Henry Boot Construction v Alston Combined Cycles [2000] APP.L.R. 04/04

CA on appeal from HHJ Humphrey Lloyd QC. before Beldam LJ; Ward LJ; Lord Lloyd. 4th April 2000

LORD LLOYD:

1. This is an appeal on a question of law certified by His Honour Judge Humphrey Lloyd Q.C. under what was Section 1 of The Arbitration Act 1979. It arises out of a construction contract dated 21st March 1994, and concerns the correct method of valuing variations. The contract incorporated the ICE Standard Conditions of Contract, 6th Edition. The question turns on the meaning of Clause 52(1). It is said that there is no previous authority directly in point.

2. The contract between the parties comprised the civil engineering works for a new power station to be built for PowerGen Plc at Connah's Quay in Clwyd, North Wales.

3. The power station consists of four gas turbines in parallel, each with its own heat recovery steam generator mounted on the same shaft. The gas turbines are situated in the Turbine Hall and the steam generators are in a separate area known simply as HRSG. Beyond the HRSG, separated by a road, lie the cooling towers, where cooling water pipes are used to condense the steam. From the cooling towers the condensed water comes back to the HRSG, where it is turned into steam again by the exhaust gases from the gas turbines. Hence the description *`combined cycle power plant'*.

4. When the employers GEC Alstom Combined Cycles Ltd., (`GECA') went out to tender in November 1993, the cold water pipe-work was shown on the drawings and specification as being 4.45 metres above datum. This was the basis on which Henry Boot Construction Limited (`Boot') tendered for the contract on 3rd February 1994. Thereafter GECA decided to lower the pipe-work to 3.35 metres above datum. This necessitated an alteration in the temporary works required for the installation of the pipe-work. Instead of laying the pipe-work in trenches with battered sides, the additional depth would require sheet piling.

5. On 25th February 1994, Boot wrote as follows:- *"As a result of the depth change to the Bonna pipe-work, we have had to allow for additional and different temporary works. This has resulted in an increase of £250,880 in the temporary works."*

6. On 18th March, GECA sent a fax: *"Please confirm the sum of £250,880 includes for all additional costs over those shown in the BQ for changing the depth of the CW pipe-work..."*.

7. On the same day Boot replied by fax: *"The sum of £250,880 was to allow for additional and different temporary works only, required in the Turbine Hall due to the lowering of Bonna pipe-work in this area"*.

8. In due course, Boot's tender was accepted in the sum of £24,195,082.

9. Disputes then arose between the parties inter alia as to the precise date when the contract was concluded, whether the faxes exchanged on 18th March 1994 were contractual documents, and whether the sum of £250,880 covered the cost of additional temporary works in the HRSG area as well as the Turbine Hall. These disputes were resolved by the very experienced arbitrator, Mr J.A. Tackaberry Q.C. in his first award dated 24th December 1997. He held that the contract was concluded on 21st March 1994, that the faxes sent on the 18th March 1994 were post-tender exchanges incorporated in the contract, and that the figure of £250,880 covered the cost of additional temporary works in the Turbine Hall but nowhere else. It did not cover the cost of sheet piling in the HRSG area, still less in the cooling towers. The former fell to be corrected as an omission from the Bill of Quantities under Clause 55(2); the latter was the subject of a variation order under Clause 51(1).

10. But in addition to these findings which were favourable to Boot, the arbitrator also found that Boot had made an error. They had calculated the figure of £250,880 by reference to the estimated quantity of sheet piling required in the HRSG area as well as the Turbine Hall. By mistake, Boot's fax of 18th March referred only to the Turbine Hall, and the mistake was not picked up by GECA. The consequences of this mistake were explored by the arbitrator in his second award dated 14th September 1998.

11. If the figure of £250,880 is divided by the amount of sheet piling required in the Turbine Hall only, namely, 2,821 square metres, it gives a rate of £89 per square metre. When that rate is applied to the 2,600 square metres of sheet piling required in the HRSG area, it gives a figure of £231,226. When applied, with appropriate adjustments, to the sheet piling required in the cooling towers, it gives a figure of £2,284,128. These are the sums claimed by Boot in the arbitration. GECA argued that the figure of £250,880 ought not to be extrapolated in that way; it produces a huge `windfall gain' for Boot.

12. The arbitrator found that the faxes of 18th March were clear enough. In a footnote he said: *"The relevant exchange could hardly have been more specific"*.

