Public Lecture at Engineers Ireland

on

Working with Subclauses 10.6 and 10.7 of the PWC

by

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1.0 Introduction

1.1 In 2004 the government launched a major initiative called the Capital Works Management Framework (CWMF) and according to the Guidance Note (GN 1.0) issued as part of that package on 28 July 2009 the CWMF was intended to *"assist in the satisfactory delivery of public sector capital works projects".* In addition according to GN 1.0 the strategic objectives of the CWMF are:

- *"greater cost certainty at contract award stage;*
- *better value for money at all stages during project delivery, particularly at handover stage; and*
- *more efficient end user delivery."*

1.2 The CWMF is set out on four pillars, the first of which essentially is a suite of standard forms of construction contracts which have been used for public sector contracts since 2007. The main PWC forms of construction contract, which will be considered later in this paper, consist of the following:

- PW-CF1 v1.9 27/1/14 Public Works Contract for Building Works Designed by the Employer.
- PW-CF2 v1.8 27/1/14 Public Works Contract for Building Works Designed by the Contractor.
- PW-CF3 v1.8 27/1/14 Public Works Contract for Civil Engineering Works Designed by the Employer.
- PW-CF4 v1.8 27/1/14 Public Works Contract for Civil Engineering Works Designed by the Contractor.
- PW-CF5 v1.8 27/1/14 Public Works Contract for Minor Building and Civil Engineering Works Designed by the Employer.

1.3 The layout of the five contracts is very similar and in each case they comprise thirteen clauses with each in turn divided into a number of subclauses. In each form clause 10 deals with *"Claims and Adjustments"* while subclause 10.6 deals with *"Adjustments to the Contract Sum"* and subclause 10.7 deals with *"Delay Cost"*.

1.4 The introduction of the PWC largely coincided with the Arbitration Act 2010 which came into effect in June 2010. This replaced the Arbitration Act 1954 and the new Act was drafted in line with the best international practice and in particular it adapted into Irish law the UNCITRAL Model Law on International Commercial Arbitration 2006. If anything the Arbitration Act 2010 had the effect of reducing the role of the Irish Courts in arbitration since it provided only very limited grounds on which an Arbitrator's Award could be resisted and it also removed access to Court which had been provided previously by means of the case stated procedure in the 1954 Act.

1.5 The main forms of contract in the PWC, as listed above, contain many novel concepts; in particular they are largely original documents rather than modified versions of well known forms of contract used elsewhere. This represented a significant shift from earlier practice where for example the civil engineering form, the IEI form of contract, was based on the corresponding form produced by the Institution of Civil Engineers and in building work the RIAI/GDLA form was also based, to some extent at least, on the equivalent RIBA form.

1.6 This originality of the PWC means there is no obvious source to consult when issues arise as regards interpretation. Disputes under the Contract are referred to a tiered process involving conciliation initially to be followed by arbitration. Both of these processes are private, normally with specific confidentiality provisions, and there is now little requirement for recourse to the Courts other than for enforcement.

1.7 Consequently, those involved with interpretation of the PWC have tended to operate in a vacuum and the Government Construction Contracts Committee (GCCC) has acknowledged this issue and that it has led to wide variation in how parties, and conciliators in dispute resolution, have interpreted various provisions of the Contract. As part of a response to this the new PWC Arbitration Rules published on 13 January 2014 provide for making Arbitration Awards public although it is unclear how this is to be done and whether such awards will be in redacted form.

1.8 However, the introduction of the Construction Contracts Act 2013 and in particular section 6(10) of the Act which states that *"The decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision"* suggests that there may now be recourse to court in relation to disputes arising under the Contract, particularly given that section 2(5)(b) of the Act confirms that "*The Act applies… whether or not the parties to the construction contract purport to limit or exclude its application."*

1.9 A further consideration is that the PWC forms of contracts are dynamic rather than static by which it is meant that the documents are provided in softcopy only on the GCCC website and are thus susceptible to relatively easy and frequent changes. It will be seen that the latest version of all five forms of contract were produced on 27 January 2014 and for example in the case of CF3 v1.7 was produced on 28 July 2011 and v1.6 on 30 March 2010.

1.10 It should also be noted that there is currently a major review of the PWC underway with the Department of Public Expenditure and Reform consulting widely with the industry stakeholders, namely the professional bodies involved in construction and also the CIF, with an indication that significant changes to the form of contract are under consideration.

1.11 It is suggested that this changing nature of the forms of contract taken together with the lack of a binding or authoritative interpretation means that the only practical approach for the construction industry is to debate the provisions in the

forms of contract which are most contentious in an effort to achieve some level of consensus. This paper is offered as a contribution to that debate and is based on the authors' experience of the form of contract, mainly through conciliation.

1.12 The authors' experience has been that in any dispute subclauses 10.6 and 10.7, which set out the mechanisms by which the Contract Sum may be altered, always come up for discussion very frequently with contrasting views as regards their interpretation. Consequently this paper sets out to deal with these particular two subclauses in the hope that its contents will be of assistance to all those in the Construction Industry, in whatever capacity, who use the PWC.

1.13 Throughout this paper when referring to the Contract the word '*clause'* will be used to refer to one of the thirteen clauses of the Contract, for example clause 10, whereas subclause will be used to refer to any further division of the clauses, for example 10.6 or 10.6.4.

2.0 Contract Interpretation

2.1 The recent Supreme Court decision in ***Marlan Homes Limited v Mark Walsh and Gary Wedick***[1] addressed a dispute between the parties regarding the provision of mortgage facilities over certain land situated at Kilmore Road, Artane in the County of Dublin.

2.2 By judgment dated 20 December 2009[2], Clarke J. then in the High Court interpreted the relevant contractual provisions as obliging Mr. Walsh and Mr. Wedick to provide what he had variously described as an *"effective charge"* or an *"effective security"* over certain lands so that if a mortgagee was obliged to realise that security he could do so by way of sale or other disposal. Clarke J. found Mr. Walsh and Mr. Wedick to be in fundamental breach of the agreement and further that the Marlan Homes Limited *("Marlan Homes")* was entitled to have that agreement rescinded.

2.3 On appeal to the Supreme Court by Mr. Walsh and Mr. Wedick *("the Appellants*"), McKechnie J. found that they were not in breach of any obligation undertaken by them to Marlan Homes. Their appeal was allowed and the orders made in the High Court set aside.

2.4 In particular and as set out by McKechnie J. in his judgment dated 30 March 2012, the question to be asked was one of contractual interpretation and in this regard the court must ensure that it was not: *"...substituting its own views of the bargain for those actually contracted for, by the parties."*[3]

2.5 McKechnie J. noted that the relevant principles in this regard were as set out by *Keane J. in* ***Kramer v Arnold***[4]***: "****In this case, as in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of*

[1] Marlan Homes Limited v Mark Walsh and Gary Wedick [2009] IEHC 576 [2012] IESC 23
[2] [2009] IEHC 576
[3] Marlan Homes Limited v Mark Walsh and Gary Wedick [2009] IEHC 576 [2012] IESC 23 [71-72] quoting Lord Mustill in Charter Reinsurance v Fagan [1997] A.C. 313
[4] Kramer v Arnold [1997] 3 I.R. 43 at p. 55

the courts is to decide what the intention of the parties was having regard to the language used in the contract itself and the surrounding circumstances."

2.6 On this basis McKechnie J. established that *"The correct approach therefore is to have regard to the nature of the document in question and to consider the words used by reference to the context in which they are set."*[5]

2.7 The importance of an objective interpretation of the contract in accordance with the meaning of the words the parties have used was also recognised by McKechnie J. noting: *"... as has been pointed out in many judgments, courts will not "easily accept the parties have made linguistic mistakes, particularly in formal documents." This was stated by Geoghegan J. in* ***Analog Devices B.V. & ors. v Zurich Insurance Company & ors [2005] I. R. 274****, where he adopted the five principles set out by Lord Hoffmann in* ***Investors Compensation Scheme and West Bromwich Building Society [1998] 1 W.L.R. 896.*** *One may obviously add that documents prepared with the benefit of professional assistance, including, but not limited to legal advice, increases such formality. The words in question must be given their ordinary and natural meaning, in a sense as would be understood by a reasonable man having an interest in or knowledge of the material circumstances.*[6]

2.8 In the context of commercial agreements, McKechnie J. drew particular attention to the following: *"It is important however to note that where the parties have committed their responsibilities to written form, in particular manner, it must be assumed that they have intended to give affect to their obligations in that way. Such must be recognised as their right both commercially and under contract law. Accordingly it is important that, when faced with a construction issue, the court should focus its mind on the language adopted by the parties being that which they have chosen to best reflect their intentions. It is not for the court either by means of giving business or commercial efficacy or otherwise, to import into such arrangement a meaning that might also be available from an understanding of the more general context in which the document came to exist, but is one not deducible by the use of the interpretive rules as mentioned."*[7]

2.9 McKechnie J. expressly agreed with the findings of Lord Mustill in ***Charter Reinsurance v Fagan:***[8] *"There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce the contact according to its terms."*

[5] Marlan Homes Limited v Mark Walsh and Gary Wedick [2009] IEHC 576 [2012] IESC 23 Para 49
[6] Marlan Homes Limited v Mark Walsh and Gary Wedick [2009] IEHC 576 [2012] IESC 23 Para 50
[7] Marlan Homes Limited v Mark Walsh and Gary Wedick [2009] IEHC 576 [2012] IESC 23 Para 51
[8] Charter Reinsurance v Fagan [1997] A.C. 313 P. 38

2.10 The extraordinary nature of the terms of the agreement should not of itself force the court to over-subscribe to an approach focused on giving the relevant provisions commercial efficacy. As stated by McKechnie J. in ***Marlan Homes***:

> *"This was by any stretch of normality an extraordinary transaction, a reflection of the insatiable belief that whatever the costs and shortcomings of the deal may be, once land was involved, upon which houses could be built, and disposed of with a frenzy of marketing activity, money could be made. Proper, even basic practices, commercial assessment, legal appraisal and risk evaluation, were stood down."*[9]
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> *"As is readily apparent therefore, there were several aspects of the parties' relationship which were not tied down as well as perhaps they could have been. It may be that the parties were so advised and were satisfied to assume the risk of their commitments: in any event such therefore is the context in which their respective obligations must be determined."*[10]
>
> *"Furthermore, with full knowledge of this situation and presumably of its legal consequences which, at the very least were of considerable uncertainty, Marlan Homes nonetheless committed themselves to a very substantial outlay, in terms not solely confined to acquisition costs but also with regard to the necessary funding, required so as to complete the development project which they had come to contractually committed themselves to do..."*[11]
>
> *"...It is not now possible to seek to exploit the terms of an agreement which simply do not exist."*[12]
>
> *"The end result is and can be considered as unattractive, when one considers the respective positions of the parties following this judgment. However such inadvisable and inescapable consequences, of this court having to apply the appropriate legal principles, to the structure of the arrangements put in place by the parties to regulate their affairs."*[13]

2.11 ***Marlan Homes*** was followed by Charlton J. in the High Court decision of ***Ickendel Limited v Bewley's Cafe Grafton Street Limited***[14] where he stated in relation to a lease agreement: *"In construing this lease, I have to bear in mind that the Supreme Court have made it clear that no rewriting of what the parties have agreed could possibly be permitted either in the guise of sympathy for any party stuck in a financial quagmire or pursuant to any notion of the courts construing public policy in aid of a result….In particular, I am not to rewrite the agreement that constitutes this lease or to take that language that is plain and disregard it as a linguistic mistake."*[15]

