Neutral Citation Number: [2013] EWHC 110 (TCC)

Case No: HT-12-389

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8th February 2013

Before:

THE HONOURABLE MR. JUSTICE COULSON

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Between :

AMEC GROUP LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR DEFENCE	**Respondent**

- -
- -

Mr Roger Stewart QC and Ms Anneliese Day QC
(instructed by **Reed Smith LLP**) for the **Claimant**
Ms Sarah Hannaford QC, Mr Christopher Wilson and Ms Rachael O'Hagan
(instructed by **TSol**) for the **Respondent**

Hearing date: 19 December 2012

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Judgment

The Hon Mr Justice Coulson:

1. INTRODUCTION

1. Pursuant to a contract dating from March 2000, the respondent engaged the claimant to carry out the design and construction of a facility to support nuclear submarines at HMNB Clyde ("the contract"). The contract is a Maximum Price Target Cost ("MPTC") contract, and the original Maximum Price Target Cost was £89 million odd. There have been extensive cost and time overruns. The current agreed Maximum Price is £142.1 million, but the claimant considers it likely that the ultimate cost of the contract may be as much as £235.7 million, some £93.6 million in excess of the current agreed Maximum Price.

2. There is no dispute that, if the costs exceeded the agreed Maximum Price, up to a cap of £50 million, the claimant was entirely liable for such excess costs. The difficulty arises out of the unusual (and badly-worded) provisions of the contract as to what would happen once this cap was reached. It has always been the claimant's case that, once the costs had exceeded the Maximum Price plus £50 million, the respondent went back on risk to pay further sums to the claimant. As the arbitrators (referred to as the Disputes Review Board, or "DRB") noted at paragraph 43 of their award:

> "Target costs mechanisms have become common place but one which imposes a substantial overrun on one party, and then on the other party when that substantial overrun reaches a ceiling, is something which the DRB had not previously encountered."

3. Historically, there were two issues between the parties. The first was whether the respondent was liable to pay anything at all once the costs reached the Maximum Price plus £50 million. The second issue was, if the respondent was liable to pay when the cap was reached, what precisely did it have to pay: actual costs (which carried with it the contractual definition of costs 'reasonably and properly incurred'), or any costs howsoever incurred by the claimant (including, therefore, costs which were unreasonably or improperly incurred)? In an adjudication decision dated 8 December 2010, the adjudicator, Dr John Uff QC, concluded that the respondent was liable to pay once the costs exceeded the Maximum Price plus £50 million cap, but that such liability was limited to actual costs properly incurred in excess of that figure.

4. In 2012, the claimant challenged the adjudicator's decision by making a reference to the DRB. The issues were argued *de novo*: the claimant sought a declaration that it was entitled to any costs howsoever incurred once the Maximum Price plus £50 million figure was exceeded, whilst the respondent argued that it had no liability at all or, alternatively, a liability limited to actual costs reasonably and properly incurred. The DRB consisted of two well-known QCs specialising in construction law, and a distinguished former judge of the Technology and Construction Court. Their award was dated 26 October 2012. In it, the DRB unanimously declared that, on a proper construction of the contract, the respondent was liable to reimburse the claimant once the cost had reached the Maximum Price plus £50 million. The majority of the DRB considered that what was then payable were the actual costs reasonably and properly incurred. The dissenting view was to the effect that all costs (howsoever incurred) should be paid by the respondent to the claimant once the cap was reached. This construction would make the respondent liable to pay the costs incurred as a consequence of the claimant's own breaches of contract.

5. By a claim form dated 23 November 2012, the claimant sought permission to appeal the DRB's award pursuant to section 69 of the **Arbitration Act 1996**. By an order dated 26 November 2012, Akenhead J ordered a rolled-up hearing, namely a hearing at which, if permission was granted, the court would proceed to hear the substantive appeal. In the event, at the hearing on 19 December 2012, having read the skeleton submissions and heard oral argument, I indicated to the parties that the application for permission to appeal would be refused. I gave brief reasons for that decision, indicating that my detailed reasons would be provided at a later date. This Judgment contains my detailed reasons for refusing the claimant permission to appeal.

6. I propose to set out the terms of the contract in **Section 2** below which are of particular relevance to this application. I do not set out all of the terms. In **Section 3,** I summarize the relevant parts of the award and the majority decision. In **Section 4,** I set out the key elements of the dissenting view. There is a short summary of the applicable law in **Section 5**. Then, at **Section 6,** I deal with whether or not this application raises a point of general public interest which is, of course, a relevant consideration in formulating the applicable test for permission to appeal. At **Section 7,** I ask myself whether the majority were obviously wrong and/or whether their view was open to serious doubt. In **Section 8,** I consider whether the dissenting view is

arguable. There is a brief summary of my conclusions at **Section 9** below. I am very grateful to counsel for the excellence of their written and oral submissions.

