Privy Council Appeal No. 57 of 1984

Mitsui Construction Company Limited *Appellant*

v.

The Attorney General of Hong Kong *Respondent*

FROM

THE SUPREME COURT OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH FEBRUARY 1986

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD ROSKILL
LORD GRIFFITHS
LORD ACKNER
SIR JOHN STEPHENSON

*[Delivered by **Lord Bridge of Harwich**]*

The appellant company ("the Contractors"), concluded an agreement with the Hong Kong Government ("the Government"), represented as a party to these proceedings by the Attorney General of Hong Kong, to undertake major civil engineering works required to improve Hong Kong's water supply by bringing water from the River Indus Pumping Station to Plover Cove. The only part of the works with which this dispute is concerned is the excavation and construction of a tunnel some 3,227 metres in length and 3.6 metres in diameter from Ma Mei Ha to Nam Chung. The Government had obtained certain geological information which is described in the contractual documents. But it is common ground that, however thorough the pre-contract site investigations, the nature of the ground through which the tunnel was to pass could not be predicted accurately in advance but would only be discovered as excavation proceeded. In these circumstances the contract, not surprisingly, specified five different types of lining, suitable no doubt for different ground conditions, but did not specify, save with respect to the portals at either end of the tunnel, where lining was to be required or of what type. The contract provided for this to be decided by the

[6] Engineer as the work of excavation proceeded. The

contract, however, included Bills of Quantities priced by the Contractors with reference to estimated lengths of tunnel which were to be left unlined and to be lined with each of the different types of lining respectively.

No one doubts that the estimated lengths of lined and unlined tunnel included in the Bills were based on the best assessment which the Government's technical advisers were able to make in the light of the geological information available. Unfortunately the estimates turned out to be wildly wrong. This can be sufficiently shown by reference to three items in the Bills of Quantities and comparing the billed quantities with the measured quantities of work in the event required and carried out in each case.

The billed length of tunnel to be left unlined was 1,885 metres; the length left unlined in the event was 547 metres. The billed length of tunnel to be lined with the heaviest and most expensive type of lining was 275 metres; the length so lined in the event was 2,448 metres. The billed quantity of steel required for lining support was 40 metric tonnes; the quantity required and used in the event was 2,943 metric tonnes.

As a result of these differences work on the tunnel took very much longer than it would have done if the quality and quantity of lining required had corresponded reasonably closely with the billed quantities. The time allowed by the contract for completion was two years. The Engineer exercised his power under the contract to grant an extension of time of 784 days "to compensate for the extra time required to cope with ground conditions in executing the tunnel excavation and lining works". The Contractors have been paid for the work as executed and measured at the rates in the Bills of Quantities. They claim that, in the events which have happened, they are entitled to an adjustment of rates to be agreed with or fixed by the Engineer. The position taken by the Government is that, on the true construction of the contract, the Engineer has no power to agree or fix any adjusted rates.

The dispute was referred to the arbitration of His Honour Edgar Fay Q.C. on the basis of a statement of agreed facts and the contractual documents. The issues as formulated for his decision as preliminary points of law were as follows:-

"A. Whether on the true construction of the contract the contractor is entitled to further compensation for any losses sustained by reason of the extra time required to cope with ground conditions.

B. Whether on the true construction of the contract the Site Instructions referred to in paragraph 5 of the Statement of Agreed Facts were variation orders for the purpose of clause 73 of the General Conditions.

C. Whether on the true construction of the contract an excess of executed over billed quantities as set out in the Statement of Agreed Facts, without having been ordered by the Engineer as a variation, is within clause 74(4) of the General Conditions."

Mr. Fay made an Interim Award in the form of a special case for the decision of the High Court. He answered all three questions of law affirmatively in favour of the Contractors. In the High Court Rhind J., in substance, upheld the arbitrator by answering questions A and C affirmatively, though he answered question B negatively. On appeal by the Government the Court of Appeal reversed the judge by a majority. All thought that question A did not arise. Cons and Fuad JJ.A. answered questions B and C negatively. Sir Alan Huggins V.-P. dissented. He would have answered questions B and C affirmatively. The Contractors now appeal to Her Majesty in Council by leave of the Court of Appeal.