[9] Marlan Homes Limited v Mark Walsh and Gary Wedick [2009] IEHC 576 [2012] IESC 23 Para 53
[10] Marlan Homes Limited v Mark Walsh and Gary Wedick [2009] IEHC 576 [2012] IESC 23 Para 59
[11] Marlan Homes Limited v Mark Walsh and Gary Wedick [2009] IEHC 576 [2012] IESC 23 Para 66
[12] Marlan Homes Limited v Mark Walsh and Gary Wedick [2009] IEHC 576 [2012] IESC 23 Para 73
[13] Marlan Homes Limited v Mark Walsh and Gary Wedick [2009] IEHC 576 [2012] IESC 23 Para 75
[14] Ickendel Limited v Bewley's Cafe Grafton Street Limited[14] judgment of Mr. Justice Charlton [2013] IEHC 293 High Court Record No. 2012/694 SP delivered on the 25th day of March 2013
[15] Marlan Homes Limited v Mark Walsh and Gary Wedick [2009] IEHC 576 [2012] IESC 23 Para 51

2.12 The Irish judgments can also be compared to the authoritative case of ***Photo Production Ltd and Securicor Transport Ltd. [1980] A.C. 827***,[16] where Lord Diplock held: *"In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is in my view wrong to place a strange construction upon words in an exclusion clause which are clearly and fairly susceptible of one meaning only..."*[17]

2.13 In ***Marlan Homes*** the Supreme Court cautioned against resorting to any principle of construction out of sympathy for the contracting parties where no ambiguity was present. This may cause difficulties for contracting parties under the Public Works Contracts in relation to terms that are clear and unambiguous and in the view of the court freely negotiated.

2.14 Consideration must therefore be given to circumstances where arguably an ambiguity has arisen as to the terms.

2.15 In the context of this lecture, this issue can be seen to arise in the context of whether subclause 10.7.4 can be taken to apply to subclause 10.6, thereby preventing a claim for disruption or acceleration or loss of productivity or knock on effect under subclause 10.6 or whether the applicability of subclause 10.7.4 is restricted to subclause 10.7.

2.16 Normally reliance could be placed on the test laid down by Lord Hoffman in ***Attorney General of Belize and Belize Telecom Ltd***.,[18] *"There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"*[19]

2.17 Further it might be argued that while any purported applicability of subclause 10.7.4 to subclause 10.6 might seem syntactically correct, this construction could not be allowed to stand. This was considered in the House of Lords decision of ***Chartbrook v Persimmon Homes***,[20] where Lord Hoffmann's findings echoed those of the dissenting judge Lawrence Collins L.J. in the Court of Appeal who had stated that while Chartbrook's construction was syntactically correct: *"...it is very difficult (and probably impossible) to discern the commercial sense behind Chartbrook's construction…I accept Persimmon's submission that Chartbrook's interpretation makes no sense…"*[21]

2.18 Having identified the evident failing in the terms, Lord Hoffman held: *"... there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be*

[16] Photo Production Ltd and Securicor Transport Ltd.[16] [1980] A.C. 827
[17] Photo Production Ltd and Securicor Transport Ltd [1980] A.C. 827 at 851
[18] General of Belize and Belize Telecom Ltd. [2009] UKPC 10 [2009] 1 W.L.R. 1988
[19] Belize and Belize Telecom Ltd. [2009] UKPC 10 [2009] 1 W.L.R. 1988 Paragraph 21
[20] Chartbrook Ltd. v Persimmon Homes Ltd. [2009] UKHL 38, [2009] 2 AC 1101, [2009] BLR 551
[21] Chartbrook Ltd. v Persimmon Homes Ltd. [2009] UKHL 38, [2009] 2 AC 1101, [2009] BLR 551 para [92]-[93]

clear what a reasonable person would have understood the parties to have meant."[22]

2.19 As stated by Nicholas Baatz QC in his paper "***Construing construction contracts: principles, policies and practice***":"***Chartbrook*** *can perhaps be seen as providing a new impetus to the construction of contracts beyond linguistic and syntactical readings to one more focused on their commercial effect."*

2.20 The Irish decision of ***Marlan Homes*** had followed ***Charter Reinsurance*** and ***ICS***. In relation to these decisions Nicholas Baatz QC noted:

> *"The balance in Lord Hoffmann's fifth principle in* ***ICS*** *was struck on the basis that the normal meaning of the words used were to be overridden only where the construction in accordance with that meaning 'flouts business common sense'. In* ***Charter Reinsurance,*** *Lord Mustill identified a point beyond which the court should not go, by adopting Lord Reid's approach in* ***Wickman Machine Tool Sales****. This means that while of course relative reasonableness is a consideration in choosing between different linguistic or syntactical constructions, the fact that one construction is "extraordinary" is not a reason why the other should be preferred, if it is otherwise the less likely construction.*
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> *The* ***Chartbrook*** *approach, at least as a matter of nuance, may be different. It is not that the formulation is different, since a lack of commercial sense is required; what is different is the scope of the enquiry into the issue of commercial common sense, the use of the parties' expectations as part of that enquiry and the fact that lack of common sense may be manifest not only in the outcome but also in the mechanism (and possibly in either). The inclusion in this case of the expectations of the parties as admissible background is a practical marker of potentially great significance for future cases."*[23]

2.21 However whether the ***Chartbrook*** approach to contract interpretation could be utilised in the case of the Public Works Contracts must be considered in the context of the entire agreement clause (clause 1.9) of the Contract which states: *"The Contract and the documents referred to in it supersede all previous representations, arrangements, understandings and agreements between the parties about the subject-matter of the Contract, and set out the entire agreement between the parties about the subject-matter of the Contract. Neither party has relied on any other written or oral representation, arrangement, understanding or agreement."*

2.22 The question of whether an entire agreement clause can restrict a court's consideration of the rules on legal interpretation as they have developed and now stand is open to debate. A similar approach to ***Chartbrook*** was adopted in the case of ***Analog Devices B.V .v Zurich Insurance Company,***[24] where the

[22] Chartbrook Ltd. v Persimmon Homes Ltd. [2009] UKHL 38, [2009] 2 AC 1101, [2009] BLR 551 para [25]
[23] Nicholas Baatz QC Construing construction contracts: principles, policies and practice Society of Construction Law Paper December 2010 165
[24] Analog Devices B.V., Analog Devices Ireland Ltd., Analog Devices Research and Development Ltd. and Analog Devices Inc. v Zurich Insurance Company and American Guarantee and Liability Insurance Company [2005] IESC 12 page 10

Supreme Court upheld the decision of Kelly J. regarding his interpretation of exclusion clauses the subject matter of the proceedings. Kelly J. expressly noted in ***Analog*** that in construing the exclusion clauses he had to "*try and ascertain what the mind of the parties was when they were negotiated"* and in that regard he was *"entitled to take into account the general background which had existed."* Kelly J. drew attention to the fact that had the drafting party *"wished to exclude liability … it was, on the state of knowledge available to them, perfectly open to them to do so."*

2.23 In the case of exclusion clauses such as subclause 10.7.4 which may prevent the contractor from recovering damages for disruption or prolongation even when caused by the employer, Keith Pickavance in "***Delay and Disruption Construction Contracts Fourth Edition***" notes: *"Whilst such exclusion clauses may not be taken too much to heart in C's eagerness to secure the contract in the heat of the bidding process, once things start to go wrong and costs (sometimes, very high costs) are suffered as a result of what would normally be considered to be a compensable event, they tend to become very important. In the United States, this sort of exclusion clause is commonly referred to as a "no-damages-for-delay" clause. The character of such an exclusion clause is that D seeks to preclude C from recovering its loss, or expense for any occurrence, regardless of whether D is at fault. Depending upon the express terms and positions of the parties such provisions have been upheld by both the US and UK courts to prevent recovery of loss and expense for disruption, or prolongation."*[25]

2.24 However Pickavance also notes that the courts can construe exclusion clauses restrictively and in certain circumstances refuse to uphold such terms: *"It seems that, where they had been given an opportunity to consider such exemptions, courts have sought to construe them restrictively and they have not upheld such terms where the delay was arbitrarily caused and was beyond the contemplation of the parties at the time of execution of the contract and where the delay was of a kind not contemplated by the parties, amounted to abandonment of the contract, was caused by bad faith, wilful conduct, or active interference (save where the contract expressly covers the point)."*[26]

2.25 These statements must be weighed against the comments made by Clark in relation to exemption clauses in the seventh edition of ***Contract Law in Ireland***[27] where he states: *"Perhaps the most important basis upon which to justify a judicial refusal to apply an exemption clause is the equitable jurisdiction to provide relief against unconscionable bargains. While this doctrine is well established in the context of real property transactions and in several other contractual settings where the parties can be said to stand in a defined or fiduciary relationship to one another, there are only isolated instances where the doctrine has been considered relevant to exemption clauses. While Denning M.R. was prepared to canvas the adoption of such an expression of the unconscionability doctrine in Gillespie Bros. & Co. Ltd, v Bowles (Roy) Ltd.,*[28]

[25] Keith Pickavance, Delay and Disruption Construction Contracts Fourth Ed. 21-270 citing Kitson Sheet Metal Ltd (1989) 47 B.L.R. 82 and Phoenix Contracting Corp 118 A.D.2d 477; 499 NYS. 2d 953 (1986) NY App Div.
[26] Keith Pickavance, Delay and Disruption Construction Contracts Fourth Ed. 21-271 citing Phoenix Contracting Corp 118 A.D. 2d 477; 499 and NYS. 2d 953 (1986) NY App Div.
[27] Robert Clark, Contract Law in Ireland Seventh Edition page 254
[28] Robert Clark, Contract Law in Ireland Seventh Edition page 254 citing Gillespie Bros. & Co. Ltd, v Bowles (Roy) Ltd. [1973] Q.B. 400

the courts have tended towards the view that interference with contractual allocations of risk should be seen as a matter for legislative interference only. However, the use of the concept of fair dealing in the context of incorporation of rules by Costello J. in Carroll v An Post National Lottery Co.[29] *suggests that the day when an Irish court refuses to apply an exemption clause because the clause offends against this concept as a matter of substantive result, may not be far off…"*

2.26 The comments made by Costello J. in the case of ***Carroll*** referred to above included the following "*If the document being tendered contains conditions of an unusual or particularly onerous nature the party tendering must take reasonable steps to draw attention to such conditions in order to establish that the other party has agreed to it. The refusal to enforce the conditions is also justified if it can be shown that in all the circumstances of the case it would not be fair or reasonable to hold the other party bound by it.*

2.27 Costello J. went on to refer to the findings made by *Bingham LJ* in *Interfoto Picture Library Ltd. v Stilletto Wisaul Programmes Ltd.*[30] *[1988] 1 All ER 439 where Bingham LJ stated "the tendency of the English authorities has, I think, been to look at the nature of the transaction in question and the character of the parties to it; to consider what notice the party alleged to be bound was given of the particular conditions said to bind him; and to resolve whether in all the circumstances it is fair to hold him bound by the condition in question. This may yield a result not very different from the civil law principle of good faith, at any rate so far as the formation of the contract is concerned.""*[31]

2.28 A contractor may argue that the Public Works Contract contains certain conditions of an unusual or particularly onerous nature such that it would not be fair or reasonable to hold the other party bound to the terms. However such an argument may prove most effective where ambiguity has arisen in relation to the terms given the staunch refusal of the Supreme Court to engage in re-writing unambiguous terms of a commercial agreement as seen in ***Marlan Homes***.

