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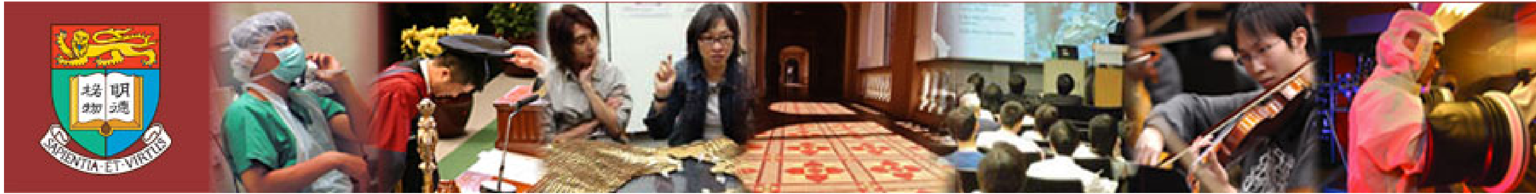

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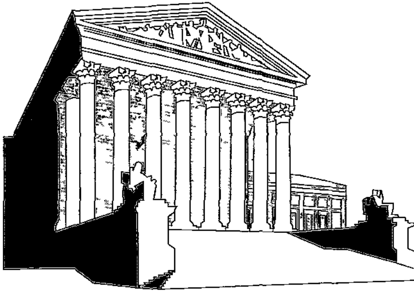

Fair Valuations

Not long ago in this column *Professor Arthur McInnis* looked at an important new case on mistake and rerating. The decision of HH Judge Humphrey Lloyd on this case has been reported as *Alstom Combined Cycles Ltd* vs *Henry Boot Construction Ltd* [2000] BLR 247 CA. *Professor McInnis* reflects on another recent unreported case on the same topics, again by HH Judge Lloyd.

It is very unusual to have two decisions rendered so close together on these issues. Both cases provide strong insights into current judicial attitudes toward mistake and rerating, how the ICE Conditions — in particular clause 52(1) and (2) — will be construed and thus how the similar wording in the Government General Conditions of Contract would also probably be interpreted.

Facts in Weldon

Weldon entered into a contract with the Commission for the New Towns, or CNT for the construction of a reservoir. The contract incorporated the ICE Conditions, Sixth Edition. Excavation of sand and gravel was required, though because Weldon could sell the gravel the contract rate was negative — 3.6 per m^3. The clay had to be removed to an off-site tip and thus a positive rate of 3.66 per m^3 was given. The contract made provision for Weldon, at its own risk, to excavate below the design level for the bed of the reservoir and obtain more gravel that it would be able to sell. At one point the engineer issued an instruction which required Weldon to excavate all the gravel below the bed and to back fill with clay to the design level. Weldon notified the engineer that it would make a claim as a result. The engineer valued the additional gravel excavation and clay back fill at bill rates. He also granted an extension of time of seven-plus weeks and valued some additional costs as prolongation claims. Weldon disputed the engineer's decisions and referred the matter to arbitration.

The Arbitration

Three awards were made by the arbitrator. Leaving aside a jurisdictional question that arose (he failed to sign the third award and the appeal was ultimately brought out of time with leave), the arbitrator valued the work under section 52(1) of the ICE Conditions — in effect work neither of a similar character nor executed under similar conditions to that priced in the bills. Therefore the arbitrator assessed the claim on the basis of a fair valuation under section 52. In this regard he had to determine whether it would include profit and overheads. He ruled that it did not and no sum was awarded for either profit or overheads. His rationale was that on the evidence Weldon had included overheads in its tender rates and prices and had failed as a matter of proof to show overheads had been incurred. The additional profit claim failed as well as a matter of proof. An appeal on a question of law was taken under the 1996 Arbitration Act. Permission to appeal on the following question of law was granted:

> 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 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.

Judge Lloyd's Reasoning On Profit

After establishing he had jurisdiction to decide the question of law, Judge Lloyd said:

> Clause 52(1) contemplates that 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.

In effect Judge Lloyd accepted that this conclusion followed from the fact that many of the other provisions in the ICE Conditions (eg cll 1(5), 12(6), 13(3), 14(8) and 31(2)) also contemplate the recovery of overheads and

profits. However, this was contemplation only.

For Judge Lloyd it did not follow as a certainty that all fair valuations under clause 52 necessarily entitled them. Why? Because the conditions referred to expenditures and their being incurred, so something might thus still have to be shown by the contractor. Though Judge Lloyd also conceded that in most cases the expenditures would likely be assumed without extra work being done or other resources being shown to have been used. His Honour added:

> In the course of his argument Mr Coulson had difficulties in countering the proposition that a fair valuation had to include each of the elements, which are ordinarily to be found in a contract rate or price: elements for the cost of labour, the cost of plant, cost of materials, the costs of overheads, and profit. In my judgement a fair valuation has not only to include something on account of each of those elements, but also it would not be a fair valuation within the meaning of the contract if it did not do so.
>
> ...in my judgement a fair valuation must, in the absence of special circumstances...include an element on account of profit.
>
> An employer must under clause 52(1) pay profit in a valuation... (via the rates or otherwise on a fair valuation).

Judge Lloyd's Reasoning On Overhead

After setting out some principles in relation to and the types overheads generally as well as the fact that the ICE Conditions undeniably allowed for their recovery, Judge Lloyd said:

> ...it would not be fair if the valuation did not include an element on account of such contribution. It would mean that such a contribution would have to be found elsewhere, presumably from the contractor's margin for profit or risk. In my view a valuation which in effect required the contractor to bear that contribution itself would not be a fair valuation, in accordance with the principles of clause 52(1) which are intended to secure that the contractor should not lose out as a result of having to execute a variation;
>
> ...it is not necessary to prove that they [fixed or running overheads] were actually incurred for the purposes of a fair valuation.

Points Coming Out Of The Weldon Case

1. A dispute over valuation may give rise to a question of law. Locally, under section 23(2) of the Arbitration Ordinance "an appeal shall lie to the court on any question of law arising out of an award made on an arbitration agreement". The same point comes out of *Henry Boot*.

2. A fair valuation:

- necessarily assumes that any costs or expenditures incurred would have been incurred by another reasonably competent contractor in the same or similar circumstances;
- must include elements for the cost of labour, plant, cost materials, overhead and profit;
- must include all relevant elements under clause 52;
- may be assimilated to the assessment of a *quantum meruit* claim;
- could be compared to the assessment of a reasonable sum under the JCT Conditions — and by extension the HKIA Conditions;
- can mean cost plus a reasonable percentage for profit with a deduction for any proven inefficiency by the contractor;
- can take into account or apply completely a general market rate for comparable work;
- could exclude contingencies if the work is valued after it has been carried out on an actual and not estimated costs basis;
- reflects an element on account of the contribution from the costs towards the contractor's fixed or running overheads.

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