The contract was embodied in a number of documents of which those presently relevant are the Articles of Agreement, the General Conditions, the Particular Specification, and the Bills of Quantities. It will be convenient, even if somewhat cumbrous, to set out en bloc all the provisions which, in their Lordships' judgment, are capable of throwing any light on the question of construction in dispute.

The Articles of Agreement contain the following recital:-

" WHEREAS the Government is desirous of constructing the Works shown on the Drawings and described in the Specifications and set forth in the Form of Tender (including the Appendix thereto) and the Acceptance thereof by the Government, Bills of Quantities and/or Schedule of Rates (hereinafter referred to as 'the Works') in accordance with such Drawings, Specifications, Form of Tender (including the Appendix thereto) and the Acceptance thereof by the Government, Bills of Quantities and/or Schedule of Rates and in accordance with the Conditions of Contract which Drawings, Specifications, Form of Tender and Acceptance thereof by the Government, Bills of Quantities and/or Schedule of Rates are annexed hereto and/or have been signed by the parties hereto and WHEREAS the Contractor has agreed to execute the said Works for the sum of

Dollars Eighty-two Million Eight Hundred Sixteen Thousand Six Hundred Fifty-seven only ($82,816,657.00) and to do such extra works and additional works as may be ordered or required upon and subject to the said Conditions of Contract (hereinafter referred to as 'the said Conditions')."

The following are the relevant provisions of the General Conditions:-

"1.(1) In the Contract the following words and expressions shall have the meaning hereby assigned to them except when the context otherwise requires:-

'Additional Works' means all such works which in the opinion of the Engineer are of a character similar to those contemplated by the Contract and which can be measured and paid for under items in the Bills of Quantities ...

'Contract Sum' means the sum named in the Articles of Agreement for the construction, completion and maintenance of the Works;

'Extra Works' means all such works as are not, in the opinion of the Engineer, of a character similar to those contemplated by the Contract and which cannot be measured and paid for under items in the Bills of Quantities or Schedule of Rates;

'Final Contract Sum' means the Contract Sum subject to such additions thereto or deductions therefrom as may be made under the provisions hereinafter contained;

'Works' means all the work and things to be executed or supplied by the Contractor under the Contract and includes Temporary Works.

6.(1) Except if and to the extent otherwise provided by the Contract the provisions of these Conditions shall prevail over those of any other document forming part of the Contract.

(2) Subject to the foregoing the several documents forming the Contract are to be taken as mutually explanatory of one another but in case of ambiguities or discrepancies the same shall be explained and adjusted by the Engineer who shall thereupon issue to the Contractor instructions directing in what manner the work is to be carried out:

13. When the Bills of Quantities are included in the Tender documents the quality and quantity of the work included in the Contract Sum shall be deemed to be that which is set out in the Bills of Quantities.

15.(1) The Contractor shall be deemed to have inspected and examined the Site and its surroundings and to have satisfied himself, before submitting his Tender, as regards existing roads or other means of communication with and access to the Site, the nature of the ground and sub-soil, the form and nature of the Site, the risk of injury or damage to property adjacent to the Site or to the occupiers of such property, the nature of the materials (whether natural or otherwise) to be excavated, the nature of the work and materials necessary for the completion of the Works, the accommodation he may require and generally to have obtained his own information on all matters affecting his Tender and the execution of the Works.

(2) No claim by the Contractor for additional payment will be allowed on the ground of any misunderstanding or misapprehension in respect of the matters referred to in sub-clause (1) or otherwise or on the ground of any allegation or fact that incorrect or insufficient information was given to him by any person whether in the employ of Government or not or of the failure on his part to obtain correct and sufficient information, nor shall the Contractor be relieved from any risks or obligations imposed on or undertaken by him under the Contract on any such ground or on the ground that he did not or could not foresee any matter which may in fact affect or have affected the execution of the Works.