2.29 Of further relevance to the issue of ambiguities arising under the Public Works Contracts is the principle of contra proferentem referred to by Geoghegan J. in ***Analog Devices B.V .v Zurich Insurance Company***[32] as follows "*If the exempting provision is ambiguous and capable of more than one interpretation then the courts will read the clause against the party seeking to rely on it."*[33]

2.30 Geoghegan J. referred to the following passage from the High Court judgment of Kean J. (as he then was) in ***Rohan Construction Ltd and Insurance Corporation of Ireland Ltd.***[34] and ***Cheshire Fifoot and Furmston's Law of Contract 13th***

[29] Robert Clark, Contract Law in Ireland Seventh Edition page 254 citing Carroll v An Post National Lottery Co. [1996] I.R. 443
[30] Interfoto Picture Library Ltd. v Stilletto Wisaul Programmes Ltd. [1988] 1 All ER 439
[31] Carroll v An Post National Lottery Co. [1996] I.R. 443 Costello J quoting Bingham LJ in Interfoto Picture Library Ltd v Stiletto Wisaul Programmes Ltd [1988] 1 All ER 439
[32] Analog Devices B.V., Analog Devices Ireland Ltd., Analog Devices Research and Development Ltd. and Analog Devices Inc. v Zurich Insurance Company and American Guarantee and Liability Insurance Company [2005] IESC 12 page 10
[33] Analog Devices B.V., Analog Devices Ireland Ltd., Analog Devices Research and Development Ltd. and Analog Devices Inc. v Zurich Insurance Company and American Guarantee and Liability Insurance Company [2005] IESC 12 page 10 citing Clark in the 4th edition of Contact Law in Ireland page 149
[34] Rohan Construction Ltd and Insurance Corporation of Ireland Ltd. [1986] I.L.R.M 419

edition: *"It is clear that policies of insurance, such as those under consideration in the present case, are to be construed like other written instruments. In the present case, the primary task of the court is to ascertain their meaning by adopting the ordinarily rules of construction. It is also clear, if there is any ambiguity in the language used it is to be construed strongly against the party who prepared it i.e. in most cases against the insurer. It is also clear that the words used must not be construed with extreme literalism, but with reasonable latitude, keeping always in view the principal object of the contract of insurance. In* ***Cheshire Fifoot and Furmston's Law of Contract 13th edition*** *the rule is defined as meaning that if there is any doubt as to the meaning and scope of the excluding limiting term, the ambiguity should be resolved against the party who inserted it and seeks to rely on it."*

2.31 Geoghegan J. also referred to the following passage from the High Court judgment of Kingsmill Moore J. in ***In Re Sweeney and Kennedy's Arbitration*** [1950] I.R. 85 "*I would like to associate myself with the opinion of Lord Green M.R. in* ***Woolfall & Rimmer, Ltd. v Moyle*** *at p. 73, where he said "...if underwriters wish to limit by some qualification a risk which prima facie, they are in undertaking in plain terms they should make it perfectly clear what that qualification is. They should, with the aid of competent advice, make up their minds as to the qualifications they wish to impose and have expressed their intention in legal in language appropriate for achieving the result desired. There is no justification for underwriters, who are carrying on a widespread business and making use of printed forms either failing to make up their minds what they mean, or, if they have made up their minds what they mean, failing to express it in suitable language. Any competent draughtsman could carry out the intention which [counsel] imputes to the document, and, if that was really intended, it ought to have been done."*

2.32 Geoghegan J. went on to note: "*The second important general principle in relation to exclusions is that the onus is on the insurer to establish the application of the exclusion or exemption. Counsel for the respondents cite in the written submissions to this court a passage from the judgment of Hannah J. in* ***General Omnibus Company Limited v London General Insurance Company Limited [1936] I.R. 596*** *which is on the following terms. The first defence depends upon the interpretation and construction of the exclusions or exceptions are stated in exemption (e). The policy starts by giving indemnity in general terms and imposing exceptions. The law is that the insurance company must bring their case clearly and unambiguously within the exception under which they claim benefit, and if there is any ambiguity, it must be given against them on the principle of contra proferentem."*

2.33 In a construction context recourse can be had to the decision of Bingham L.J. in the English Court of Appeal in ***Rosehaugh Stanhope (Broadgate Phase 6) PLC and Rosehaugh Stanhope (Broadgate Phase 7) PLC v Redpath Dorman Long Limited***[35] The defendant had entered into trade contracts with the plaintiff for the

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[35] Bingham L.J. in Rosehaugh Stanhope (Broadgate Phase 6) PLC and Rosehaugh Stanhope (Broadgate Phase 7) PLC v Redpath Dorman Long Limited Court of Appeal (Civil Division) 26 June 1990 1990 WL 754228

supply and erection of structural steel. The plaintiff appointed a construction manager and under the terms of the trade contract, the construction manager was to determine extension of time. The construction manager made an estimate for loss and damage pursuant to the contract and the plaintiff issued proceedings and sought summary judgment, even though the plaintiff conceded that the defendant had an arguable case for an extension of time at the time that the plaintiff was seeking summary judgment against them.

2.34 In ***Rosehaugh*** Lord Bingham stated: *"I do not think the two sub-clauses, read together, envisage that the defendants may be in breach for purposes of sub-clause (3) when there is a live and arguable issue whether the construction manager has made fair and reasonable extensions to the programmed completion date which, if made, would exonerate the defendants. Sub-clause (3) provides that the construction manager's bona fide estimate shall be binding and conclusive until final ascertainment (presumably under sub-clause (5) or by the court), but there is no corresponding provision with regard to breach, and it could not in my view be argued that his ruling on liability under the last sentence of sub-clause (1) or under sub-clause (4) is binding. I incline to this construction the more readily since I cannot believe the parties intended one of them to be subject to a potentially crippling obligation upon a contingency. In any event, I consider these provisions to be ambiguous and so adopt the construction less favourable to the plaintiffs whose document it is."*

2.35 However in the case of the Public Works Contracts, due regard must be given to subclause 1.2.4 which appears to attempt to restrict reliance on the principle of contra proferentem: "*No rule of legal interpretation applies to the disadvantage of a party on the basis that the party provided the Contract or any of it or that a term of the Contract is for the party's benefit."*

2.36 The extent to which the terms of a contract can determine and dictate the approach to be taken to legal interpretation is also open to debate. Further, any restriction on contra proferentem still leaves the issue of how any ambiguities arising in relation to the terms of the contract are to be resolved when they arise. Subclause 1.3.1 provides that unless provided otherwise if there is any inconsistency between the Works Requirements and the Pricing Document the Works Requirements will take priority. However subclause 1.3.4 goes on to state that *"If the Works Requirements include a Bill of Quantities and, the Bill of Quantities is inconsistent with any other Works Requirements, the other Works Requirements prevail."* If it is unclear what the applicable rates would be if "*the other Works Requirements prevail*" and the principle of contra proferentem does not apply, it is difficult to see how an ambiguity as to applicable rates would be resolved.

2.37 Similarly in the case of any purported applicability of subclause 10.7.4 to subclause 10.6, normally a contractor would be entitled to rely on contra proferentum on the basis that as subclause 10.7.4 *is ambiguous and arguably capable of more than one interpretation it should be read against the employer.*[36]

[36] Analog Devices B.V., Analog Devices Ireland Ltd., Analog Devices Research and Development Ltd. and Analog Devices Inc. v Zurich Insurance Company and American Guarantee and Liability Insurance Company [2005] IESC 12 page 10 citing Clark in the 4th edition of Contact Law in Ireland page 149

However if the principle of contra preferentem cannot be relied upon it is unclear how the issue of such ambiguity is to be approached and addressed.

2.38 Finally, regard must be given to the express reference to purposeful interpretation in the Public Works Contracts at clause 1.2.1 namely that: *"The parties intend the Contract to be given purposeful meaning for efficiency and public benefit generally and as particularly identified in the Contract."*

2.39 In relation to the "*purpose of the rule of law*" ***Keating on Construction Contracts*** ("*Keating*") states: *"This principle, it is submitted may be of particular relevance in the context of construing the applicable test of causation in extension of time and loss and expense provisions under a building contract. It emphasises the need to decide as a matter of law (which in the present context means considering the proper construction of the clause under construction) what causal connection is required between the relevant event/loss to trigger entitlement to relief. Such an approach emphasises that when construing a provision, account needs to be taken not just of the language of causation within the clause itself (which as indicated above is usually not clear enough to give final guidance) but also the purpose of the provision in question within the contractual scheme as a whole."*[37]

2.40 It is worth noting the recent comments of Akenhead J. in the Technology and Construction Courts in the case of ***Walter Lilly v Giles Patrick Mackay***[38] where he spoke of construing clause 26.1 of a JCT'98 contract in a commercially pragmatic context: "*In my judgment, it is necessary to construe the words in a sensible and commercial way that would resonate with commercial parties in the real world….*"[39] It is arguable that a tribunal may determine that giving purposeful meaning to a Public Works Contract for efficiency and public benefit generally would involve adopting such a commercially realistic interpretation.

2.41 As can be seen above, the courts acknowledge that ambiguity can occur in contractual terms thereby requiring reliance on the principle of contra proferentem in certain circumstances.

2.42 However, it is also starkly evident that the courts are loath to interfere with the agreement made between the parties and will only do so on rare occasion.

2.43 In particular, the recent Supreme Court decision of ***Marlan Homes*** offers stark warning to parties to a commercial agreement that the courts will not offer a paternal role and extricate them from contractual terms the wisdom of which may later be questioned.

[37] Furst and Ramsey, *Keating on Construction Contracts* 8th Ed. London Sweet and Maxwell 2006 para 9-061 page 351
[38] Walter Lilly v Giles Patrick Mackay [2012] EWHC 1773 (TCC) [468]
[39] Walter Lilly v Giles Patrick Mackay [2012] EWHC 1773 (TCC) [468]

3.0 Structure of the PWC

3.1 The approach of the PWC is clearly set out in GN 1.5, the CWMF Guidance Note Public Works Contracts v1.4 1 May 2013, which says *"The Contracts are to be awarded on a lump sum fixed price basis for a defined scope of work".* The same document then goes on to say "*This lump sum fixed price may not be altered except in very limited circumstances…".* In relation to the five contracts under consideration here, namely CF1 to CF5, the limited circumstances include *"legislative changes, hyperinflation"* and also *"for Compensation Events, as listed in Part 1K of Schedule".*

3.2 The same document also makes clear that *"There should be no amendments made to any of the standard forms of contract"* and this is specified in a Department of Finance circular 33/06. GN 1.5 also makes it clear that Provisional Sums and Prime Costs Sums are no longer permitted in this form of contract.