2. THE CONTRACT

7. The critical terms of the contract were conditions 9.1 and 9.2. They provided as follows:

> "**Maximum Price Target Cost Pricing Provisions**
>
> 9.1 The Authority and the Prime Contractor have agreed that the following Maximum Price Target Cost (MPTC) pricing provisions shall apply to the Works carried out under this Contract. These provisions are illustrated graphically at Part 9 to the Commercial Document.
>
> 9.2 The MPTC Pricing Provisions for the Works comprise the following as detailed in the MPTC Breakdown Schedule at Part 9 of the Commercial Document:

		Design &. Construction Works
9.2.1	Target Cost	**£120,151,499**
9.2.2	Target Profit	**£6,728,484**
	(x% of Target Cost)	(5.6%)
9.2.3	Maximum Cost	**£139,789,223**
	(Target Cost + y%)	(16.35162%)
9.2.4	Maximum Price	**£141,615,026**
	(Target Cost +z%)	(17.86372%)

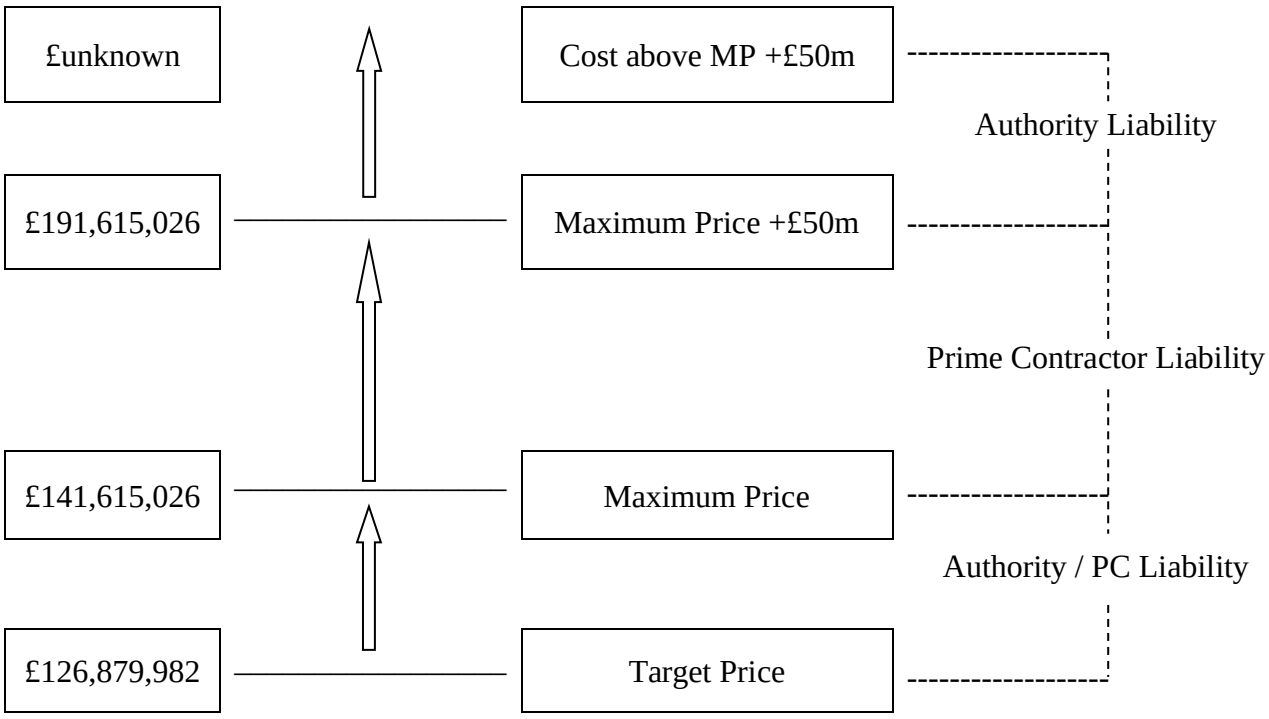
> (The % figures in the above breakdown are for the purposes of establishing revised figures if Changes in the Scope of Service take place as contemplated by Condition 7.12 and 12.1)
>
> 9.2.5 A sharing arrangement for cost under-runs between the Authority and the Prime Contractor of 55/45 (the Authority's share shown first) between the Target Cost and Actual Cost ascertained in accordance with Condition 9.7 to 9.10.
>
> 9.2.6 A sharing arrangement for cost over-runs between the Authority and the Prime Contractor of 75/25 (the Authority's share shown first) between the Target Cost and Actual Costs ascertained in accordance with Conditions 9.7 to 9.10 up to the Maximum Cost, beyond which the Prime Contractor shall be liable for all costs incurred in satisfying his obligation under the Contract and whereby the share line becomes 0/100 (the Authority's share first).