13. He held, correctly, that he had no power under the contract to correct the mistake. It is not suggested that the mistake can be rectified by proceedings in equity. Nevertheless, the arbitrator felt at liberty to put the figure of £250,880 on one side when arriving at valuations for the sheet piling in the HRSG area and the cooling towers. The key passage in his award is as follows:

    "If one is not seeking to apply the price directly to the work in question, then the work in question must, by definition, be different from the work included within the ambit of the price. If the work is sufficiently different to warrant an adjustment of the price, what one would expect to reach would be a modified price. But that would be satisfactory or reasonable (to use the phrasing of the Clause) only if one could be confident about the satisfactory nature of the route taken to the original price. That confidence is not available here. On the contrary one knows that the route to

the original price was flawed by at least one mistake. That seems to me to undermine the applicability of the price in any extended role in the contract. To put it another way, while one cannot change the mistake, I do not see it as `reasonable' to enlarge its ambit and thereby compound the effect of the error. I anticipate that the contractor who had underestimated a price by error would see the force of the argument and would be as vehement in opposing its extension beyond the ambit of the original mistake, as GECA is vehement in opposing the use of £250,880 in this case.

Given that the rule must be the same whichever way the error goes, it seems to me that it is `reasonable' not to use a price where the price has been reached by a mistake or error."

14. Liberated by this line of reasoning from the consequences of the mistake, the arbitrator arrived at his own fair valuation. He awarded £74,460 for the sheet piling in the HRSG area and £500,474 for the sheet piling in the cooling towers, a reduction of about £2 million in the amount of Boot's claim.

15. In order to understand the references in the arbitrator's award to what would be `reasonable', it is necessary at this stage to set out the terms of Clause 52(1) in full. In the course of the argument before the arbitrator, it was found convenient to break the clause down into three so-called Rules. But it must not be forgotten that Rules 2 and 3 are part of the same continuous sub-paragraph.

"Valuation of ordered variations

The value of all variations ordered by the Engineer in accordance with Clause 51, shall be ascertained by the Engineer after consultation with the Contractor in accordance with the following principles.

[RULE 1]

(a) Where work is of similar character and executed under similar conditions to work priced in the Bill of Quantities it shall be valued at such rates and prices contained therein as may be applicable

[RULE 2]

(b) Where work is not of a similar character or is not executed under similar conditions or is ordered during the Defects Correction Period the rates and prices in the Bill of Quantities shall be used as the basis for valuation so far as may be reasonable

[RULE 3]

failing which a fair valuation shall be made.

Failing agreement between the Engineer and the Contractor as to any rate or price to be applied in the valuation of any variation, the Engineer shall determine the rate or price in accordance with the foregoing principles and he shall notify the Contractor accordingly"

16. To go back again to the arbitrator's reasoning, he held that it would not be `reasonable' to use the figure of £250,880 in applying Rule 2, since the figure was known to contain at least one mistake. It would not be `reasonable' to enlarge the ambit of that mistake, and thereby compound the effect of the error. Accordingly he declined to apply Rule 2 and arrived instead at a fair valuation under Rule 3.

17. By their Originating Notice of Motion dated 2nd October 1998, Boot challenges the arbitrator's reasoning. In particular, they say that the arbitrator has misinterpreted the word *`reasonable'* in the phrase *`so far as may be reasonable'* in Clause 52(1)(b).

18. The form of the question of law was the subject of some discussion before the learned judge. In the end, the question was formulated 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 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 on the rate or price".*

19. The reference to *`extraneous grounds'* in the question of law is explained by the use of that word in the following passage from Engineering Law and the ICE Contracts by Max Abrahamson 4th Edition, page 185: *"It is not unreasonable to apply rates as a basis for pricing varied work merely because the rates are mistaken (page 14), or uneconomic, certainly in relation to the normal type of variation which is endemic in civil engineering works. What is reasonable is to be decided purely by reference to the nature of the original and varied work, not extraneous considerations".*

20. For the reasons set out in his judgment given on 22nd January 1999, the learned judge answered the question of law in the negative, and accordingly allowed the appeal. He remitted the award to the arbitrator with a direction, in effect, to make a valuation under Rule 2, in other words to base his valuation on the figure of £250,880 for sheet piling work in the Turbine Hall. GECA now appeal to this court.

21. With that lengthy introduction I can turn to the arguments of Lord Neill of Bladen Q.C. on behalf of GECA. He supported the arbitrators reasoning as to the meaning of `so far as may be reasonable' in Rule 2. He accepted, as had indeed been common ground throughout, that one starts with Rule 1. If the work covered by the variation is of similar character to work priced in the Bill of Quantities and if the work is to be executed under similar conditions, then the work is to be valued in accordance with the contract rates. Rule 1 is mandatory. It follows that if the work in the present case had been of similar character, and executed in similar circumstances, the rate derived from £250,880 would have applied, however obvious the mistake, and however unreasonable the result. Lord Neill hinted at a possible argument based on the words `as may be applicable'. But in the end he did not develop it.

22. In the event the arbitrator held that the work in the HRSG area and the cooling towers was not of similar character, and there was no appeal from that finding. Boot conceded that they could not rely on Rule 1, save to the extent that it might throw light on the proper construction of Rule 2.