3.3 Turning to the Contract subclause 1.3.1 says that unless provided otherwise *"the documents in the Contract are to be taken as mutually explanatory of each other if possible."* However if there is inconsistency the priority is as follows:

- The Agreement
- Schedule, Letter of Acceptance and any post Tender clarifications
- Completed Form of Tender
- The Conditions, i.e. CF1, CF2, etc.
- The Works Requirements
- The Pricing Document
- The Works Proposals, if any
- Any other document in the Contract

In addition, it should be noted subclause 1.3.4 says that *"If the Works Requirements include a Bill of Quantities and, the Bill of Quantities is inconsistent with any other Works Requirements, the other Works Requirements prevail."*

3.4 The Standard Form of Agreement used in these Contracts contains six articles of which Art. 3 specifies the initial Contract Sum in words and figures and then goes on to say *"The initial Contract Sum is a Lump Sum and shall only be adjusted when the Contract says so."* Contract Sum is defined in clause 1 of the Contract as *"the amount identified in the Agreement as the initial Contract Sum, as adjusted in accordance with the Contract."*

3.5 Cleary the basis of the PWC contracts CF1 to CF5 is an agreement for the Contractor to carry out a defined scope of works for a fixed lump sum. Expressed mathematically this means:

$$\mathbf{P = Q}$$

where **P** = Contract Sum and **Q** = Works Requirements and where both **P** and **Q** are shown in bold to indicate that both factors are fixed.

3.6 This form of contract is very different to the traditional remeasured form of contract used in engineering work where for example clause 55(1) of the IEI third edition says *"the quantities set out in the Bill of Quantities are the estimated quantities of the work 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 obligations under the Contract."* In that form of contract the relationship can also be expressed mathematically as:

$$P = \mathbf{p_1}q_1 + \mathbf{p_2}q_2 + \mathbf{p_3}q_3 + ... + \mathbf{p_n}q_n$$

where in that equation P is equal to the Contract Sum but is not shown in bold since it is not fixed and instead is ultimately determined by the actual measured quantity of work under each item or heading and $\mathbf{p_1}$... $\mathbf{pn}$, represent the rates in the Bill of Quantities and are shown in bold as they are fixed. $q_1 ... q_n$ are the quantities shown in the Bill of Quantities and again are not shown in bold as they are variable.

3.7 In the traditional building form of contract for example the RIAI or GDLA where quantities forms part of the contract and a Bill of Quantities is included as a Contract Document clause 3 says that an *"error in the description or quantity in the Bill of Quantities… shall be rectified and the rectification treated as a Variation…"* While there is no general provision for remeasurement within the Contract, it may be sought by a Contractor but subject to the proviso, that if it is found to be unnecessary, the Contractor is liable for the fees involved in such remeasurement.

3.8 In all cases the contract will contain a Pricing Document and GN 1.5 says this is to be used in tender evaluation, to provide detailed unit costs which can be used to value changes and also to value work done at any particular point and finally to provide cost information to facilitate the Project Review stage. In broad terms the primary pricing document can be either a Bill of Quantities or "*a tender cost analysis detailing how the tender price is to be broken down*", sometimes referred to as a Schedule of Rates. A Bill of Quantities is likely to be provided with the employer design forms CF1, CF3 and CF5 but not with the contractor designed forms CF2 and CF4 where some form of schedule of rates is likely to be used.

3.9 The PWC is administered by the Employer's Representative (ER) and subclause 4.3 of the Contract provides for the appointment of such a person. However the Contract is silent on the qualifications of such a person and also the manner in which that person is to discharge the ER's duties.

3.10 The ER is dealt with in subclause 3.2.2 of GN 1.5 which says *"The Employer's Representative (ER) is a person appointed to administer the Contract on behalf of the Employer and to represent the Employer's interest".* GN 1.5 then goes on to say *"The ER is the person primarily responsible for liaison with the Contractor. The responsibilities of this position are outlined in the following table:"* The table goes on to list six areas of responsibility as follows:

- Instructions in the form of directions or Change Orders
- Certificates
- Delay and Compensation Events
- Meetings
- Design
- Acting impartially

3.11 Under that final heading of acting impartially GN 1.5 says *"In making assessments or issuing certificates, the ER must act with impartiality and in accordance with the Contract."* While there is in the Guidance Note, there is no such provision in the Contract.

3.12 Subclause 4.3.2 says that any limitations of the ER's authority are to be stated in the Contract but the Contract also says that the Contractor is to take it that any direction or instruction from the ER is given with full authority.

3.13 Subclause 4.4 of the Contract says that the ER may give the Contractor an instruction which can either be a direction or a Change Order with this latter being defined as *"an instruction of the Employer's Representative to change [including add to or omit from] the Works or to change [including impose or remove] constraints in the Contract on how the Works are to be executed."* This capacity of the ER to issue Change Orders provides the needed element of flexibility within the Contract but, once again, there is no guidance in the Contract on the extent to which such discretion may be exercised. For example, it is not clear whether the ER is limited to making changes ancillary to and necessary for the execution of the Works. Given the silence of the Contract on this point it would appear it is the latter option.

3.14 While the scope of works in the Contract as represented by the Works Requirements can be changed by means of a Change Order, the price side of the equation, in other words the Contract Sum, is varied by the impact of Compensation Events. Table 1K of the Schedule sets out a list of 21 different Events and in each case they may be specified as "*yes"* or *"no"* under the heading of Delay Event and Compensation Event. This means there are four possibilities for each Event namely, NN, YN, NY, YY where these are respectively neither delay or compensation, delay but not compensation, not delay but compensation and finally, delay and compensation. If an event is NN it will have no impact on either the Contract Period or the Contract Sum while if it is YN it will have an impact on the Contract Period but not on the Contract Sum, if it is NY it will no impact on the Contract Period but will have on the Contract Sum and finally, it if YY it may give rise to a change to both the Contract Period and the Contract Sum.

3.15 Table No 1 below sets out the manner in which the various 21 Events are used within the different forms of contract.

Table No 1

Form	Delay Events	Compensation Events
CF1 and CF3	All 21 Events are used. Only Event 17 is not a Delay Event.	16 of the Events are Compensation Events. Events 12, 13, 14 and 15 are not Compensation Events while Events 17, 18, 19, 20 and 21 are optional. In other words when the Employer prepares the contract documentation the Event may be set as either Y or N.
CF2 and CF4	Only 16 of the 21 Events are used. 5, 7, 17, 19 and 20 are not used. All of the remaining 16 are Delay Events.	Ten of the 16 Events used are Compensation Events. 12, 13, 14 and 15 are not Compensation Events while Events 18 and 21 are optional.
CF5	All 21 Events are used and only Event 17 is not a Delay Event.	16 of the Events are Compensation Events. Events 12, 13, 14 and 15 are not Compensation Events while Event 17 is optional.

3.16 Event 17 must be considered as it has an impact on subclauses 10.6 and 10.7. Event 17 in full states *"A difference between the Contract value of the Works according to the quantities and descriptions in a Bill of Quantities in the Pricing Document, if there is one, [taking into account the method of measurement and any amendments identified below] and the Contract value of the Works described in the Works Requirements, because the Bill of Quantities, when compared with the Works Requirements*

- *includes an incorrect quantity or*
- *includes an item that should not have been included or*
- *excludes an item that should have been included or*
- *gives an incorrect item description*

and the difference for an item in, or that should have been in, the Bill of Quantities is more than €500."

3.17 The thinking behind this is set out in subclause 2.6.3 of GN 1.5 which says that Event 17 is provided for in the three Employer designed contracts CF1, CF3 and CF5 where a Bill of Quantities is normally provided as the *"primary Pricing Document"*. GN 1.5 says *"In such situations the Employer specifies whether or not errors in quantity are to be Compensation Events by entering yes or no in the*

Schedule Park 1K, item 17 (Compensation column). No is the default if there is no entry."

3.18 GN 1.5 then deals with the different situations where Event 17 is either compensatable or not. If it is not compensatable, in other words the default position, it means the contract must be carried out in line with the Works Requirements regardless of what is in the Bill of Quantities and the Bill of Quantities only comes into use in a situation where a change is made to the Works Requirements. In such circumstances the intention is that if there is an applicable rate in the Bill of Quantities this should be used for valuation of the Change.

3.19 On the other hand if Event 17 is compensatable, in other words yes, the Contract Sum may be adjusted to take account of the discrepancy between the Works Requirements and the Bill of Quantities once the threshold of €500 is exceeded. This is intended to work either way as examples in GN 1.5 show. In the first example if the Works Requirements provide for 500m of timber skirting and the Bill of Quantities includes for 50m of skirting at €18/m, it suggests the omission is €8,100 and the Contractor is entitled to be compensated for this. In effect this means that the Contract Sum is to be increased by €8,100. In the next example if the Works Requirements show 500m of skirting and the Bill includes 550m at €18/m it means the Bill is overpriced by €900 and the Employer is entitled to be compensated by that amount, in other words, the Contract Sum is to be reduced by €900.

3.20 There may be some debate whether Event 17 is limited only to increases in the Contract Sum, in other words, it could not be used to justify a decrease in the Contract Sum. However it is clear that it was envisaged to work both positively and negatively and the use of the word *'difference'* rather than simply *'increase'* in the wording of Event 17 is clearly suggestive of this. Finally, the second heading within the Event, where a correction can be made for an item in the Bill that should not have been included, clearly implies a decrease in the Contract Sum.

3.21 The default position as regards Event 17 is no, in other words, it is not compensatable and it is understood that most PWC contracts, under CF1, CF3 or CF5, are used in this manner. However, a number of Contracts are used with Event 17 compensatable with the intention to remove any inconsistency between the Works Requirements and the Bill of Quantities and this is done on the basis of what is specified in the Works Requirements while retaining rates tendered in the Bill of Quantities and allowing the Contract Sum to vary in order to do so. Thus while the essence of the Contract remains a lump sum price for a defined scope of work there is now, in theory at lease, a fully priced Bill of Quantities which is consistent both with the defined scope of work and the lump sum price. In many ways this provision allowing for modification of the Bill of Quantities on this basis is closer to the RIAI/GDLA model referred to previously, then a pure lump sum contract or a fully remeasured one.

3.22 It will be clear from the above that, regardless of Event 17, the Works Requirements are constant and obviously any change in the Works Requirements

is likely to give rise to an adjustment of the Contract Sum. Such a change to the Works Requirements could come about as a result of a Change Order but it also could arise in a more general sense from the Compensation Events listed for a specific contract. The impact of such events on a Contract Sum is dealt with in subclauses 10.6 and 10.7 of the Contract and it is to these that we now turn.

3.23 Subclause 10.6 contains two sentences at the outset and is then followed by four subclauses 10.6.1, 10.6.2, 10.6.3. and 10.6.4. Subclause 10.6 is identical in the three Employer designed forms of contract namely, CF1, CF3 and CF5. In the case of CF2 and CF4 the only difference is that subclause 10.6.4 is extended by the addition of 10.6.4(4) which is not in the other versions.

3.24 Subclause 10.7 is the same in Forms CF1, CF2, CF3 and CF4 and comprises six subclauses, in other words, 10.7.1 through to 10.7.6. In CF5 there are only five subclauses with what is 10.7.3 and the other forms being omitted and this changes the numbering.

4.0 Subclause 10.6

4.1 The layout of subclause 10.6 is somewhat unusual in that, rather than starting directly with 10.6.1, it has two sentences at the outset. The second of these says: "*Additional, substituted and omitted work shall be valued as follows:"* and leads straight into subclauses 10.6.1 to 10.6.4 inclusive; quite clearly the intention is that these subclauses are to be used for the valuation where work is added omitted or substituted. The word '*work'* is not defined in the Contract but it is difficult to see this causing any problem and for the purposes of this discussion *'work'* may be taken as what is required of the Contractor to satisfy the Works Requirements. It should be noted the word *'work'* is defined in the Construction Contracts Act 2013 along broadly similar lines.