73.(1) The Engineer shall make any variation of the form, quality or quantity of the Works or any part thereof that may in his opinion be necessary for the completion of the Works and for that purpose or, if for any other reason it shall in his opinion be desirable, shall have power to order the Contractor to do, and the Contractor shall do, any of the following:-

(a) increase or decrease the quantity of any work included in the Contract;

(b) omit any such work;

(c) change the character or quality or kind of any such work;

(d) change the levels, lines, position and dimensions of any part of the Works;

(e) execute Additional Works and Extra Works;

and no such variation shall vitiate or invalidate the Contract but the value (if any) of all such variations shall be taken into account in ascertaining the amount of the Final Contract Sum.

(2) No such variation shall be made by the Contractor without an order in writing from the Engineer:

Provided that -

(a) no order in writing shall be required for any increase or decrease in the quantity of any work where such increase or decrease is not the result of an order given under this clause but is the result of the quantities exceeding or being less than those stated in the Bills of Quantities;

(b) if, for any reason the Engineer shall consider it desirable to give any such order verbally the Contractor shall comply with such order and any confirmation in writing of such verbal order given by the Engineer whether before or after the carrying out of the order shall be deemed to be an order in writing within the meaning of this clause; and

(c) if the Contractor shall confirm in writing to the Engineer any verbal order of the Engineer and such confirmation shall not be contradicted in writing by the Engineer before the commencement of the work concerned it shall be deemed to be an order in writing by the Engineer.

74.(1) The Engineer shall determine the amount, if any, which in his opinion shall be added to or deducted from the Contract Sum in respect of any Additional Works or Extra Works done or work omitted by his order.

(2) All Additional Works or omitted work shall be valued at the rates set out in the Contract.

(3) All Extra Works shall be valued at rates agreed upon between the Engineer and the Contractor.

(4) If the nature or amount of any omission or addition relative to the nature or amount of the Works or to any part thereof shall be such that

in the opinion of the Engineer the rate contained in the Contract for any item of the Works is by reason of such omission or addition rendered unreasonable or inapplicable then a suitable rate shall be agreed upon between the Engineer and the Contractor.

(5) In the event of disagreement the Engineer shall fix such rates as shall in his opinion be reasonable and proper.

75. No increase of the Contract sum or variation of rate under clause 74 shall be made unless as soon as is practicable after the date when the order was given under clause 73 and, in the case of Additional Works or Extra Works before the commencement of the work or as soon thereafter as is practicable, notice shall have been given in writing -

(a) by the Contractor to the Engineer of his intention to claim extra payment or a varied rate; or

(b) by the Engineer to the Contractor of his intention to vary a rate as the case may be:

Provided that no notice shall be required in respect of Additional Works and omitted works where such works are to be measured as constructed.

91. The quantities set out in the Bills of Quantities are the estimated quantities of the Works but they are not to be taken as the actual and correct quantities of the Works to be executed by the Contractor in fulfilment of his obligation under the Contract.

92.(1) The Engineer shall, except as otherwise stated, ascertain and determine by measurement the value in accordance with the Contract of work done in accordance with the Contract."

The Particular Specification, by clause 2.6.30, provides:-

"Whilst tunnel driving is in progress the Engineer will order the type of permanent lining to be subsequently installed and separate items for excavation are provided according to the type of lining ordered. The Contractor will be informed of the type of permanent lining required for a length of tunnel immediately before it is drilled for blasting and separate items are provided in the Bill of Quantities for additional costs arising from this decision being changed after the length has been excavated."

The Preamble to the Bills of Quantities, by clause 3, provides:-

> "The quantities of works and materials in the Bill of Quantities are approximate only and shall not be considered as limiting or extending the work to be done and the materials to be supplied by the Contractor. All the work done and materials supplied by the Contractor will be measured and paid for at the rates quoted in the Bill of Quantities."

There is no dispute that the measured quantities of relevant work executed in the tunnel which are set out and compared with the corresponding billed quantities in a document which forms part of the Statement of Agreed Facts resulted from proper compliance by the Contractors with orders given by the Engineer pursuant to clause 2.6.30 of the Particular Specification. It is equally accepted that these instructions were prompted by the unexpectedly difficult ground conditions encountered in the course of excavation.