23. Turning to Rule 2, Lord Neill argued that it would not be `reasonable' to use a rate contained in the Bill of Quantities if the rate were itself unreasonable. To use the rate in those circumstances would be an unreasonable use. The judge had erred by giving too narrow a meaning to the words `so far as may be reasonable'. The language of Rule 2 is unrestricted. Where the choice lies between rival constructions, one should prefer the construction which produces a sensible commercial result, rather than an arbitrary inflexible and indeed `Alice-in-Wonderland' result. It followed that the arbitrator was entitled to reject Rule 2, and arrive instead at a valuation under Rule 3. The judge should not have interfered.

24. In support of his argument, Lord Neill referred to a number of other provisions in the contract which confer on the engineer a discretion to fix a reasonable rate. In particular he relied on Clause 52(2), 56(2) and 74(3)(A).

25. There was a reference in paragraph 12 of GECA's skeleton argument to Lord Hoffman's observations in ***Investors Compensations Scheme v West Bromwich Building Society*** [1988] 1WLR 896. But this was not taken up by Lord Neill in his oral submissions. Instead he referred to the judgment of Russell L.J. and Megaw L.J. in ***Tinghamgrange Ltd v Dew Group Ltd*** (1995) 47 Con L.R. 105 at 111 and 117. But I found it difficult to extract any assistance from that authority.

26. Although Lord Neill's argument was presented with all his usual skill, I am not persuaded. The meaning of Rule 2 does not, I think, admit of much doubt. It provides a half-way house between Rule 1 and Rule 3. Like Rule 1, Rule 2 is mandatory. It applies when the work covered by the variation order is of a different character from the work priced in the Bill of Quantities, or is executed under different conditions. If the differences are relatively small, the Engineer is obliged to use the rates set out in the Bill of Quantities as the basis for his valuation, making such adjustment as may be necessary to take account of the differences. But the differences may be very great, as, for example, where the variation order calls for the excavation of foundations in solid rock, instead of clay. In those circumstances, the Engineer may take the view that it would not be `reasonable' to base his valuation on the rates contained in the Bill of Quantities. He is then thrown back on Rule 3. That is the sole function of the words `so far as may be reasonable' in Rule 2. They call for a comparison between the work covered by the variation order and the work priced in the Bill of Quantities. They do not enable the Engineer to open up or disregard the rates on the ground that they were inserted by mistake. As Beldam L.J. put it in the course of argument, it is the use of the rates in the changed circumstances brought about by the variation order that must be reasonable, not the rates themselves.

27. Lord Neill argued that it would be wrong to regard the rates as immutable; he gently derided the learned judge's use of the word *`sacrosanct'* in that connection. But it seems to me that that is exactly what the proviso to Clause 55(2) requires: *"Provided that there shall be no rectification of any errors, omissions or wrong estimates in the descriptions, rates and prices inserted by the contractor in the Bill of Quantities".*

28. Clause 52(2) on which Lord Neill relied, provides an exception. But it is an exception which proves the rule. It applies *`if the nature or amount of the variation relative to the nature or amount of the contract work'* is such as to make it unreasonable to apply the contract rates to the variation. In such a case, the engineer may fix a reasonable rate. Thus, Clause 52(2) creates a limited exception to Rules 1 and 2 where the scale or nature of the variation makes it unreasonable to use the contract rates. It certainly does not justify displacing the rates themselves because they were inserted by mistake or are too high or too low or otherwise unreasonable.

29. The same applies to another provision on which Lord Neill relied, namely, Clause 56(2). It enables the engineer to increase or decrease the rates where `the actual quantities executed in respect of any item [is] greater or less than those stated in the Bill of Quantities'. These limited exceptions underline the basic rule that the rates themselves are not subject to correction.

30. Any other view 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 not only unsettle the basis of competitive tendering, but also create the sort of uncertainty in the administration of building contracts which should be avoided at all costs.

31. For the above reasons, and the reasons set out in Judge Lloyd's admirable judgment, with which I am in complete agreement, I would dismiss the appeal, and remit the Award to the arbitrator in accordance with paragraph 2 of his Order. I can well understand the arbitrator's reluctance to extend the effect of the mistake in the Bill of Quantities. But having held correctly, as I have said, that he had no power to correct the mistake, he should have carried his reasoning through to its logical conclusion. He was bound to disregard the mistake when applying Rule 2. The language of Rule 2 does not permit of any other construction. It follows that in failing to apply Rule 2 the arbitrator erred in law.

32. However, I am not altogether happy with the formulation of the question of law, and in particular with the reference to *`extraneous grounds'*. This is too vague for my liking. I would prefer to omit he words `on extraneous grounds such as' and substitute `on the ground'.

33. The second half of the question, which is more a question of fact than law, gave rise to a subsidiary argument that the arbitrator does not have the material on which to make a valuation under Rule 2, since it is not clear whether

the figure of £250,880 allowed for any savings in carrying out the temporary works as varied, nor is it clear whether there is any overlap between that figure and the figure of £343,240. But I agree with the judge that these are matters which will be for the arbitrator to investigate in carrying out his valuation under Rule 2, making such use as may be appropriate of his powers under Clause 52(4) and Particular Condition 5(1). Now that the underlying question of principle has been determined in favour of Boot, I do not foresee any great difficulty.