4.2 The opening sentence of subclause 10.6 reads as follows: *"Adjustments to the Contract Sum for a Compensation Event shall only be for the value of any additional, substituted, and omitted work required as a result of the Compensation Event under this subclause 10.6 and any Delay Cost under subclause 10.7."* The words '*additional', 'substituted'* and '*omitted'* mirror what is in a Change Order, in other words, work may be added or omitted while the word *'substituted'* obviously provides for a mix of addition/omission but it also covers work carried out under different constraints.

4.3 The word *'only'* as an adverb in this sentence appears to be significant and the question arises does it mean any of the following:

- Subclauses 10.6 and 10.7 are the only provisions allowing for adjustment of the Contract Sum.
- Adjustment to the Contract Sum can only arise as a result of a Compensation Event and the purpose of subclauses 10.6 and 10.7 is to value the impact of the Compensation Event on the Contract Sum.

- Subclause 10.6 only values change in the work whether by addition, omission or substitution while subclause 10.7 only provides a valuation for delay cost.

- All of the above.

4.4 It is suggested that the sentence taken in its totality means all of the above since, for example, even where the word *'only'* is omitted and the operative part is rewritten it reads as follows: *"Adjustments to the Contract Sum… shall… be for the value of any … work …under this subclause 10.6 and any Delay Cost under subclause 10.7".* Even when expressed in that manner it seems clear the intention of this sentence is to provide two compartments, the first comprised of subclauses 10.6.1 to 10.6.4 inclusive which are to be used for the valuation of changes to work while subclause 10.7 is to be used for establishing delay cost. The use of the adverb *'only'* appears merely to strengthen the arguments for such an interpretation.

4.5 Turning to subclauses 10.6.1 to 10.6.4, the first three subclauses represent the standard or traditional valuation model generally used in a Bill of Quantities based contract whereas 10.6.4 deals only with additional or substituted work and is a discretion available to the ER. On the other hand subclauses 10.6.1 to 10.6.3 are mandatory and they are written in a hierarchical order, in other words, 10.6.1 must be used first and it is only if that subclause is inapplicable that 10.6.2 is used before moving on to 10.6.3.

4.6 In earlier versions of the Contract there was some question if in fact 10.6.4 could be used given the hierarchical nature of the earlier three subclauses and the fact that, ultimately, they are sufficient to cover all eventualities. As a consequence of that the expression *"Instead of subclauses 10.6.1, 10.6.2 and 10.6.3 applying"* has been added, obviously to clarify that the ER may use 10.6.4 at any time in relation to additional or substituted work, but not for omitted work to which 10.6.4 does not apply.

4.7 The similarity of the three subclauses of 10.6 to the traditional model will be clear by reference to clause 52(1) of the IEI third edition which states: *"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. 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 of valuation so far as may be reasonable failing which a fair valuation shall be made."*

4.8 The provision in the IEI form of contract quoted above has often been referred to as comprising three rules which in simply terms are: direct use of Bill rates, the use of modified Bill rates and finally fair valuation. Clearly these three rules correspond with subclauses 10.6.1, 10.6.2 and 10.6.3.

4.9 On the face of it the application of subclause 10.6.1 is quite straightforward since its operation is mandatory and there is no provision for reasonableness or fairness. In other words provided certain conditions are met, it is an express

requirement of the Contract that: *"the determination shall use those rates".* For example on a contract if it was decided to change the number of fire doors and there was a rate for such doors in the Pricing Document, that rate must be used in the calculation of the adjustment to the Contract Sum whether for addition or omission. Equally if a number of fire doors were to be substituted by those with a different rating and Pricing Document rates were available for the two different types of door, these would simply be used to calculate the addition and subtraction to arrive at a net adjustment of the Contract Sum.

4.10 It will be seen there is no requirement for fairness or reasonableness in 10.6.1 and once there are rates in the Pricing Document they must be used whether they are too high or too low. There are really only two issues which arise in relation to this subclause, namely the meaning of *"similar ... work ... under similar conditions*" and also what is meant by *"rates in the Pricing Document.".*

4.11 The first of these issues, namely similarity of work and conditions, does give rise to differences but it is suggested that this something which must be dealt with on a case by case basis such that it is really not possible to generalise. However, it is clear what is intended is that 10.6.1 should apply not only where there is an exact match between the work described in the Pricing Document and the proposed work but that it should also apply where there is a close match in other words similarity.

4.12 When considering the expression *"rates in the Pricing Document"* the obvious starting point is that this is the figure inserted under the heading *"Rate"* either in a Schedule of Rates or in a Bill of Quantities. There can be no real question about this where it is simply a Schedule of Rates but where a Bill of Quantities is involved the position becomes somewhat more complex. Event 17 in Table 1K of the Schedule has been dealt with earlier and it is intended to remove any inconsistencies between the Bill of Quantities and the Works Requirements. In effect this means that if Event 17 is compensatable there can be no doubt about the meaning of the expression *"rates in the Pricing Document"* but where Event 17 is not compensatable questions can arise as to what precisely it means.

4.13 It needs to be borne in mind that when completing a tender a Contractor is not allowed to change the quantities even if it is apparent that they are significantly different from what is in the Works Requirements. Once a Contractor enters a rate in the column provided it is multiplied by the appropriate quantity and this figure is then extended and carried forward as part of the initial Contract Sum. In such circumstances it has been argued that the rate in the Pricing Document is not necessarily that entered in the column under the word '*Rate'* but instead is the realistic rate obtained by dividing the figure in the total column by the quantity from the Works Requirements.

4.14 The arguments in favour of such an interpretation are based on the priority of documents in the Contract set out in subclause 1.3 and specifically in subclause 1.3.4 which says *"If the Works Requirements include a Bill of Quantities, and the Bill of Quantities is inconsistent with any other Works Requirements, the other Works Requirements prevail".* That approach is also based on taking a commercially realistic approach to the terms and construing them *"in a sensible*

and commercial way that would resonate with commercial parties in the real world" as stated by Akenhead J in ***Walter Lilly***. It is also likely to be suggested that it is in line with the objective of the parties in construing the Contract in order to give *"efficiency and public benefit generally".*

4.15 On balance, it is suggested the argument favours the use of the rate entered in the column of the same name but it is acknowledged that in certain circumstances conciliators and arbitrators may feel that a sensible commercial approach justifies deriving the rate using the total figure and the quantity in the Works Requirements. However such an approach is not possible where Event 17 is compensatable.

4.16 Turning to subclause 10.6.2 this applies to additional, substituted or omitted work for which there is a comparable rate in the Pricing Document but where there is a dissimilarity whether as regards the work or the condition under which it is to be executed. Once again the theory of this is relatively straightforward. The approach is to take the applicable rate and establish a factor which, when applied to the rate, takes account of the difference in work or conditions.

4.17 As is in the case of 10.6.1, subclause 10.6.2 is mandatory and it is also clear from the way it is written that it applies only when 10.6.1 is inapplicable because of dissimilarity of work or conditions. In such circumstances the relevant part of 10.6.2 states *"the determination shall be on the basis of the rates in the Pricing Document when that is reasonable."*

4.18 Subclause 10.6.2 means that when there is a rate in the Pricing Document which matches additional, substituted or omitted work it must be used for valuation under 10.6.2 but with the rate modified to take account of the dissimilarity. In other words the underlying rate is to be used but is to be multiplied by a factor to represent the difference between what was done on site and what was provided for in the Pricing Document.

4.19 The real issue here is the application of the word *'reasonable'* and whether the determination has to be reasonable since, if so, it follows that not only must the adjustment factor be reasonable but the rate being used must also be so.

4.20 The question set out above has been dealt with in a judgment by Lloyd J in ***Henry Boot Construction Ltd v Alstom Combined Cycles Ltd***[40] which arose out of an appeal against an arbitrator's decision on a contract using the ICE Conditions of Contract sixth edition which in clause 52 contains a valuation provision, the operative part of which is identical to that in the IEI Conditions of Contract third edition quoted earlier. The arbitrator was asked *t*o consider the application of what he described as Rule 2 (the equivalent of subclause 10.6.2 in the PWC) to a price or rate which had been established by mistake.

4.21 In considering this the arbitrator said *"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*

[40] Henry Boot Construction Ltd v Alstom Combined Cycles Ltd. [1999] B.L.R. 123, TCC; [2000] B.L.R. 247 CA

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 a mistake, I do not see it as 'reasonable' to enlarge its ambit and thereby compound the effect of the error."[41] Essentially the arbitrator took the view that the word *'reasonable'* within the relevant clause meant that the underlying rate together with its adjustment factor should both be looked at in the context of a requirement for reasonableness.

4.22 Lloyd J disagreed with this proposition on the basis the underlying rate could not be looked at as part of such a valuation and said, for example*: "Clause 55(2) does no more than restate… the fundamental proposition that the contract rates and prices are sacrosanct and not subject to correction. In the ICE Conditions the contractual foundation for the rule that the rates and prices are immutable even though they prove to be too profitable or uneconomic is to be found earlier in the conditions in clause 11(3)(b): 'The Contractor shall be deemed to have… 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'."*[42]

4.23 The ***Henry Boot*** judgment contains several quotations by Lloyd J from Max Abrahamson's book on the ICE Conditions such as for example*: "Mistakes in the rates themselves not found by or on behalf of the Employer before acceptance of the tender bind the Contractor for all work done, including variations unless they fall outside the variation clause in the original contract…"* Lloyd J further quoted from Abrahamson: *"The basic consideration is that the Contractor has agreed to do all work within the contract – original and varied – on the basis of his bill rates".*[43]

4.24 In the same judgment Lloyd J also said: *"a mistake in a rate or price or in its application binds both parties… A party to a construction contract is therefore stuck with a rate or price whether the contract price is expressed as a lump sum or subject to recalculation by adjustment or after remeasurement using the contract rates and prices which are constituent elements of the contract price or tender sum."*

4.25 Lloyd J also said: *"In my judgment, the same approach 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*

[41] Henry Boot Construction Ltd v Alstom Combined Cycles Ltd. [1999] B.L.R. 123, TCC; [2000] B.L.R. 247 CA

[42] Henry Boot Construction Ltd v Alstom Combined Cycles Ltd. [1999] B.L.R. 123, TCC; [2000] B.L.R. 247 CA

[43] Henry Boot Construction Ltd v Alstom Combined Cycles Ltd. [1999] B.L.R. 123, TCC; [2000] B.L.R. 247 CA

to be made if there is a contract rate or price applicable or which could be used as a basis for valuing the variation. 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 variation. The word 'reasonable' in clause 52(1)(b) refers only to the extent to which it is feasible to use a given contract rate or price as the basis for the valuation, irrespective of its amount."[44]

4.26 Lloyd J made reference to the fact that a Contractor could price work in anticipation of how a contract might unfold in the following terms: *"It is one of the skills for tendering for a construction contract of this type (where the Contract Price is subject to recalculation) to anticipate where there may be departures from the estimated quantities or item descriptions which might prove to be to the Contractor's advantage."* Lloyd J then went on to say "*A Bill of Quantities in addition exists to provide the mechanism for valuing variations… in the context of clause 11(3)(b) another obligation of the Contractor is to comply with orders for variations given by the Engineer under clause 51. Accordingly, the Contract rates and prices must be sufficient for that purpose since clause 52 states the principles upon which the Engineer is act in valuing variations."*[45]

4.27 Having referred to the skills of tendering on the part of the Contractor Lloyd J then went on to say: *"Similarly, a Contractor who priced the Contract intelligently on the basis that the change was likely to be made would be justifiably irate if the Engineer or an Arbitrator could operate clause 52(1)(b) to cut back the valuation that would otherwise be made under Rule 2 because it would produce untoward 'windfall' gain for it would be one which the Contractor had counted on making, i.e. it was not a 'windfall' at all but part of the risks of contracting which produce thrills as well as spills."* Some distance further on Judge Lloyd said *"The words in clause 51(2)(b) 'the rates and prices shall be used' are clear and mandatory. There would be little point in such a clear statement if they are only be used if it was otherwise 'fair to do so'".*[46]

4.28 It is clear the net effect of the above is that Lloyd J took the view that rates provided in a Bill of Quantities were sacrosanct or immutable and consequently not subject to review in the clause which is the equivalent of 10.6.2. As a consequence this limited the qualification of reasonableness to the adjustment factor only. The ***Henry Boot*** judgment is based on clause 11(3)(b) of the ICE sixth edition form of contract which presumably is what Lloyd J was referring to when he spoke of the "*wording of such a Contract and the philosophy to be derived from it."* Clause 11(3)(b) has been quoted earlier and mirrors clause 11(2) of the IEI third edition Conditions of Contract.