9.2.7 The maximum liability of the Prime Contractor for any loss, claim or additional costs over the Maximum Price in connection with this Contract or arising from any breach of contract or under any indemnity hereunder, breach of statutory duty, in tort or otherwise at common law or otherwise howsoever arising shall not exceed the Maximum Price plus £50m (fifty million pounds sterling)

9.2.8 The Prime Contractor confirms that he estimated prices which contribute to the total cost of the MPTC Pricing Provisions, as detailed within Part 9 of the Commercial Document, represent the best estimate of the likely costs of the Works. However, both the Prime Contractor and the Authority agree that there will be no adjustment of the MPTC Pricing Provisions as a result of any increases or decreases to the estimated prices within the MPTC Pricing Provisions, at any time during the course of the Contract. This Condition shall not preclude changes to the MPTC Pricing Provisions as a result of any other provision of this contract."

8. Incorporated in the contract was a document entitled 'Joint Equality of Information Pricing Statement' (known as 'JEOIPS'). Paragraph 6 of Schedule B of JEOIPS was in diagram form and read as follows:

"6. Condition 9.2.7 of the Terms and Conditions specify that the Prime Contractor's overall financial liability shall not exceed the Maximum Price plus £50m. This pricing agreement is to provide further clarity on who has financial liability at what part of the overall MPTC process:



The costs shown in the above diagram represent the Target and Maximum Prices as at 14th December 2008. As a principle, the Authority will require demonstration of all actual costs incurred which will contribute to the £50m liability limit."

9. In the contract, 'Actual Costs' was defined as meaning the costs detailed in condition 9.8. Conditions 9.7 and 9.8 provided as follows:

"**Assessment of Actual Costs Incurred**

9.7 For the purposes of assessing Actual Costs incurred by the Prime Contractor, the Prime Contractor shall, in accordance with Condition 9.11, furnish such particulars of costs properly incurred in connection with MPTC Pricing Provisions under the Contract as may be reasonably required by the Authority. Such costs shall be allocated in accordance with the Prime Contractor's Cost Allocation Statement at Part 14 to the Commercial Document. The Prime Contractor shall permit such particulars of costs to be verified by the Authority by inspection of his books, accounts, documents and other records.

9.8 Actual Costs properly incurred against the MPTC Pricing Provisions shall include but shall not be limited to:

9.8.1 Wages and salaries constituting a direct charge to the Works preformed under the Contract;

9.8.2 Materials intended for incorporation in the Works performed under the Contract;

9.8.3 Overheads and administration charges appropriate to the Contract;

9.8.4 Sub-contractor and supplier costs within the Supply Chain for which invoices have been received by the Prime Contractor since the date of the last Milestone Payment which, in the reasonable opinion of the Prime Contractor, are anticipated to be paid to the said sub-contractor and/or supplier before satisfactory completion of the Milestone being claimed."

10. The significance of 'Actual Costs' was also addressed in Conditions 9.11 to 9.15 of the contract, which dealt with the Final Price payable to the claimant:

"**Assessment of Final Price Payable**

9.11 The Final Prices Payable to the Prime Contractor for carrying out the Works covered by the MPTC Pricing Provisions shall be based upon the Actual Costs in each case properly incurred and verified in accordance with Conditions 9.7 to 9.9. The Prime Contractor shall submit to the Authority, annually from date of award of contract and within 2 Months of completion of the Works, a Certified Cost Statement as per the

sample attached at Schedule 5 detailing all costs incurred in providing Works under the Contract.

9.12 The Final Price Payable in respect of the Works shall be calculated as follows:

9.12.1 If the Actual Costs determined in accordance with Conditions 9.7 to 9.8 are equal to the finally adjusted Target Cost, then the Prime Contractor shall be paid the finally adjusted Target Price (i.e., finally adjusted Target Cost plus finally adjusted Target Profit);

9.12.2 If the Actual Costs determined in accordance with Conditions 9.7 to 9.8 are less than the finally adjusted Target Cost, the Prime Contractor shall be paid a sum equal to:

9.12.2.1 The Actual Cost determined in accordance with Conditions 9.7 to 9.8;

9.12.2.2 The finally adjusted Target Profit; plus

9.12.2.3 45% of the difference between the finally adjusted Target Cost and the Actual Cost determined in accordance with Conditions 9.7 to 9.8.