The submission for the Contractors may be briefly summarised thus. In the context of all the relevant terms of the contract, the expression "any omission or addition", whose "nature or amount" must be compared with "the nature or amount of the Works" under clause 74(4) so as to trigger an adjustment of any rate in the Bills of Quantities, if "in the opinion of the Engineer the rate contained in the Contract for any item Works is by reason of such omission or addition rendered unreasonable or inapplicable", is apt to cover every difference, whether by way of increase or decrease, between the quantity of any item of work priced in the Bills of Quantities and the measured quantity of work executed which is covered by that item. It is immaterial whether the difference results from orders given by the Engineer in express exercise of the power to "make any variation of the form, quality or quantity of the works or any part thereof" under clause 73(1), or, as in this case, from orders with respect to tunnel lining given pursuant to clause 2.6.30 of the Particular Specification, or without any specific order when the quantity of measured work properly completed in accordance with the contract turns out for any reason to differ from the billed quantity.

For the Government it is submitted, again in brief summary, that the only "omission or addition" which qualifies for consideration under clause 74(4) is one which results from an express exercise by the Engineer of the power to order a variation under clause 73(1); that an order under clause 2.6.30 of the Particular Specification is not such an order because "the Works", when first referred to in clause

73(1) and again in clause 74(4), are not to be quantified by reference to the Bills of Quantities but must be taken to embrace whatever quality and quantity of tunnel lining the Engineer chooses in the event to order under clause 2.6.30 of the Particular Specification. Counsel for the Government relies heavily on clauses 15 and 91 of the General Conditions and clause 3 of the Preamble to the Bills of Quantities.

In order to resolve the issue arising from these rival contentions their Lordships do not find it necessary to give any answer to questions A or B. The single issue requiring resolution has been refined as the case has progressed through the courts. Question C is not perhaps as precise a formulation of that issue as one might have wished. But an affirmative or negative answer to question C will be sufficient to indicate whether or not the Engineer has jurisdiction, in the events which have happened, to consider the differences between the relevant measured quantities and billed quantities and, if he is of opinion that those differences are such as to render any bill rate "unreasonable or inapplicable", to agree a "suitable rate" under clause 74(4) or fix a new rate under clause 74(5).

It is obvious that this is a badly drafted contract. This, of course, affords no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they have used interpreted in the light of the relevant factual situation in which the contract was made. But the poorer the quality of the drafting, the less willing any court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis. As already stated, the ground conditions which would largely dictate the scope of the tunnel lining works required were unpredictable. As the Government themselves stated in a document entitled a "brief" which was before the arbitrator in lieu of a pleading: "All tunnelling work is mainly determined by ground characteristics on which planning and methods of construction are largely dependant". Later they added: "... time related costs are a significant factor and are closely determined by ground conditions".

Against this background of facts, if the contract documents were understood in the sense contended for by the Government, engineering contractors tendering

for the work would have two options. They could either gamble on encountering more or less favourable ground conditions or they could anticipate the worst case and price their tenders accordingly. It is clear from what happened here that the worst case might double or more than double the time required to do the work with a consequent increase in time related costs. On this basis, tenderers gambling on favourable ground conditions would risk a large loss, while conversely, if all tenderers anticipated the worst case, but in the event reasonable conditions were encountered, the Government would be the losers. It follows that, if the Government are right, there is a large element of wagering inherent in this contract. It seems to their Lordships somewhat improbable that a responsible public authority on the one hand and responsible engineering contractors on the other, contracting for the execution of public works worth many millions of dollars, should deliberately embark on a substantial gamble.

By contrast, if the Contractors' submission is correct, tenderers can and will base their tenders on the expectation that the scope of the tunnelling and lining work is reasonably to be inferred from the billed quantities. Then, if unexpectedly bad ground conditions dictate so large a departure from those quantities, and consequent alteration of the scope of the work, that, in the opinion of the Engineer, the bill rates are "rendered unreasonable or inapplicable", the rates can be suitably adjusted. Given the inherent uncertainty as to the scope of the work that will be required, a provision to this effect would seem an eminently sensible means of ensuring that the Contractors receive no less, and the Government pay no more, than a reasonable price for the work actually done.