4.29 It is arguable, on the basis of the ***Henry Boot*** judgment, that the underlying rates are not subject to review in any 10.6.2 valuation particularly in the light of *"a party to a construction contract is therefore stuck with its rate or price whether*

[44] Henry Boot Construction Ltd v Alstom Combined Cycles Ltd. [1999] B.L.R. 123, TCC; [2000] B.L.R. 247 CA
[45] Henry Boot Construction Ltd v Alstom Combined Cycles Ltd. [1999] B.L.R. 123, TCC; [2000] B.L.R. 247 CA
[46] Henry Boot Construction Ltd v Alstom Combined Cycles Ltd. [1999] B.L.R. 123, TCC; [2000] B.L.R. 247 CA

the Contract Price is expressed as a lump sum or subject to recalculation by adjustment or after remeasurement using the Contract rates."[47] It should be noted that the ICE form of contract speaks of *"rates"* and *"prices"* whereas the PWC refers only to "*rates"*; however it is suggested this does not affect this underlying argument.

4.30 A situation where an error was incorporated into a lump sum pre-contract unbeknownst to either contracting party was referred to in Keating as follows: *"Neither party noticed the error before the contract was made and there is no ground for rectification. If the contract is for a lump sum there is, it is submitted, no implied right to have the contract price adjusted to take account of the error."*[48]

4.31 Keating goes on to note "*When the contractor has made an error in its pricing of the tender for a lump sum contract there are no grounds for rectification and the contract provides for payment of variations at rates shown in the tender, a difficult question can arise when pricing variations and the error is apparent. Should any, and if any, what, adjustments be made in the rates shown in the tender to arrive at the new rate for pricing variations?" Referring to Henry Boot*[49] *and I.N.D. Wallace QC article, Variation Valuation: No Correction of Pricing Errors*[50] *Keating notes "The answer under clause 52 of the Infrastructure Conditions of Contract is that rates entered by mistake cannot be opened up or disregarded on the basis of being an error. It is thought that this is likely to apply generally in the absence of an express power to make an adjustment for pricing errors."*[51]

4.32 The contrary argument is that the *"wording… and the philosophy to be derived from it"* of the PWC is fundamentally different. Specifically, there is generally no warranty in relation to the rates themselves and the Agreement in Art. 3 says: *"The initial Contract Sum is a lump sum and shall only be adjusted when the Contract says so."* Even more importantly Art. 4 immediately afterwards says: *"The Contractor has satisfied itself before entering into the Contract of all the circumstances that may affect the cost of executing and completing the Works and of the correctness and sufficiency of the Contract Sum to cover the cost of performing the Contract."*

4.33 This is very different to subclause 11(3)(b) of the ICE Conditions of Contract which was used by Lloyd J to conclude that the rates in the Bill of Quantities are sacrosanct and immutable. In the case of the PWC it could be argued, in the absence of such a provision, the rates are not similarly cast in stone and instead could be reviewed by an ER, a conciliator or an arbitrator under subclause 10.6.2.

4.34 As set out previously the relevant wording of 10.6.2 is: *"The determination shall be on the basis of the rates in the Pricing Document when that is reasonable".* It

[47] Henry Boot Construction Ltd v Alstom Combined Cycles Ltd. [1999] B.L.R. 123, TCC; [2000] B.L.R. 247 CA

[48] Furst and Ramsey, *Keating on Construction Contracts* 8th Ed. London Sweet and Maxwell 2006 s. 4-032 citing the possible relevance of the unreported case of M.J. Gleeson Ltd. v Sleaford U.D.C. (1953) noted in H.B.C. (12th edn), para 5-014

[49] Henry Boot Construction v Alston Combined Cycles [2000] B.L.R. 247 CA

[50] I.N.D. Wallace QC "Variation Valuation: No Correction of Pricing Errors" [2001] I.C.L.R 221

[51] Furst and Ramsey, Keating on Construction Contracts 8th Ed. London Sweet and Maxwell 2006 s. 4-054

is suggested the obvious and straightforward reading of the extract is the word *'that'* refers back to the word *'determination'* so that the requirement is that the determination shall be reasonable. As stated previously the determination is the product of two components – the original rate and the adjustment factor applied to it and because of the relationship it means that each of the two components must be reasonable in order to achieve a reasonable determination.

4.35 The interpretation set out in the previous paragraph is the one arrived at by the arbitrator in the ***Henry Boot*** case based on very similar contract wording. Lloyd J did not take issue with that interpretation but instead insisted that the provisions of the ICE form of contract, or as he put it *"the wording of such a Contract and the philosophy to be derived from it"*, meant that the rates were fixed, or in his words *"sacrosanct"* and *"immutable"*, such that they were not open to review in the equivalent valuation provision.

4.36 This obviously leads to the question whether similar provisions have been made in the PWC and it is suggested that they have not. If that is the case it follows that in a 10.6.2 valuation the rates are not sacrosanct and consequently may be reviewed in order to achieve a reasonable determination. However in a situation where a Bill of Quantities is used with Event 17 as a Compensation Event, the balance of the argument will shift somewhat. It is likely to be argued that in such circumstances the Bill of Quantities, and more importantly the rates, are consistent with the Contract Sum such that there is an implication they are sufficient and satisfactory for any additional work. This is certainly an additional point in the argument although not necessarily a decisive one given that the fundamental nature of the contract remains the same.

4.37 It should be noted that such an approach would tend to make 10.6.2 redundant. For example, Lloyd J in the ***Henry Boot*** judgment said: "*I agree… that the affect of the arbitrator's interpretation… 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 the conditions being dissimilar) then that this is tantamount to enabling a fair valuation to be made whenever the first two criteria are met."*[52]

4.38 This now leads to a consideration of subclause 10.6.3 which states: "*If the adjustment cannot be determined under the above rules, the Employer's Representative shall make a fair valuation based on rates for similar work in the locality, if available".* This is also mandatory in that it imposes an obligation on the ER to proceed on the basis of fair valuation but only if 10.6.1 or 10.6.2 cannot be used.

4.39 The question of fair valuation was dealt with by Lloyd J in the ***Henry Boot*** judgment where he said*: "A fair valuation when used as an alternative to a valuation by or by reference to contract rates and prices generally means a valuation which will not give the Contractor more than his actual costs reasonably and necessarily incurred plus similar allowances for overheads and profit for anything more would confer on him an additional margin for profit and*

[52] Henry Boot Construction Ltd v Alstom Combined Cycles Ltd. [1999] B.L.R. 123, TCC; [2000] B.L.R. 247 CA

would not be fair to the Employer. Fairness is an objective test which takes into account the position of both parties. It is surely not right to use a fair valuation to compensate a Contractor for a loss suffered elsewhere and unconnected with the work in question."[53]

4.40 It will be noted that the word *'fair'* is used in subclause 10.6.3 while the word *'reasonable'* is in subclause 10.6.2. These terms are not synonymous but it is suggested that one implies the other such that it is impossible to be fair without being reasonable or to be reasonable without being fair.

4.41 Fair valuation clauses are not generally as prescriptive as 10.6.3 and in that context the reference to rates for similar work in the locality was added relatively recently as an amendment to the Contract. The use of suitable rates from elsewhere is always an option under a fair valuation clause but it is suggested the essential requirement is that under such a clause the Contractor is entitled to profit and overheads but equally the Employer is entitled to expect that such a valuation will be reasonable. For example, the expression *'reasonable profit'* is used in the FIDIC suite of contracts but is not quantified other than in the World Bank Version of the Red Book where a figure of 5% is included for profit. Such an approach would accord with the view in *Keating* that: *"A fair valuation of extra work will include overheads and profit.*"**54**

4.42 To summarise, in a 10.6.3 valuation the appropriate rate could be established either by reference to similar work done by others as suggested by the clause but it could also be built up on the basis suggested by Lloyd J namely, actual costs reasonably and necessarily incurred together with a reasonable allowance to cover overheads and profit.

4.43 Subclause 10.6.4 is a further valuation option and, unlike the other subclauses in 10.6, it is discretionary rather than mandatory with the option only available to the ER. Subclause 10.6.4 relates solely to "*additional or substituted work",* in other words, it does not apply to omitted work. The subclause may be used *"in full or in part"* in any determination of the adjustment to the Contract Sum as a result of a change to the work from a Compensation Event.

4.44 A 10.6.4 valuation is carried out by comparing the cost of the work as a result of the Compensation Event with the cost of the same work but without the impact of the Compensation Event. It is done by calculating the cost of labour, materials and plant and, in the case of CF2 and CF4, design work. The cost of labour, materials and plant is established using information provided by the Contactor in Schedule Part 2 D while, in the case of CF2 and CF4, the cost of design is *"at the tendered rates in the Pricing Document."* All of the rates inserted by the Contractor in Schedule Part 2D are to include "*on costs, overheads and profit and exclude VAT."*

[53] Henry Boot Construction Ltd v Alstom Combined Cycles Ltd. [1999] B.L.R. 123, TCC; [2000] B.L.R. 247 CA

[54] Furst and Ramsey, *Keating on Construction Contracts* 8th Ed. London Sweet and Maxwell 2006 s4-053 citing Weldon Plant v Commission for New Towns [2000] B.L.R. 496 at 501 (considering Clause 52 of the then ICE Conditions).

4.45 Labour is costed using hourly rates provided by the Contractor under three categories namely, Craftpersons, General Operatives and Apprentices in Schedule Part 2D. The cost of materials is established using the net cost together with a percentage addition inserted by the Contractor in Schedule Part 2D. The cost of plant, "*reasonably used for that work, whether hired or owned by the Contractor"* is established by reference to rates in a document which is normally listed in Schedule Part 1K with the proviso that *"the rates will be treated as if in Euro".* The Contractor is invited in the Schedule Part 2D to insert a percentage addition/deduction.

4.46 Subclause 10.6.4 also provides that the ER's decision is conclusive which means according to subclause 4.3 *"any opinion, certificate, determination, assessment or objection of the Employer's Representative under the Contract may be revised in accordance with clause 13, except for decisions stated in the Contract to be conclusive."* In other words an ER's decision under 10.6.4 is not subject to review at conciliation or arbitration; interestingly it will not be possible to exclude review of 10.6.4 decisions once adjudication is introduced under the Construction Contracts Act 2013.

4.47 Broadly there are two issue which arise in relation to 10.6.4, the first being that Contractors have tended to insert unrealistic rates into Schedule Part 2D while the second issue, which is obviously linked with the first, is that the application of 10.6.4 is likely to mean a Contractor doing additional or substituted work at a loss.