9.12.3 If the Actual Cost determined in accordance with Conditions 9.7 to 9.8 is greater than the finally adjusted Target Cost then the Prime Contractor shall be paid a sum equal to:

9.12.3.1 The finally adjusted Target Cost; plus

9.12.3.2 The finally adjusted Target Profit; plus

9.12.3.3 75% of the difference between the finally adjusted Target Cost and the Actual Costs determined in accordance with Conditions 9.7 to 9.8

PROVIDED that the Final Price Payable to the Prime Contractor shall not exceed the contractually agreed Maximum Price.

…

9.15 The Final Price Payable excludes the following:

9.15.15 Any costs incurred by the Prime Contractor by reason of any default or breach on the part of the Prime Contractor and without prejudice to the generality of the foregoing;

9.15.16 Any sum allowed or paid by the Prime Contractor in respect of liquidation damages;

9.15.17 Any sum allowed or paid by the Prime Contractor as damages for breach of contract;

9.15.18 Any sums allowed or paid to the Authority resulting from any loss or damage caused to the Authority, its employees or agents as a result of a default by the Prime Contractor.

9.15.19 All costs relating to remedial work as a consequence of defects in the Prime Contractor's Works as a result of negligence or gross error, or of defects noted by the DEPM in reviewing and inspecting Works submitted for final inspection, or of construction defects becoming apparent during the Defect Liability Period for which the Prime Contractor is responsible to make good."

11. It would be unnecessarily wearisome to set out all of the other contractual provisions which deal with value, pricing and payment. Suffice to say that, in one way or another, they all refer to and/or emphasise the significance of Actual Costs, defined as costs 'properly incurred', with the Certified Cost Statement (condition 9.11, at paragraph 10 above) referring to "Cost reasonably and properly incurred…"

12. Although these contractual provisions are rather long-winded, in essence the pricing arrangements can be summarised as follows:

(a) Condition 9.2.5 provided that any cost *under-runs* between the Target Cost and Actual Cost were to be shared 55/45 between the respondent and the claimant;

(b) Condition 9.2.6 provided that cost *over-runs* between the Target Cost and the Actual Costs up to the Maximum Price were to be shared 75/25 between the respondent and the claimant;[1]

(c) Condition 9.2.6 also provided that the claimant was liable for *all costs* beyond the Maximum Price;

(d) Once the Maximum Price plus £50 million had been reached, then Condition 9.2.7 and paragraph 6 of schedule B of the JEOIPS combined to pass the liability to pay back to the respondent. As noted below, that construction is not now disputed. The remaining issue is whether what was payable by the respondent pursuant to this provision was all costs, or merely actual costs, as defined in the contract.

3. THE AWARD / THE MAJORITY VIEW

13. Having set out the contractual provisions, at paragraph 33 of the award the DRB indicate that the majority view is set out between paragraphs 34 to 49, whilst the dissenting view is set out between paragraphs 50 to 61.

[1] Although Condition 9.2.6 referred to Maximum *Cost*, the DRB noted at paragraph 32 of their award that this must be an error and the reference should have been to Maximum *Price*. Neither party argued to the contrary at the hearing.

14. At paragraph 34, the majority set out some uncontroversial principles of contract construction. At paragraphs 35 – 37, they explained why they concluded that the respondent was liable to the claimant to make further payments once the Maximum Price plus £50 million figure had been reached.

15. From paragraphs 39 to 49 the majority then dealt with the second issue, which is the one that is the subject of this application for permission to appeal. Does the reference to 'additional costs' in condition 9.2.7 mean actual costs, as defined in the contract as costs reasonably and properly incurred, or all costs, howsoever incurred? The majority view was that it must mean actual costs. They said that because:

    (a) The contract conditions and paragraph 6 of JEOIPS repeatedly referred to and used the phrase "actual costs" (see paragraph 39 of the award);

    (b) If condition 9.2.7 referred to all costs, howsoever incurred, not actual costs, then large parts of the clause were superfluous (see paragraph 40 of the award);

    (c) Conditions 9.2.6 and 9.2.7 must be read together. When they were, it was clear that the reference to additional costs in condition 9.2.7 must mean actual costs (see paragraph 41 of the award);

    (d) The claimant's contrary construction would have some very unusual results. It would mean, for example, that the claimant would not be liable for the costs caused by its own breaches of contract, and that instead the respondent would be liable to pay such costs (see paragraph 42(1) of the award);

    (e) The claimant's construction would mean that many express provisions of the contract would become inapplicable once the cap of Maximum Price plus £50 million was reached. This would include the claimant's express obligation to remedy defects in its own work, and at its own cost, set out at condition 4.13 (see paragraph 42(2) of the award);

    (f) The payment mechanisms in the contract related to the payment of actual costs and were inconsistent with an obligation to pay any costs, howsoever incurred (see paragraph 42(3) of the award).