LORD JUSTICE WARD:

Introduction

34. In the course of construction of the Connah's Quay power station Henry Boot Construction Limited (`Boot') carried out additional temporary work in the area of the Heat Recovery Steam Generator (`HRSG') and the Cooling Towers. A dispute having been referred to arbitration, Mr John Tackaberry Q.C., an experienced arbitrator, valued that work on a fair valuation basis under Clause 52 of the I.C.E. Conditions which governed Boot's contract with General Electric (`GECA').

35. The arbitrator held, in summary, that in deciding whether or not to use the contract rates it was reasonable to have regard not only to the mistake that was made in specifying those rates but also to the difficulties in seeking to extract a rate which could be said with confidence to be directly relevant and applicable to the work in question, there being an absence of detailed information as to how Boot calculated those rates in the first place.

36. Boot appealed to the High Court. The issue was, and remains, whether the arbitrator erred in law in taking those two factors into account. As H.H.J. Humphrey Lloyd Q.C. observed in paragraph 6 of his judgment:- *"... the type of question raised by this appeal is a matter of the construction of the contract."*

The contractual terms

37. The contract was made in the standard I.C.E. Conditions of Contract (6th Edition) but with some modifications made to it. The clause of immediate relevance is Clause 52(1) which reads:-

> ***" Valuation of ordered variations***
>
> *The value of or variations ordered by the Engineer in accordance with Clause 51 shall be ascertained by the Engineer after consultation with the Contractor in accordance with the following principles:*
>
> *(a) Where work is of a similar character and executed under similar conditions to work priced in the Bill of Quantities it shall be valued at such rates and prices contained therein as may be applicable" (referred to as `Rule 1').*
>
> *"(b) Where work 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" (referred to as `Rule 2') "failing which a fair valuation shall be made" (referred to as `Rule 3').*

38. It is also necessary to consider the following:-

> ***" Basis and sufficiency of Tender***
>
> *11(3) the Contractor shall be deemed to have*
>
> *(a) ...*
>
> *(b) satisfied himself before submitting his tender as to the correctness and sufficiency of the rates and prices stated by him in the Bill of Quantities which shall (unless otherwise provided in the Contract) cover all his obligations under the contract. ...*
>
> ***Engineer to fix rate***
>
> *52.(2) If the nature or amount of any variation relative to the nature or amount of the whole of the contract work or to any part thereof shall be such that in the opinion of the Engineer or the Contractor any rate or price contained in the contract for any item of work is by reason of such variation rendered unreasonable or inapplicable either the Engineer shall give to the Contractor or the Contractor give to the Engineer notice before the varied work is commenced or as soon thereafter as is reasonable in all the circumstances that such rate or price should be varied and the Engineer shall fix such rate or price as in the circumstances he shall think reasonable and proper. ...*
>
> ***Correction of errors***
>
> *55(2) ... there shall be no rectification of any errors omissions or wrong estimates in the description rates and prices inserted by the Contractor in the Bill of Quantities. ...*
>
> ***Measurement and valuation***
>
> *56(1) ... the Engineer shall ... ascertain and determine by admeasurement the value in accordance with the Contract of the work done in accordance with the Contract.*
>
> ***Increase or decrease of rate***
>
> *56(2) Should the actual quantities executed in respect of any item be greater or less than those stated in the Bill of Quantities and if in the opinion the Engineer such increase or decrease of itself shall so warrant the Engineer shall after consultation with the Contractor determine an appropriate increase or decrease of any rates or prices rendered unreasonable or inapplicable in consequence thereof and shall notify the Contractor accordingly."*

The judgment

39. The judge expressed the question of law in these terms:- *"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 on 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 on the rate or price".

40. Although he does not explain what he means by `extraneous', a word he may have taken from the work of Mr Max Abrahamson, *Engineering Law and the ICE Contract,* he later refers to Boot's argument that the reasonableness of applicability of the rate for the purposes of Clause 52(1)(b) was to be gauged strictly by reference to the work carried out and *`not by reference to extraneous considerations such as how a rate or price was arrived at and whether it was to high or to low'*, my emphasis being added. The reference to "extraneous" grounds adds confusion rather than clarification to the definition of the point of law and it would be better if the word were omitted and the question asked with reference to the two specific factors upon which the arbitrator relied.

41. The essential reasoning of the judge seems to me to be contained in the following passages to which I have occasionally added emphasis because I may later comment upon them:-

"31. Clause 55(2) does no more than restate (in a place where it may be particularly apposite) the fundamental proposition that the Contract Rates and Prices are sacrosanct and not subject to corrections.

