

In such circumstances contractors traditionally argue that it is not fair for very low rates to be used in valuing variations because such compounds their losses, and employers conversely argue that very high rates should not be used because it would mean that the contractor makes a windfall profit.

The very important case of Henry Boot Construction Ltd v. Alstom Combined Cycles Ltd is the first case to examine exactly this point, and the judgment of His Honour Judge Humphrey Lloyd QC, has clarified matters very clearly – at least for the time being. I say for the time being because the case is currently the subject of an appeal.

In this case, Alstom employed Henry Boot to carry out some civil engineering works at a power station in Wales. 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 £250,880 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 £250,880 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 and the matter went before His Honour Judge Humphrey Lloyd QC, a person with considerable experience in construction matters, who formulated the issue as follows:

"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."

In the course of his judgement, Judge LLoyd clarified a number of points of great importance and interest to quantity surveyors, particularly as the ICE 6th Edition contains very similar provisions for measurement and valuation as the Government of Hong Kong General Conditions of Contract ("GCC").

Firstly the judge stressed the importance of the contract rates, and the fact that they cannot be avoided simply because one party is dissatisfied with them. **The contract rates were (he said) sacrosanct, immutable and not subject to correction,** and he drew attention to Clause 55(2) (GCC Clause 59(3)) that provides that there shall be no rectification of any errors, omissions or wrong estimates in the descriptions, rates and prices inserted by the Contractor. It was stressed that the effect of this clause was that a mistake in a rate or price or in its application bound both the parties equally.

The only situations where a contract rate may be departed from are where they are being used to value variations for works which are not executed under similar conditions, or where there are substantial changes in quantities which render the rate inapplicable.

However, in either of these operations the judge considered that **the fact that a rate or price which would otherwise be applicable may be considered too high or too low is completely immaterial.** A very high rate or a very low rate is not rendered unreasonable by a variation or a substantial increase or decrease in quantities, it is already unreasonable when the contract is entered into!

Therefore, when valuing variations the words "executed under similar conditions" used in clause 52(1) (Clause 61(1)(b) and (c)) do not refer to economical or financial

conditions or considerations. As the judge observed:

The work is not executed under dissimilar conditions simply because the applicable rate may result in the Contractor being paid markedly more or less than that which might be regarded as "fair", e.g. more or less than actual or reasonable costs plus profit and overheads.

The question whether a rate or price is profitable or not is therefore irrelevant in applying the valuation principles of such clauses.

Nor, the court considered, could Clause 52(2) (the proviso to GCC Clause 61) be used to counter the position. The relative profitability produced by a valuation under clause 52(1) does not render rates or prices for other work unreasonable or inapplicable, such rates and prices are only rendered unreasonable by reason of the variation works themselves.

Similarly when considering whether a rate had become inapplicable due to a substantial increase or decrease in quantities pursuant to Clause 56(2) (HK Government GCC Clause 59(4)(b)) the same principles applied in that the rates or prices could only be amended if the increase or decrease of itself (or in consequence of) warranted such an alteration. The relative profitability of a rate or price is immaterial. A rate which high or low due to an error is unreasonable in itself because of the error in pricing not because of a change in quantities.

The principles set out in this are therefore of very great importance to those involved in valuation matters under the contract. Whether the appeal court will amend any of the principles set down by Judge Lloyd remains to be seen.

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