16. At paragraphs 44 – 49 of the award, the majority set out their view that the respondent was entitled to deduct liquidated damages from the actual costs payable to the claimant.

4. THE AWARD / DISSENTING VIEW

17. It is important to note at the outset that, because of the way in which the award was divided up, the dissenting view dealt both with the underlying issue of liability (on which the DRB were unanimous and which is now no longer in dispute), as well as the second issue as to what was payable by the respondent to the claimant once the cap was reached. I consider that paragraphs 50 – 54 of the dissenting view were concerned with that first issue of liability. In essence, the conclusion set out in these paragraphs was that the term which switched the liability to pay back to the

respondent once the cap of the Maximum Price plus £50 million had been reached, was categorised as a 'catastrophe' clause. This is confirmed at paragraph 54:

> "Why would the Authority agree to pay AMEC anything over Maximum Price plus £50 million? The answer must be to protect the Authority and the project from AMEC being financially unable to complete the Contract, having absorbed £50 million of loss (in addition to any other losses incurred before the maximum was reached)…From AMEC's point of view another reason would be that AMEC could be unable to get financing or comfort from its bankers for such a project with all its inherent risks, unless there was some safety valve which would ensure that its losses were capped at £50 million."

18. This passage is criticised by the respondent because it is not based on any evidence adduced at the arbitration hearing and could only be speculation on the part of the dissenter. In my judgment there is force in that criticism: the passage certainly demonstrates an unusual approach to contract construction. But it makes sense as a general explanation as to why, in the circumstances of this large project, the respondent may be liable to make further payment to the claimant once the cap of Maximum Price plus £50 million had been reached.

19. The issue which lies at the heart of this application for permission to appeal is identified at paragraph 55 of the dissenting view: is the respondent liable for all costs, or merely actual costs as defined by the contract? Then, at paragraphs 56 to 59, four reasons are set out by the dissenter as to why the answer should be all costs, howsoever incurred, rather than actual costs. By way of conclusion, at paragraph 60, the dissenting view describes the term as a guarantee by the respondent to the effect that "if your losses exceed £50 million we will come to your rescue". There is also an attempt to explain away the reference to 'actual costs' in the proviso at the end of the JEOIPS (see paragraph 8 above), a matter to which I return below.

5. THE APPLICABLE LAW

5.1 Section 69 of the Arbitration Act 1996

20. Section 69 of the Arbitration Act 1996 provides as follows:

> "(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.
>
> An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.
>
> …
>
> (3) Leave to appeal shall be given only if the court is satisfied—

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question."

In the present case, I consider that the pre-conditions at s.69(3)(a) and (b) above are fulfilled. I also take the view that, if either of the grounds in (c) are made out, the provision at (d) would not operate to prevent the granting of leave to appeal.

5.2 'Obviously Wrong'

21. The test was originally formulated by Lord Diplock in ***The Nema*** [1982] AC 724 at 742-3 where he said:

> "…leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong. But if on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave; the parties should be left to accept, for better or for worse, the decision of the tribunal that they had chosen to decide the matter in the first instance."

22. The test has subsequently been described in rather more colourful language. In ***The Kelaniya*** [1989] 1 Lloyd's LR 30, Lord Donaldson said, discussing the test and its relationship with one-off cases:

> "This is not however to say that, even in a one-off case, an arbitrator is to be allowed to cavort about the market carrying a small palm tree and doing whatever he thinks appropriate by way of settling the dispute. What it does amount to is that the Courts will normally leave him to his own devices and leave the parties to the consequences of their choice. They will only intervene if it can be demonstrated quickly and easily that the arbitrator was plainly wrong."

23. More recently still, Colman J described the test in this way in the Master's Lecture, entitled 'Arbitration and Judges – How much interference should we tolerate?' (London, 14/03/06):

> "What is obviously wrong? Is the obviousness something which one arrives at…on first reading over a good bottle of Chablis and some pleasant smoked salmon, or is 'obviously wrong' the conclusion one reaches at the twelfth reading of the clauses and with great difficulty where it is finely balanced. I think it is obviously not the latter."