Not the least infelicity in the drafting of the contract is that it contains two definitions of "the Works" and uses the expression indifferently in both senses. Which meaning is to be attributed to it can only be ascertained from the context in each case. The first definition is embodied in the recital in the Articles of Agreement set out earlier in this judgment. The parenthesis "(hereinafter referred to as 'the Works')" follows words which include a reference to the Bills of Quantities. "The Works" as so defined are quantified by the billed quantities. It is by reference to the Works so quantified (referred to later in the recital as "the said Works") that the Contract Sum is calculated. This is emphasised by clause 13 of the General Conditions. It will be convenient to refer to "the Works" in this sense as "the basic Works". On the other hand "Works", as defined in clause 1 of the General Conditions, is all-embracing and apt to include "Additional Works" and "Extra Works" as therein

defined. In this sense "the Works" refers to what may be conveniently called "the executed Works".

Prima facie it seems to their Lordships clear that "the Works" when first referred to in clause 74(4) must mean "the basic Works". It would follow from this that any difference between billed and executed quantities gives rise to an "omission or addition" the nature or amount of which is to be considered relative to the nature or amount of the basic works as indicated in the Bills of Quantities. Their Lordships find it difficult to understand how, on the argument advanced for the Government, the "amount of the Works", which are to provide the standard of comparison in considering omissions and additions, can be quantified at all.

However, it is said rightly that clauses 73, 74 and 75 of the General Conditions must be read together. The argument for the Government then proceeds thus. The words "by his order" in clause 74(1) govern the whole of clause 74. They refer back to variation orders, strictly so called, under clause 73. No such order was given here. Proviso (a) to clause 73(2) was inserted *ex abundanti cautela* to protect the Contractors against a refusal to pay for work properly carried out without any order which results in an increase of measured quantities over billed quantities, but does not dispense with the need for a variation order to activate the machinery under clause 74. Likewise clause 75 pre-supposes that a variation order will have been given before the clause 74 machinery can be set in motion and the proviso to clause 75 does not refute this pre-supposition.

Clause 73(1) raises again the question of deciding in what sense the expression "the Works" is used. Their Lordships think the sense of the opening words must be: "the Engineer shall make any variation in the form, quality or quantity of the basic Works or any part thereof that may in his opinion be necessary for completion of the executed Works etc.". On this reading, reinforced by the language of clause 73(1)(a), there is much to be said for the view that proviso (a) to clause 73(2) amounts to a deeming provision whereby any difference between measured quantities of work properly carried out pursuant to the contract and billed quantities is deemed to result from a variation order. However, it is quite unnecessary to decide whether this view is or is not correct. On any view it is clear that proviso (a) to clause 73(2) plays an important part in relation to the operation of the machinery of clause 74.

By the definition in clause 1(1) of the General Conditions the Final Contract Sum requires to be calculated by making additions to or deductions from

the Contract Sum "under the provisions hereinafter contained". The only provision in the General Conditions to which this definition can refer is clause 74 and the correspondence between the language of clause 74(1) ("shall be added to or deducted from the Contract Sum") with the language of the definition is unmistakable. Here then is the only contractual machinery by which the difference between the Contract Sum and the Final Contract Sum can be determined and that determination must, *ex concessis*, take account of differences between measured quantities of work properly executed and billed quantities, whether or not resulting from any order given by the Engineer. Clause 74(1) and (2) and clause 92(1) together provide the necessary machinery for calculating, by reference to the rates in the Bills of Quantities, the appropriate amount to be added to or subtracted from the Contract Sum. There is nothing to confine the operation of clause 74(2) to differences between measured and billed quantities which arise from variation orders. Contrary to the submission for the Government, the definition of "Additional Works" is not so limited. It follows, although the drafting is inelegant and clumsy, that the words "by his order" in clause 74(1) must be read subject to the proviso to clause 73(2)(a) if the plain purpose of clause 74 is not be frustrated. This enables all differences between measured and billed quantities to be taken duly into account under clause 74(2). Their Lordships can see no reason why they should not equally be taken into account under clause 74(4).