34. ... the same approach (as applies to Rule 1) must apply to Rule 2 for that is no more than a continuation of Rule 1 to deal with the position where the factors mentioned in Rule 1 are not present - similarity of work or conditions. If the varied work is of a dissimilar character or to be executed under dissimilar conditions then the contract clearly maintains the principle that a valuation ought to be made if there is a contract rate or price applicable or which could be used as a basis for valuing the variations. The fact that the result of the use of the contract rate or price might not be reasonable is as irrelevant as it is under the first principle. In terms of the language used in Clause 52(1)(b) the reason is simple: the Contract Rate or Price is already unreasonable before the variation is ordered; it is not made unreasonable by the execution of the variations. The word `reasonable' in Clause 52(1)(b) refers only to the extent to which it is feasible to use a given rate or price as the basis for the valuation, irrespective of its amount. ... No adjustment could possibly be made under the first principle; no adjustment should be made under the second principle for it is to be assumed when using the rate or price as a basis that it is otherwise sufficient for the operations in question. To allow a variation falling within Clause 52(1)(b) to be used as a pretext to unravel and correct mistakes made by a contractor in the pricing of a contract would, in my judgment, be completely inconsistent with the wording of such a contract and the philosophy to be derived from it. That is not to say that in practice an Engineer or an arbitrator may not very occasionally bend Rule 2."

35. The object of the principle that rates and prices are sufficient for the purpose of Clause 52 is to enable the parties to know where they stand. ... They need to know with reasonable certainty what the effect of a proposed variation may be.

36. ... the effect of the arbitrator's interpretation and GECA's case is that it effectively merges Rules 2 and 3 since if the intrinsic `reasonableness' of a rate or price is an additional criterion to be satisfied (beyond the work or conditions being dissimilar) then that is tantamount to enabling a fair valuation to be made whenever the first two criteria are met. The words in Clause 52(1)(b) `the rates and prices <u>shall be used</u>' are clear and mandatory. There will be little point in such a clear statement if they are only to be used if it was otherwise `fair to do so'.

38. ... The fact that the rate that might be derived is unusually low or high does not mean that it is not to be used - indeed it has to be used, even though there may be a lack of confidence that it is realistic. The arbitrator's other reservation ... about the figure of £343,240 for further temporary works may lead to a modification of the rate but that is an element of the valuation.

39. The test in Clause 56(2) is whether the `increase or decrease <u>of itself</u> shall so warrant'. This is in my judgment a clear reference to the need to look to the trigger of the work itself to decide whether that change - and not an error built into the rate or price - makes it reasonable to consider whether the rate or price should be altered. ... In addition Clause 56(2) says that the alteration of the rate or price has to be done `in consequence thereof'. This is a further indication that the causal chain starts with the change itself and ends at a revision of the existing rate and not with the revision of the constituent but erroneous elements of the rate itself before or in addition to any revision occasioned by the change in the increase or decrease. What has to be established is whether the increase or decrease in itself rendered unreasonable any rate or price.

41. ... clause 52(2) states plainly that the opinion that must be formed is that `any rate or price contained in the contract for any item of work is <u>by reason of such variation</u> rendered unreasonable or inapplicable'. ... the price of £250,880 is rendered not unreasonable or inapplicable by any variation so Clause 52(2) cannot therefore apply."

42. My analysis of the issues

1. The starting point, as Mr Furst Q.C. for Boot submits, has to be that the valuation of the work done under this contract is determined by admeasurement: see Clause 56(1). The contract prices and rates are then applied to those measurements. These rates are not capable of rectification: see Clause 55(2). To that extent they may fairly be described as `sacrosanct'.

2. There are, however, occasions when rates can be altered. Lord Neil Q.C. pointed to Clause 74 dealing with an early determination of the contract when the work is to be paid for `at a fair and reasonable price'. Of greater significant to the issue before us are Clauses 52(2) and 56(2). Their rates can be altered, not because they are inherently unreasonable, but because the scale of the valuation makes it unreasonable to use them. I

accept that it is the change in the work which operates as the trigger for the decision whether or not it is reasonable to use the rates. I see the force of the argument that for the consistency of the operation of the contract as a whole Rule 2 should, if possible, be used in a similar way.

3. I also accept that a common purpose of these conditions and thus of the `philosophy to be derived from' the contract is `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 arbitrator a roving commission to be fair.

4. Rules 1 and 3 make that plain enough. Under Rule 1, if the varied work is similar to priced work, then the varied work `shall be valued at' the specified rates `as may be applicable', i.e. at the rates which apply to the work to which the varied work is judged to be similar. Once a rate is identified, then it is mandatory to apply it to calculate the value of the work. Any mistake in the rate is irrelevant because the arbitrator has no discretion to disapply it. *Non constat* that the rate is equally irrelevant under Rule 2 where the task is not merely to ascertain what rate is applicable and then to apply it willy nilly but to decide whether it is reasonable to use the applicable rate (whether it is based on mistake or not) as the basis for valuation. Under Rule 3, if it is not reasonable to use the rates in the Bill of Quantities, then a `fair valuation shall be made.'