5.3 Questions of General Public Importance

24. The authorities demonstrate that it can be something of an uphill task to persuade a court that the question is one of general public importance. However, in ***The Kelaniya***, noted above, although permission to appeal was refused, Lord Donaldson found that the contract in question was of general public importance because it involved what he described as "the application of the inter-club agreement for the apportionment of liabilities in respect of cargo under the notoriously imprecise New York Produce Exchange form of charter-party; and, whilst it is quite true that the words of amendment used in this particular charter may be one-off, the question of what is the effective amending words in other charters in this form is a general one…"

25. By contrast, in ***Keydon Estates Ltd v Western Power Distribution (South Wales) Ltd*** [2004] EWHC 996 (Ch), Lloyd J (as he then was), noted that the provision in question (that the sub-lease was for the full residue of the term) was unusual and was likely to have arisen as a result of an oversight. He therefore concluded that it was not a point of general public importance.

5.4 The Relevance of a Dissenting View

26. The fact that there is a dissenting view is of some assistance to the court on the argument that the decision was obviously wrong, or alternatively was at least open to serious doubt. In ***The Northern Pioneer*** [2002] EWCA Civ 1878, at paragraph 64, Lord Phillips said:

> "The difference of view between the experienced arbitrators in this case provides, of itself, ground for contending that the decision of the majority is 'at least open to serious doubt'."

In ***F Ltd v M Ltd*** [2009] EWHC 275 (TCC), another case where there was a dissenting view, I said at paragraph 16:

> "…a comment or observation in a dissenting opinion, to the effect that an important point has been decided by the majority without reference to the parties, will be a factor to which the court will attach weight in dealing with an application under Section 68. Depending on the circumstances, such an observation may have considerable weight, although it is unlikely that it could, on its own, prove determinative."

That was a case concerning irregularity rather than a point of law, but the same general considerations must apply.

5.5 'Major Intellectual Aberration'

27. In ***Braes of Doune Windfarm (Scotland) Ltd v Alfred McAlpine Business Services Ltd*** [2008] 1 Lloyd's LR 608, Akenhead J, in dealing with the criteria under s.69(3)(d) said:

> "It could properly be said that, if all the other criteria were established it would often, but not invariably, be unjust for an obviously wrong decision on an important question of law not to be put right by the court. That could be thought to be even more so if the chosen highly respected arbitrator had simply had a major intellectual aberration."

Although that passage was specifically concerned with s.69(3)(d) of the 1996 Act, the phrase 'a major intellectual aberration' has subsequently been described as "a useful way of bringing to mind that the error on which we are concerned, if there be an error, must be an obvious one": see paragraph 8 of the judgment of Arden LJ in ***HMV UK v Propinvest Friar Limited Partnership*** [2011] EWCA Civ. 1708.

28. With those principles of law in mind I turn to deal with the questions which arise on this application for leave to appeal.

6. DOES THIS APPLICATION RAISE A QUESTION OF GENERAL PUBLIC IMPORTANCE?

29. I have read the statement of Mr Mark Watson, served on behalf of the claimant, dated 22 November 2012, and the statements served on behalf of the respondent, from Mr John Ioannou and Mr Stephen Johnstone, both dated 12 December 2012. From that material I conclude that:

(a) This was originally drafted as a one-off contract, for use on this particular project;

(b) Two or three other contracts in similar form have subsequently been let over the ten year period since this contract was first agreed;

(c) The vast majority of the contracts let by the respondent are on standard form contracts, particularly the NEC 3 form, which does not contain the sort of complex shifting back and forth of the basic liability to pay manifest here.

30. In those circumstances, I conclude that this is not a point of general public importance. It is an issue of construction in respect of a one-off contract. The contract is not in standard form and is not in regular or widespread use. The decision of the DRB is therefore of no general interest to the public.

31. Furthermore, I consider that much of the debate in the witness statements as to whether or not this was a point of general public importance rather missed the point. There was a good deal of material about the public importance of incentive-based contracts and how this decision will be of particular interest to those concerned with

such forms of contracting. But in my view, the particular issue which arises on this application has nothing to do with the general advantages or disadvantages of incentive-based contracts. The dispute here is a particular one, namely the precise construction of a specific 'catastrophe' clause which, as the name implies, will rarely be activated in any event. In my view, the arguments deployed on this application have nothing to do with the general merits or demerits of incentive-based contracts.

32. Moreover, I cannot help but note the view of the DRB themselves (as set out at paragraph 2 above); they say expressly that they have never come across this particular approach to risk-sharing before. That again demonstrates that this is an unusual, one-off point and not a matter of general public importance.

33. Accordingly, for these reasons, it seems to me that the appropriate test on this application is whether or not the majority view is obviously wrong. However, in case I am wrong about the general public importance of the issue, I also consider the majority view by reference to the lesser test of whether it is at least open to serious doubt.