This reading of clause 74 is reinforced by clause 75, which applies alike to any increase of the Contract Sum as it does to any variation of rate. This again would lead to absurdity if it precluded any increase of the Contract Sum in the absence of an Engineer's order. But here again the proviso makes clear that this was not intended.

Clauses 73 to 75 embody the terms of the contract providing expressly for the manner of calculating the Final Contract Sum. It remains to consider whether there is any other provision of the contract capable of displacing or modifying the meaning which, in accordance with the views already expressed in this judgment, those clauses, and in particular clause 74(4), appear on their face to bear. Neither clause 91 of the General Conditions nor clause 3 of the Preamble to the Bills of Quantities could possibly do so. The Government place heaviest reliance on clause 15 of the General Conditions. This clause, so runs the argument, is effective to cast upon the Contractors all risks from difficult ground conditions, including the risk that the quality and quantity of tunnel lining required will differ, no matter to what extent, from the estimates in the

Bills of Quantities. Their Lordships cannot agree. Clause 15 can be given ample content without impinging on clauses 73 to 75. Under clause 15 the Contractors take the risk, for example, that in excavating particular lengths of tunnel they will encounter unforeseen difficulties from roof and sides repeatedly caving in, which can only be met by providing elaborate and expensive temporary support. But if the quantities of tunnel lining works as ordered and executed under clause 2.6.30 of the Particular Specification are so different from the estimated quantities in the Bills of Quantities as to attract the operation of clause 74(4), it is quite immaterial that the Engineer may have been prompted to order those quantities by the nature of the ground conditions.

Their Lordships cannot help thinking that much of the difficulty felt by both courts below in construing the contract before them arose from the attention they devoted to reported decisions on the construction of other contracts containing supposedly similar provisions. In particular the Government relied on a decision of the South African Court of Appeal in the case of *Grinaker Construction (TVL) (PTY) Limited v. Transvaal Provincial Administration* [1982] 1 S.A.L.R. 78. Rhind J. and Sir Alan Huggins V.-P. thought it necessary to distinguish this case. The majority in the Court of Appeal expressly purported to follow it. With all respect, their Lordships think the decision in the case of *Grinaker* is simply irrelevant. The case was concerned with a differently worded contract applied to different facts. Certain phrases in the contract which has to be construed in the instant case are mirrored by the same phrases in the contract which had been construed in the case of *Grinaker*. To fasten on those phrases and ignore the differences in the context in which they were found and to treat *Grinaker* as a relevant, even if only persuasive, authority in this case was erroneous. It would be both wasted effort and an impertinence for their Lordships to consider and express a view as to whether *Grinaker* was rightly or wrongly decided. Such a view would be of no assistance in construing the contract in the instant case.

Their Lordships must also say respectfully that they think Fuad JA. fell into error in the comparisons he made between some of the terms of the contract presently in issue and analogous but differently worded terms in other forms of building and engineering contracts commonly in use and in the significance he attached to those comparisons. It is, of course, always legitimate to say that parties to a contract might have expressed themselves more clearly than they have with respect to the point at issue. But comparison of one contract with another

can seldom be a useful aid to construction and may be, as their Lordships think it was in this case, positively misleading.

Their Lordships are satisfied that on the true construction of the contract and on the agreed facts the differences between the measured quantities and the billed quantities are such as to give jurisdiction to the Engineer, if he is of opinion that the nature and amount of those differences relative to the nature and amount of the corresponding items in the Bills of Quantities are such as to render the billed rate for any item unreasonable or inapplicable, to agree a suitable rate with the Contractors under clause 74(4) or, in the event of disagreement, to fix a rate under clause 74(5). Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be allowed, the order of the Court of Appeal set aside and the order of Rhind J., save as to issues (A) and (B), restored. The Government must pay the Contractors' costs of the proceedings in the Court of Appeal and before the Board.