5. How then should an arbitrator approach Rule 2? Before one gets to Rule 2 a decision will have had to have been taken that Rule 1 did not apply. So the decision will have been made that the varied work is not `of similar character and executed under similar conditions to the work priced in the Bill of Quantities'. Boot submit that the question the arbitrator should then ask is a narrow one, namely, `is it reasonable to use the rates specified for work X as the basis for the valuation of dissimilar work Y?' The answer will be yes if upon a comparison of the varied work and the contract work the arbitrator can conclude that although the work is not exactly similar so as to invoke Rule 1, it is nonetheless not unreasonably dissimilar, or, putting it another way, reasonableness is determined by, and is solely dependent upon, whether the varied work is reasonably sufficiently similar to the contract work to justify the use of contract rates. GECA on the other hand submit that the words must be given a wide meaning and that the question is no more, and no less, than asking whether it is reasonable to use the Bill of Quantity rates as the basis for the valuation of this dissimilar work.

6. I am bound to say that I find the ordinary and natural meaning of the words compels the question being literally posed in the way GECA contend. So I ask myself whether the structure of the contract and its purpose force the displacement of that linguistic meaning.

7. In my judgment the clause should not be narrowly construed for the following reasons:-

   (1) If the parties wish to stipulate that contract rates must be used if the varied work is within reason similar to specified work, then it would have been easy to make that explicit. In Clause 52(2) it was plain that the extent of the variation was to be the test for deciding whether the rate had become unreasonable. Likewise in Clause 56(2) it was the increase or decrease in quantity which `of itself' warranted the corresponding increase or decrease of rates `rendered unreasonable or inappropriate in consequence thereof.' The draftsman was thus perfectly capable of achieving the mandatory use of contractual rates if the degree of similarity in the work was the only touchstone of reasonableness.

   (2) The judge held that the same approach must apply to Rule 2 as for Rule 1 so that if no adjustment is to be made for mistakes under Rule 1, then mistake cannot justify an adjustment under Rule 2. On that approach the two fold task is, and he said as much, simply to ascertain whether the work was reasonably comparable and then to ascertain whether there was a rate *applicable* for use as the basis for valuation. If that approach is correct then Rule 2 is entirely subsumed into Rule 1. Clause 52(1) would then read:-

      (a) Where the work is of a similar or reasonably similar character ... to work priced in the Bill of Quantities it shall be valued at such rates and prices contained therein as may be applicable.

      (b) In any other case, a fair valuation shall be made.

   (3) I cannot accept that construction because Rule 2, unlike Rule 1, does not demand a valuation at rates `as may be applicable' but demands only the use of Bill of Quantity rates as the basis for valuation so far as it may be reasonable to use them as that basis. Rates in the Bill of Quantities may be capable of being applied to the varied work but the applicability of the rate and price does not by itself and necessarily make it reasonable to use them as the basis for valuation.

   (4) Similarly it may be `feasible to use a given contract rate or price as the basis for the valuation' but feasibility does necessarily not equate with reasonableness. It may be possible to use the rate but at the same time it may not be reasonable to do so.

   (5) I agree that the reasonableness of the price as such is not the object of the enquiry. What must be judged to be reasonable is the use of the contract price as the basis for valuation. What I cannot accept is that it is impermissible to have regard to the result of using the contract price in judging whether or not that use is reasonable or unreasonable. It seems to me to be a travesty of the language. If the question is whether or not it is reasonable to use contract prices as the basis for valuation then on the ordinary meaning of the words many factors may bear upon the reasonableness of that use and one of them has to be the reasonableness or unreasonableness of the consequence of that use. How can it be reasonable to use a figure if its use leads to a result which is absurd and therefore beyond reason?

(6) The desirability of maintaining the `sacrosanct' role for stipulated prices should not force an unnatural strain on the language. The sanctity of contractual rates can perfectly properly be catered for on the appellant's wide construction of Rule 2 by the arbitrator directing himself that certainty of contractual expectation is a factor of great weight in considering the reasonableness of the use of contractual rates so that they should not be displaced except for strong and cogent reasons. Little mistakes or even big mistakes can and should reasonably be disregarded. But to use a rate based on a gross error which produces a ludicrous result cannot be a reasonable use of those figures.

(7) I fully accept that it may be held by the arbitrator to be reasonable to use mistaken figures as the basis for valuation even if the consequence is that the resultant valuation is different from a fair valuation (whether greater or less, matters not), as that fair valuation would be carried out under Rule 3. In so doing I am not treating the intrinsic reasonableness of the rate or price as an additional criterion as the judge assumed in paragraph 36 of his judgment. Looking at the reasonableness of the result of the use of mistaken figures is a quite different technique from looking at the intrinsic reasonableness of the rates as such. I am not merging Rules 2 and 3 because I accept that reasonable use of contract rates may well produce an unfair valuation. All I would permit the arbitrator is the discretion *not* to use contract rates where that use as the basis for valuation is not a reasonable use. He is the judge of reasonableness. Reasonableness is a matter of fact.