7. IS THE MAJORITY VIEW OBVIOUSLY WRONG?

34. In my view, the majority view is not obviously wrong. Moreover, I also consider that it is not open to serious doubt. Indeed, for the reasons summarised below, I consider that the majority view was plainly right.

35. First, the majority construed condition 9.2.7 by reference to the other terms of the contract. I consider that to be the correct approach to contract construction. Having adopted that course, the majority conclusively demonstrated that the entire pricing and payment regime of this contract depended on the ascertainment of actual costs. It was the actual costs incurred by the claimant which were to be measured against the Target Cost and the Maximum Price, and it was the actual costs which triggered the milestone payments. It was the actual costs which were included in the Certified Cost Statement (condition 9.11) as having been those costs "reasonably and properly incurred". Thus, because the entire pricing and payment regime in the contract depended on the ascertainment of actual costs, it would be a very curious result, and render large parts of condition 9.2.7 (and indeed other parts of the contract) superfluous, if the provisions relating to the position once the Maximum Price plus £50 million had been reached suddenly abandoned the concept of actual costs altogether and made all costs, howsoever incurred, recoverable by the claimant.

36. Secondly, the majority demonstrated in their analysis that, if the costs recoverable were not actual costs, as defined, it would result in some very odd results. Paragraph 42 of the award sets out some of them. These matters were not addressed in any detail as part of the claimant's application to this court, and, where they are touched on in paragraphs 35 to 37 of the claimant's skeleton, I find the points made wholly unpersuasive. They are not even mentioned in the dissenting view, let alone answered. It seems to me that they provide an insurmountable bar to the claimant's construction of condition 9.2.7.

37. Thirdly, and related to that second point, there is the bizarre conclusion to which the claimant's construction inevitably leads, to the effect that the claimant would be able to recover from the respondent the costs of rectifying its own breaches of contract,

and would be entitled to be paid to remedy defects which it had created in the first place. That would be a very unusual situation which, on ordinary principles, could only be permitted by the clearest possible contractual provisions. In this case I consider that there are no provisions which support such an approach.

38. Fourthly, the majority demonstrated that the claimant's argument is, at root, a semantic one, depending in large part on the fact that the proviso to paragraph 6 in schedule B of the JEOIPS document (paragraph 8 above) - which gave rise to the liability to pay in the first place - referred to 'actual costs' in lower case, as opposed to the capital 'A' and capital 'C' used in some other parts of the contract. To argue that there is a very different meaning to be ascribed to the same words, depending only on whether or not they have capital letters, is a remarkably unattractive approach to contract construction. In any event, it is not an argument open to the claimant in this case since, as again the majority demonstrated, the phrase 'actual costs', in lower case, is used interchangeably in other parts of the contract with 'Actual Costs', as defined.

39. It would be unnecessary in a judgment of this sort to set out further reasons why, in my view, the majority view was obviously correct. But it is worth standing back and looking at the picture in the round. The respondent denied that it had an obligation to pay at all. In my view, that was an argument which, but for the JEOIPS document, might well have been successful. Accordingly, since the respondent's basic liability to pay again, once the Maximum Price plus £50 million figure was reached, creeps rather hesitantly into the contractual spotlight, it is perhaps unsurprising that the precise definition of what is to be paid is not as clear as it might have been. If it is a 'catastrophe clause', to use the dissenter's words, it may be that the draughtsman was not paying particular attention to its finer points. But it would be commercially surprising if the parties intended that a contract, which depended throughout on the ascertainment of actual costs, could go so wrong in terms of time and cost that, when the Maximum Price plus £50 million was reached, actual costs suddenly became irrelevant and all costs, however unreasonable or improperly incurred, would become recoverable instead. No justification for such a violent change of approach to payment has ever been put forward.

40. In my view, that is the answer to the final argument advanced by the claimant. Mr Stewart QC suggested that the majority view made no commercial sense. I respectfully disagree with that for the reasons which I have indicated. Indeed, if the only thing that mattered in terms of contract construction was the need to reach a commercially commonsensical answer, then I consider that the majority view is the one to be preferred.

41. For all those reasons, therefore, I consider that, not only was the majority view not obviously wrong, or even open to serious doubt, but also that the majority were right in their approach and in their conclusions.

8. IS THE DISSENTING VIEW SERIOUSLY ARGUABLE?

42. Another way of approaching the question raised by this application is to consider whether or not the dissenting view is at least seriously arguable. In my view, with great respect to the dissenter, it is not.