4.48 Quite commonly Contractors do not insert any figure in the relevant categories of Schedule Part 2D with the result that the default options apply (in some instances as regards plant Contractors have been known to insert a 100% reduction). The default position as regards materials is 0%, in other words, materials are to be valued at net cost. The default position as regards plant is 0%, in other words, the rates in the Schedule referred to or inserted by the Employer in Schedule Part 1K will be taken as applicable in Euro.

4.49 The default position for labour, where a Contractor either puts in no figure or puts in a figure lower than the default, is that it is to be 75% of the rates in the *"construction industry registered employment agreement current on the designated date"*, commonly referred to as the REA. In addition the Schedule says that the hourly rates are to include for related costs to include *"PRSI, benefits, tool money, overtime, travelling time and country money"*. As an aside registered employment agreements no longer have any legal status as a result of a recent challenge involving the electrical contractors.

4.50 The current REA rate for a craftsperson is €17.21 per hour so that 75% of this is €12.90 per hour. This latter figure is generally accepted as approximately 50% of the hourly cost of labour to the Contractor for a craftsperson when due allowance is made for the made add-ons listed above.

4.51 It will be clear from the above that where an ER decides to apply 10.6.4 there is a real prospect, unless realistic rates have been provided in the Schedule, that the valuation will furnish a figure significantly below what it has cost the Contractor

to perform the work. As stated previously there is no guidance in the Contract on how the ER is to exercise the very broad discretion under this subclause and in particular there is no reference to impartiality or fairness/reasonableness.

4.52 As a consequence of the above the following questions seem to arise in relation to this subclause.

- Is impartiality on the part of the ER to be implied into the Contract?
- Is it implied that the Contractor is entitled to reasonable profit for extra compensatable work not envisaged or included in the Works Requirements?
- What recourse, if any, has a Contractor if an ER makes a decision providing for a loss?

4.53 It is suggested there the answer to the last of those questions is that a party unhappy with a decision under 10.6.4 could arguably proceed straight to Court. The reason for saying so is that there is a generally recognised entitlement of parties to refer disputes to Courts although this is generally modified by arbitration legislation. Art. 8 of the Arbitration Act 2010 says *"A Court before which an action is brought in a matter which is the subject of an arbitration agreement shall… refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."* In this particular instance an action brought in relation to a 10.6.4 decision would not be covered by an arbitration agreement and consequently the Court would be under no such obligation to stay the matter.

4.54 It is difficult to see that a Court would not apply a need for impartiality on the part of an ER when making decisions under 10.6.4. It is suggested the requirement for impartiality on the part of a contract administrator is well established in the construction industry and for example *Keating* when considering an architect's duty to act fairly and professionally under the JCT Standard Form of Building Contract (2011 edition) *says:* "*The parties contract on the understanding that in all matters where the Architect has to apply professional skill, it will act in a fair and unbiased manner in applying the terms of the Contract. This is not limited to the issue of Certificates but applies to every function where it has to form a professional opinion upon matters which would affect the amount paid to (or to be deducted from) the Contractor."*[55]

4.55 In addition there can be little doubt that a Court would have regard to subsection 1.2 of the Contract which deals specifically with interpretation and subsection 1.2.1, quoted already, which says: "*The parties intend the Contract to be given purposeful meaning for efficiency and public benefit generally and s particularly identified in the Contract.* "

4.56 The word "*purposeful*" suggest the parties have agreed to an active rather than passive, almost to the point of interventionist, approach to interpretation. The requirement is that this be carried out in the interests of "*efficiency and public benefit*" and it would appear the adjective "*generally*" applies to both objectives.

[55] Furst and Ramsey, *Keating on Construction Contracts* 8th Ed. London Sweet and Maxwell 2006 Chapter 20 section 176 page 922

That said, obviously any interpretation of the Contract must have regard to what the parties have agreed and must not intervene to extricate one of them from a bad bargain.

4.57 It is suggested that "efficiency" could apply both to the job and to the relationship between the parties and in each case should be taken to mean well ordered, businesslike, productive, cost-effective, productive etc. "*Public benefit"*, particularly when qualified by "*generally*" would appear to apply in a broad sense and to both parties. It would certainly extend to one of the objectives of the PWC namely the achievement of better value for money but on the other hand it is difficult to see how it would encompass below cost work or excessive profit margins.

4.58 When viewed in that context it is suggested there must be little or no chance of a Court upholding a discretionary decision of an ER which knowingly led to a below cost valuation for work carried out by the Contractor which could conceivably be entirely outside the scope of the Works Requirements. It is suggested that the effect of such an approach by a Court would be to reduce subclause 10.6.4 to little more than another version of 10.6.3.

4.59 Anecdotal evidence suggests that subclause 10.6.4 has been relatively little used possibly because ERs are wary of its provision and also because it is unnecessary to exercise the discretion given the comprehensive nature of the three earlier subclauses. It is understood that in a number of cases ERs have indicated rather than proceeded on the basis of 10.6.4 and even in some instances when ERs have purported to make a determination under 10.6.4 the matter in question has been allowed to proceed to conciliation and has been dealt with there.

5.0 Subclause 10.7

5.1 Subclause 10.7 deals with delay cost as a result of a Compensation Event and determines the amount to be added to the Contract Sum. It is generally set out in six further subclauses 10.7.1 to 10.7.6 and that numbering, which is found in Contracts CF1 to CF4 inclusive, is going to be used in this paper. It should be noted that the Contract CF5 has only five subsections. In other words what is subclause 10.7.3 in the other forms of contract has been omitted but apart from that there are no further differences between the forms.

5.2 Subclause 10.7.1 states that where the Date for Substantial Completion of the Works has been extended as a result of a Compensation Event there is to be an increase in the Contract Sum by an amount which is to be calculated in one of two ways as follows:

- A daily rate tendered by the Contractor in Schedule Part 2D. This is to be applied to each Site Working Day by which the Contract Period is extended.

- Expenses, but excluding profit and loss of profit, *"unavoidably incurred… as a result of the delay… caused by the Compensation Event…"*

5.3 The choice of the particular method is made by the Employer in the Schedule Part 1K with the default option being the daily rate. In addition the Employer has the option of seeking either a single daily rate or alternatively separate daily rates for different periods or part of the contract. Again the default option is a single daily rate.

5.4 Substantial Completion of the Works is defined in section 1 of the Contract and it arises when all of the following have occurred.

- The Works is complete and capable of being taken over and used for its intended purpose and there are no defects other than minor defects or defects which the Employer is prepared to accept under subclause 8.5.4.
- All tests have been passed.
- The Contractor has given the ER the required Contractor's Documents.
- The Contractor has given the ER the collateral warranties required under the Contract.

5.5 Site Working Day is also defined as *"a day on which, according to the Contract and the Contractor's programme most recently submitted to the Employer's Representative, the Contractor is to Execute the Works on the Site."*

5.6 The first of the two options referred to above namely, the daily rate of delay cost is most commonly used and this is entered by the Contractor in Schedule Part 2D as a VAT exclusive figure per Site Working Day. The Schedule 2D also makes provision that *"if left blank, or stated as a negative value, read as zero".*

5.7 Thus on the face of it the operation of subclause 10.7.1 is quite straightforward. If the Date for Substantial Completion of the Works has been extended by say ten Site Working Days then the Contract Sum is to be increased by 10X where X is the Contractor's tendered rate of delay costs. Alternatively it could be calculated as the expenses, without profit or loss of profit, unavoidably incurred as a result of that delay of ten days. The extension itself must take account of programme contingency as provided for in the Contract.

5.8 The difficulty which arises as regards subclause 10.7 is the fact that in many instances Contractors have entered either unreasonably low figures for delay cost or alternatively tendered at zero. Obviously in such circumstances, whether the extension to the Date for Substantial Completion is one or 10 days or 100 days, the impact on the Contract Sum is either zero or else a negligible figure. Perhaps inevitably, once a dispute arises as regards delay, a claim is frequently made in respect of the delay period for a sum which works out at a daily figure sometimes running into thousands of Euro.

5.9 Various arguments are put forward to justify such a position but it has to be said there is no one particularly obvious or common line. One argument which has been advanced is that subclause 10.7.1 is in effect an exclusion clause and must be considered in that light and construed extremely narrowly.

5.10 In this particular instance the question is what was the intention of the parties when the contract was signed and whether the contract could be construed in any way other than the payment of the amount entered by the Contractor in Schedule Part 2D for each Site Working Day by which the Substantial Completion has been extended. The wording of 10.7.1 is such that it is difficult to see the intention of the parties was in any real doubt so that if a Contractor entered zero as the daily rate then the increase to the Contract Sum will be zero regardless of the delay incurred.

5.11 Subclause 10.7.2 deals with the issue of concurrent delay and says that: "*where the delay has been brought about by more than one cause, and one or more of the causes is not a Compensation Event, there shall be no increase to the Contract Sum for delay cost for the period of concurrent delay"*.

5.12 In his paper ***Concurrent Delay Revisited***[56] John Marrin QC considers the argument that a contractor will fail in his delay cost claim if he is unable to satisfy the but-for test of causation and finds that this is the approach that is the most likely to find favour in the context of calculating prolongation costs.[57]

5.13 This appears to concur with the findings set out in *Hudson* in respect of claims under the contract which are summarised as follows:[58] "*Depending upon the precise wording of the contract a contractor is only entitled to recover loss and expense where it satisfies the "but for" test. This, even if the event relied upon was the dominant cause of the loss, the contractor will fail if there was another cause of that loss for which the contractor was contractually responsible*."

5.14 *Keating* makes reference to the dominant cause approach coming into play in circumstances where the loss is caused by both the claimant and defendant: *"Where the loss was caused both by the claimant and the defendant then unless the claimant can establish that the defendant's breach was the dominant cause or the defendant can show that the claimant's breach was the dominant cause, it is probable that the claimant's claim and any counterclaim by the defendant would fail.*"[59]

5.15 However in the case of a claim for delay cost under the Public Works Contracts even if the claimant contractor can establish that the employer's breach was the dominant cause, under 10.7.2, if the works are concurrently delayed by more than one cause, and one or more of the causes is not a compensation event, there shall be no increase to the contract sum for delay cost for the period of concurrent delay.

5.16 Subclause 10.7.3 deals with the impact of Non-Working Days and its application is restricted to CF1 to CF4 inclusive presumably on the basis that these are likely

[56] Concurrent Delay Revisited, A paper presented to the Society of Construction Law at a meeting in London on 4th December 2012 John Marrin QC February 2013 179
[57] Concurrent Delay Revisited A paper presented to the Society of Construction Law at a meeting in London on 4th December 2012 John Marrin QC February 2013 179 Prolongation costs
[58] Atkin Chambers *Hudson's Building and Engineering Contracts* 12th Ed. Sweet and Maxwell 2010 page 357
[59] Furst and Ramsey, *Keating on Construction Contracts* 9th Ed. London Sweet and Maxwell 2012 Concurrent causes page 350 Loss and Expense Claims Summary Page 357

to be used with projects of longer duration. A Non-Working Day is defined as *"a day that, for good reason, is not a Site Working Day [such as a trade holiday]."*

5.17 The subclause deals with the situation where an extension of the Date for Substantial Completion incorporates *"a period of seven or more consecutive Non-Working Days"* and where this occurs as a result of a Compensation Event, the Contract Sum is to be increased by the Contractor's expenses *"unavoidably incurred"* but without profit or loss of profit. However this is subject to the qualification that the amount so obtained is not to exceed the figure that would have been arrived at using the daily rate for delay in the Schedule Part 2 when that is multiplied by the number of additional Non-Working Days.