(8) Even the judge accepts that an arbitrator `may occasionally bend Rule 2.' On the respondent's construction, no bending on any occasion is permissible once comparability of work requires the rate to be used. What justifies this occasional bending of the rule? The only credible justification can be that it is reasonable to do so. That is what the appellant contends. Even Mr Abrahamson is prepared to make an exception to the rule. He says at p.186 of the 4th Edition of his work:- *"... the limitation that rates are to provide a basis for valuation only so far as is reasonable may in exceptional cases require the Engineer to move towards a fair valuation giving the contractor a reasonable profit on the work done. It is impossible to be more precise on this matter which is for the judgment of the Engineer ... ."*

(9) In summary, therefore, I find that GECA's contention gives effect to the ordinary and natural meaning of the language whereas Boot's construction, in its attempt to give a purposive interpretation to the contract, so narrowly confines the focus of reasonableness that such an absurd result is foist on the parties that they cannot be taken to have intended it. In my judgment upon a proper construction of the contract and as a matter of law, the arbitrator was entitled to have regard to the magnitude of the mistake in deciding whether it was reasonable to use that rate as a basis for the valuation of the work.

8. I turn now to the second basis of the arbitrator's award. He had difficulty in extracting a rate directly relevant and applicable to the work in question because of the absence of detailed information as to how Boot calculated the rate in the first place and because they included a figure of £343,240 for further temporary works without it being clear how that inclusion inter related with the other elements of the bill. These conclusions seem to me to be conclusions reached by the adjudicator upon a consideration of the facts of the case before him. He was, in my judgment, fully entitled to that information before he could decide what rate to apply and whether the use of that rate was reasonable or not. It cannot be said in my judgment that as a matter of construction he was not entitled so to approach the case and consequently no point of law arises. Even the judge seems to accept that this is an element of the valuation, and elements of valuation are for the exercise of his judgment with which this Court cannot interfere

Conclusion

43. For my part, I would have allowed the appeal and restored the arbitrator's award but if, as a result of my lords judgment on the reasonableness issue the case must be remitted to the arbitrator, then I agree with the way Beldam L.J. would direct that it be reconsidered.

LORD JUSTICE BELDAM:

44. I gratefully adopt Lord Lloyd's statement of the circumstances which give rise to the question of law in this case. His Hon. Judge Humphrey Lloyd QC in his careful judgment stated this question in these terms: *"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 on the rate or price."*

45. The judge answered this question: "No". and remitted the award to the arbitrator to make a valuation pursuant to Clause 52(1)(b) of the Conditions of Contract of the additional and temporary sheet piling in the areas of the HRSG and the cooling towers on the basis of the price of £250,880 for such work in the turbine hall.

46. In his judgment Lord Lloyd suggests that the words "*on extraneous grounds such as*" should preferably have been omitted from the question of law. I agree. The arbitrator did not reject the price of £250,880 as the basis for valuing the additional works simply on the ground that it contained or was based on a mistake. He also based his decision on the ground that much, if not all, of the detailed information which would have enabled the price to be used as a basis of valuation of the relevant work had not been provided and was not available.

47. I take the words "extraneous grounds" to mean on grounds which, on the proper construction of Clause 52 of the contract, it was not open to the arbitrator to consider. The inclusion of these words in the question appears to

assume that the grounds mentioned in the question are in fact extraneous. It seems to me that the question we have to consider is whether under Clause 52(1)(b) of the ICE Conditions, 6th Edition, an arbitrator in deciding whether it is reasonable to use as a basis for valuation a rate or price stated in the Bill of Quantities can have regard to:

(a) The fact that the rate or price contained or was based upon a mistake, or

(b) The fact that the information provided by the contractor concerning the nature and extent of the work to which the rate or price related did not enable him to use it as a basis for valuation of the additional work.

48. In paragraphs 144-148 of his award Mr John Tackaberry, the experienced arbitrator, considered the status of the figure of £250,880. He concluded that it was a lump sum price for additional and different temporary works in the turbine hall which comprised sheet piling. He also concluded that the description of the work was inserted in the contract in a way that could only have been intended by both parties to be treated as comparable to items in the Bill of Quantities. He therefore concluded that it was "a price" which he defined as a unit cost for a piece of work which will often contain more than one element. After giving examples of lump sum prices, he said: *"Clearly where there is some event on site which re-occurs, either as a function of the job as originally planned or as a result of subsequent changes, that price can be applied to each occurrence. Minor differences between precisely what is involved in two or more occurrences fall to be ignored; and everybody concerned is saved the work of detailed measurements."*

49. In paragraphs 150-151 of his award, the arbitrator concluded that: *"The "event" in the HRSG is somewhat different and in the Cooling Towers is very different indeed to "the event" in the Turbine Hall. Thus the amount of work involved in the sheet piling of the Cooling Towers is vastly greater than that in the Turbine Hall. Indeed to apply the price from the Turbine Hall to the Cooling Towers would be to produce a windfall loss to Boot nearly as dramatic as the proposed windfall gain which results from the Boot strategy of developing the Turbine Hall price into a rate and then applying that rate to the Cooling Towers."*

50. In the result, he did not think that the price could be used for the purpose of valuing such additional temporary works as were necessary as a result of the utilisation of sheet piling for the CWP trenches other than in the turbine hall. This conclusion led him to reject a valuation of the works based on Clause 52(1)(a) (Rule 1). This decision is accepted and rightly for it was based on questions of fact which are for the engineer or arbitrator to decide.