43. As noted above, I considered that, on first reading, paragraphs 50 – 54 of the dissenting view were concerned with the issue of liability, which no longer arises in this case. Even if that were wrong, I do not consider that these paragraphs add anything to the question of construction which I have to consider. Even if the matters set out are part of the background as the dissenter sees it, there is nothing there which I consider to be particularly informative. Even if it is right (and it all appears to be speculation on his part) that this safety net provision was designed to prevent the claimant from being financially unable to complete the contract, that does not mean that the safety net was intended to cover every penny the claimant spent once the cap was reached, no matter how unreasonable or improper. That, so it seems to me, is an unsustainable leap of logic which is unsupported by the words of the contract.

44. In paragraph 55 onwards, the dissenter sets out his views as to why the reference to costs in condition 9.2.7 must be to all costs, not actual costs. The dissenter provides four reasons for this conclusion. However, on analysis, those reasons are actually contrary to the words used by the parties in the contract itself. Thus:

(a) At paragraph 56, the dissenter says that the respondent had "no interest" in actual costs once the Maximum Price was reached. That ignores all of the contract provisions relating to milestone payments and Final Payment, which apply once the Maximum Price was reached and which all say in terms that what matters is actual cost. It also ignores the point that, since the respondent was coming back on risk at Maximum Price plus £50 million, the respondent would inevitably be very interested in what was actual cost and what was cost that was due to the claimant's default, and therefore (at least ordinarily) irrecoverable.

(b) Critically, the observation in paragraph 56 as to the respondent's lack of interest in actual cost in this situation wholly ignores the proviso to clause 6 of section B of the JEOIPS document (paragraph 8 above) which expressly states that "the Authority will require demonstration of all actual costs incurred which will contribute to the £50 million liability limit." I consider that the respondent's emphasis on actual costs could not be plainer, and to conclude, in the face of those words, that it is 'implausible' that the respondent required the claimant to certify the actual costs once the Maximum Price had been reached, is wrong.

(c) Paragraph 57 talks about certainty and suggests that it is implausible to argue that the claimant's bankers would have thought that the £50 million would be limited to actual costs, so that on this basis the claimant's losses would in fact have had to have exceeded £50 million before the safety valve was triggered. But again, the answer to that is simple: that is what the contract expressly provided. Moreover, certainty is a two-way street. If the claimant was entitled to all costs incurred above Maximum Price plus £50 million, no matter how badly it performed, then in one sense it might be regarded as having an incentive to perform badly. In those circumstances, there would be no corresponding certainty for the respondent at all.

(d) Paragraph 58 appears to make a virtue of the size of the £50 million figure and then concludes that it could not mean actual costs because they would not be easy to establish. Again, with great respect to the dissenter, that simply

ignores all of the contractual provisions which repeatedly say that the claimant needed to demonstrate actual costs (however hard or easy they may be to establish).

(e) Paragraph 59, which at first I did not understand, (because it refers to the last sentence of condition 9.2.6 when in fact condition 9.2.6 is just one sentence) is in truth circular. It is suggesting that condition 9.2.7 is there to bail out the claimant and that therefore, in some way, questions of actual costs no longer matter. The conclusion does not follow: even if the clause is a bail-out, that does not mean that it was intended to make recoverable every penny spent by the claimant, no matter how improperly or unreasonably.

45. In my judgment, the problem with the dissenting view is encapsulated at paragraph 60 of the award. There, the dissenter goes as far as to say that condition 9.2.7 was some form of guarantee, a construction which in my view is not borne out either by the words or his own categorisation of this provision as a catastrophe clause. But the dissenter also asserts that the proviso at the end of the JEOIPS document, with its express reference to actual costs, "is sufficient for public accounting purposes. It makes it clear that the fall-back guarantee is not to be regarded as a charter for loading losses which are not attributable to this contract."

46. I am bound to say that I consider that to be an attempt to rewrite the express terms of the contract. The reference in the proviso to actual costs is plain: that is a concept which is defined in the contract and is a vital element of the pricing and payment regime. The fact that it is in lower case is immaterial, something which the dissenter appears to accept in the first part of paragraph 60. The contractual definition of actual costs is costs 'reasonably and properly incurred'. The concept of actual costs is far more rigorously defined and clear-cut than the meaning of 'costs' for which the dissenter contends, which is essentially all and any costs and losses provided they are in some way attributable to this contract. There is no basis, either in commercial reality or construction principle, which could lead to such a result.

9. CONCLUSIONS

47. At the end of the hearing on 19 December 2012 I refused the claimant's application for permission to appeal and I gave brief reasons for that decision. The fuller reasons set out above explain in greater detail how and why I reached that view. I have not dealt with any consequential matters which will have to be addressed once this Judgment has been handed down.