5.18 Subclause 10.7.3 is intended to cover situations when work will be stopped for an extended period and presumably the limitation of seven or more consecutive days is intended exclude say Saturday and Sunday followed by a Bank Holiday. Thus, as an example, if the completion of the job was delayed from early December to sometime in January, the Contractor would then be entitled to an increase in the Contract Sum under this subclause for the Non-Working Days of the Christmas period.

5.19 Subclause 10.7.4 is widely regarded as one of the most contentious provisions of this form of contract and consequently it is worth quoting in full: *"Except as provided in this sub-clause 10.7 [notwithstanding anything else in the Contract] losses or expenses arising from or in connection with delay, disruption, acceleration, loss of productivity or knock-on effect shall not be taken into account or included in any increase to the Contract Sum, and the Employer shall have no liability for such losses or expenses."*

5.20 The issue as regards this subclause is not so much its meaning but more its application. As written it is relatively straightforward and says that there is to be no increase in the Contract Sum for delay, disruption, acceleration, loss of productivity or knock-on effect.

5.21 The real question in relation to subclause 10.7.4 is whether its application is restricted to subclause 10.7 or whether it has more general application throughout the Contract and specifically if it applies to subclause 10.6. If it does not apply to subclause 10.6 then clearly a Contractor could bring a claim for disruption, for example, on the basis of changed constraints giving rise to substituted work under subclause 10.6. If 10.7.4 has general application then it means that no such claim for disruption or acceleration or loss of productivity or knock-on effect could be brought under subclause 10.6.

5.22 One view of this clause is that apart from delay cost giving rise to an increase in the contract under clause 10.7, no further payment or liability arises anywhere in the contract as a consequence of *"disruption, loss of productivity or knock-on effect."* The arguments in favour of general application of 10.7.4 is the manner in which it is written with reference to *"anything else in the contract"* and also *"any increase to the Contract Sum"* and finally *"no liability for such losses or expenses"*.

5.23 Alternatively it could be argued that the application of clause 10.7.4 is restricted to clause 10.7, rather than applying in a general sense, and in particular with respect to clause 10.6, relying on the opening sentence of clause 10.6 arguably dividing the impact of Compensation Events on the Contract Sum into two separate categories, the first being *"work"* and the second being *"delay cost",* and providing for their valuation in subclauses 10.6 and 10.7 respectively. Arguably the effect of this is to compartmentalise 10.7.4 within subclause 10.7 and that, if subclause 10.7.4 had been intended to apply to subclause 10.6, it would have explicitly said so.

5.24 The arguments in favour of a more limited application of 10.7.4 rest primarily on the first sentence of 10.6 and a view that *"the value of any… substituted… work required as a result of the Compensation Event"* shall be dealt with under subclause 10.6 while on the other hand *"any delay cost"* is to be dealt with under subclause 10.7. In effect that interpretation takes the view that subclauses 10.6 and 10.7 are in effect two separate categories or compartments dealing with two separate calculations giving rise to an adjustment in the Contract Sum. In that approach the argument is that a subclause buried within 10.7 could not be seen as applying to subclause 10.6.

5.25 10.7.4 specifically refers to *"losses"* or *"expenses"* whereas there is no such reference in subclause 10.6. The only such reference is in the second option of 10.7.1 which specifically refers to *"the expenses [excluding profit and loss of profit] unavoidably incurred by the Contractor as the result of the delay".* Consequently it may be that 10.7.4 has been included to specifically restrict any calculation of delay cost to what is provided and also the manner of calculation in clause 10.7.

5.26 In the ***Walter Lilly*** Akenhead J suggested that generally where a contractor suffers delay on grounds entitling him to compensation he can still claim overheads and lost profit once he can prove on the balance of probabilities that if the delay had not occurred the contractor would have secured work or projects which would have produced a return representing a profit and/or a contribution to head office overheads.[60] It could be suggested that approach would allow for such a claim under 10.7.1(1) without subclause 10.7.4 such that in reality the purpose of 10.7.4 is probably to ensure there is no scope to broaden out 10.7.1(1).

5.27 On balance, it is suggested the arguments for a narrow, rather than a broad, application of 10.7.4 are at least sufficiently strong to allow a conciliator or an arbitrator to proceed on that basis.

5.28 Finally the following should be noted in relation to 10.7.4:

- A provision in a contract to the effect that a Contractor would not be compensated as a result of disruption, or for example an instruction to accelerate, would be a big statement and, if not unprecedented, would certainly be very unusual.

[60] Walter Lilly, paras [540]-[543].

- If it was intended to exclude disruption, acceleration, etc., in this manner it would be relatively easy to achieve. It would simply be necessary to move 10.7.4 from its current position and, with some very minor changes, place it immediately after the first sentence of subclause 10.6 in order to give it general application.

- If is really intended that 10.7.4 should have broad application it is suggested that could easily be achieved during the current review of the PWC.

5.29 Subclause 10.7.5 is very straightforward. It simply provides that there will be no delay cost payable as a result of an extension to a Date for Substantial Completion of a section. In other words delay cost is only payable where completion of the entire Contract is delayed.

5.30 However, the inclusion of this section may prevent the Contractor from recovering from the Employer delay-related losses incurred by its sub-contractors who were delayed in completion of their works but which nonetheless finished before the Date for Substantial Completion and did not have a knock-on effect on that date.

5.31 Subclause 10.7.6 is equally straightforward and un-contentious. It simply provides that *where more one than one rate for delay cost is used, the one to be used will be the rate for the period when the delay occurred or alternatively* if the rate is referable to a part of the works, it will be for that particular part. In any difference as regards which delay rate is to be used this is to be decided by the ER but without any suggestion that such a determination is to be conclusive.

6.0 Summary and Conclusions

6.1 The first sentence of subclause 10.6 is very significant and merits careful consideration when dealing with subclauses 10.6 and 10.7. It is suggested that this first sentence means the Contract provides two and only two options to adjust the initial Contract Sum as follows:

- Subclause 10.6 for the impact of Compensation Events on the work to be carried out to satisfy the Works Requirements.

- Subclause 10.7 for the impact of Compensation Events on the time for completion of the Contract.

6.2 Subclause 10.6.1 is mandatory and is an express requirement to use rates provided in the Pricing Document, whether as a Schedule or in a more detailed Bill of Quantities, for the valuation of additional, substituted or omitted work where there is similarity both as regards the work and conditions in which it is performed. There is no requirement for fairness or reasonableness which means the parties are stuck with the rates regardless of whether they are too high or low. In a situation where there is a significant discrepancy between the quantity in a Bill of Quantities and what is provided in the Works Requirements it is sometimes argued that the figure inserted in the rates column may be disregarded in favour of a more realistic rate derived from the total figure for the item in the

Bill of Quantities divided by the quantity in the Works Requirements. This issue will not arise where Event 17 of the Schedule Table 1K is compensatable since this provides a mechanism whereby the Bill of Quantities can be made consistent with the Works Requirements.

6.3 Subclause 10.6.2 must be used for the valuation of additional, substituted or omitted work where 10.6.1 is inapplicable because of dissimilarity whether of work or conditions. The express requirement is that *"the determination shall be on the basis of the rates in the Pricing Document when that is reasonable."* The determination will be the product of the rate being used and an adjustment factor to be applied to it and it is arguable that the requirements of the subclause mean the determination must be reasonable and on that basis the rate being used is open to review. Such an approach would represent a significant change from the approach adopted in remeasured forms of contract, such as the IEI third edition, where it is accepted that no such review of the rates is possible under the equivalent clause. Were it accepted the rate could be reviewed on the basis of reasonableness, this subclause would be largely indistinguishable from subclause 10.6.3.

6.4 In a situation where 10.6.1 and then 10.6.2 are inapplicable, subclause 10.6.3 requires the valuation to be done by the ER as a *"fair valuation based on rates for similar work in the locality, if available"*. It is well established that under such valuation a Contractor is entitled to reasonable overheads and profit.

6.5 Subclause 10.6.4 is a valuation option provided to the ER for additional or substituted, but not omitted, work. It can be used for the valuation of a Compensation Event in full or in part and it is carried out by comparing the cost of doing the work with the impact of the Compensation Event with the cost of the same work without the Compensation Event.

6.6 A decision under subclause 10.6.4 is not open to review at conciliation or arbitration and it is suggested this means any such decision could be challenged in Court. It is suggested that a Court when dealing with such a valuation is likely to imply a requirement of impartiality and fairness on the part of the ER. If so, this subclause would be rendered largely indistinguishable from subclause 10.6.3.

6.7 All of the subclauses of 10.6 provide for the valuation of substituted work and it is suggested that this must include for changes in the constraints under which the work is carried out where such change can be imposed by any one of the Compensation Events applicable in a particular contract.

6.8 Subclause 10.7 deals with the impact of delay cost on the Contract Sum and the valuation of this is set out in subclause 10.7.1 with two different valuation options provided. In the first of these a daily delay cost, provided by the Contractor in the Schedule Part 2D is applied to each Site Working Day *"for which the Date for Substantial Completion of the works has been extended because of the Compensation Event".* In the second option the Contract Sum is increased by the *"expenses [excluding profit and loss of profit] unavoidably incurred by the Contractor as a result of the delay to the Date for Substantial Completion of the work caused by the Compensation Event."*

6.9 Subclause 10.7.1 is notable in that Contractors have tended to insert zero or trivial daily delay rates in Part 2D of the Schedule and, where delay arises subsequently, have tended to argue that such rates should not be applied. The main justification offered tends to be that 10.7.1 is an exclusion clause and should be construed very narrowly. However it is suggested that such arguments are unconvincing.

6.10 Subclause 10.7.2 deals with the issue of concurrent delay and provides that where there is *"more than one cause, and one or more of the causes is not a Compensation Event, there shall be no increase to the Contract Sum for delay cost for the period of concurrent delay."*

6.11 Subclause 10.7.3 and also subclauses 10.7.5 and 10.7.6 are relatively straightforward and un-contentious. The first of these 10.7.3 deals with extended holiday periods while 10.7.5 provides that there will be no delay cost paid for an extension to the Date for Substantial Completion of a section and finally subclause 10.7.6 deals with the application of daily delay rates where there is more than one daily rate provided in the Contract.

6.12 Subclause 10.7.4 has given rise to considerable debate and it has been strongly suggested that it should be omitted as part of the review of the PWC. It provides that *"losses or expenses arising from or in connection with delay, disruption, acceleration, loss of productivity or knock-on effect shall not be taken into account or included in any increase to the Contract Sum".*

6.13 The real issue in relation to subclause 10.7.4 is not so much its interpretation but more its application. Specifically the issue is whether it should have narrow application and be confined to subclause 10.7 or whether it should have a broader application and in particular whether it should apply to subclause 10.6. The argument for a broad interpretation is based on the earlier part of the subclause which says *"except as provided in this subclause [notwithstanding anything else in the Contract]".* The argument for a narrower interpretation relies mainly on the first sentence of subclause 10.6 which clearly has general application and which, it is argued, confines subclause 10.7 to the valuation of delay cost. It is also argued that subclause 10.7.4 refers to *"losses or expenses"* and there is no such reference in subclause in 10.6.

6.14 While there is no decisive argument one way or the other in relation to 10.7.4 it is suggested the balance favours a narrow rather than a broad application.