51. The arbitrator next considered whether in applying the first part of Clause 52(1)(b) (Rule 2) the price could be used as the basis for valuation "*so far as may be reasonable*". He had already found that the route to the original price was flawed by mistake which he said *"undermined the applicability of the price in any extended role in the contract*". He added: *"To put it another way, while one cannot change the mistake, I do not see it as "reasonable" to enlarge its ambit and thereby compound the effect of the error. I anticipate that a Contractor who had underestimated a price by error would see the force of the argument and would be as vehement in opposing its extension beyond the ambit of the original mistake, as GECA is vehement in opposing the use of the £250,880 in this case."*

52. He therefore concluded: *"Given that the rule must be the same whichever way the error goes, it seems to me that it is "reasonable" not to use a price where the price has been reached by mistake or error."*

53. In addition in paragraphs 155-159 the arbitrator concluded that there was no warrant in the contract for using rates to get prices or for using prices to get rates and he thought, in seeking to apply Rule 2, it was not necessary to mingle the matters and that it would be difficult to qualify such a method as "reasonable". He added two additional difficulties. Firstly there was an absence of much, if not all, of the detailed information as to how Boot calculated the rates for the pipework in the first place which rates would or should have included the necessary temporary works then planned. The second stemmed from the fact that Boot included a figure of £343,240 for further temporary works but it was not possible, in his view, to work out precisely how this inclusion interrelated with the other elements of the Bill. He thus concluded that there was no route which permitted the use of the price of £250,880 in the valuation of the relevant work in the HRSG and the cooling towers under Rule 2 and so he valued the work by making a fair valuation (Rule 3).

54. Under Clause 52(1)(b), in the case of work not of a similar character or not executed under similar conditions, the rates and prices in the Bill of Quantities are to be used at the basis for valuation "so far as may be reasonable". Thus the clause contemplates cases in which it may be reasonable to use rates and prices in the Bill of Quantities and in others not but it is the reasonableness of using the rates and prices, and not the reasonableness of the prices or rates, which has to be considered. I agree with the judge and Lord Lloyd that the fact that the price stated in the Bill of Quantities referred by mistake only to the works in the turbine hall was not a material consideration in deciding whether it was reasonable to use the price as the basis for valuing the other additional works. Insofar as the arbitrator rejected the price of £250,880 as a basis for valuation because it was not reasonable to enlarge the ambit of the mistake, in my view he took into account an irrelevant consideration and his decision cannot stand.

55. The arbitrator is required to value work which is by definition dissimilar or executed under dissimilar conditions to work for which a rate or price is quoted in the Bill of Quantities. The extent to which it is reasonable for him to do so must depend on his assessment of the work involved in the "dissimilar" work and his extraction from the rates or prices quoted in the Bill of Quantities of ingredients which it is reasonable for him to use in valuing the additional work.

56. The arbitrator decided that "the rate extraction exercise" was inappropriate because of the difficulties of extracting from the figure of £250,880 a rate which could be said with confidence to be directly relevant and applicable to the work in question for the reasons contained in paragraph 158 of his award.

57. In paragraphs 166-167 the arbitrator referred to Clause C.5(1) of the Particular Conditions of Contract dealing with new rates and prices referred to as "star rates". He said that the amount of information that was in fact available to the parties for the purposes of the arbitration was minimal and such other information as might have been available had been lost or destroyed.

58. When the arbitrator referred to "the rate extraction process", he was I think referring to the means by which the price (£250,880) could be related to the additional "dissimilar" works. Normally the breakdown of the price would include provision for plant, materials, labour and overheads and, if as the arbitrator said there was insufficient information available to him to relate the price to the additional works, it was open to him to form the opinion that he could not say how far it was reasonable to use the price in the valuation of the "dissimilar" works. But it is not possible to say whether the arbitrator would have rejected the use of the price of £250,880 as a basis for valuation solely on this latter ground. Accordingly I would remit the award to the arbitrator to reconsider whether in the light of the court's ruling that the existence of the mistake was irrelevant, it is reasonable to use the price of £250,880 as a basis for valuation notwithstanding the difficulties to which he referred.

Order:

1) Appeal allowed
2) Agreed minute of order to be provided by counsel

(Order does not form part of the approved judgment)

Stephen Furst Esq. QC instructed by Taylor Joynson Garrett for the Appellant)
Lord Neill of Bladen instructed by Lovell White Durrant for the Respondent