MAEDA KENSETSU KOGYO KABUSHIKI KAISHA ALSO KNOWN AS MAEDA CORPORATION AND ANOTHER v. BAUER HONG KONG LTD [2020] HKCA 830; CACV 301/2019 (16 October 2020)

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CACV 301/2019

[2020] HKCA 830

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 301 OF 2019

(ON APPEAL FROM HCCT NO 4 OF 2018)

IN THE MATTER of the Arbitration Ordinance (Cap 609)

and

IN THE MATTER of an Arbitration

BETWEEN

MAEDA KENSETSU KOGYO KABUSHIKI KAISHA also known as MAEDA CORPORATION	1st Plaintiff (1st Respondent in the Arbitration)
CHINA STATE CONSTRUCTION ENGINEERING (HONG KONG) LIMITED	2nd Plaintiff (2nd Respondent in the Arbitration) (together as "the Plaintiffs")
and	
BAUER HONG KONG LIMITED	Defendant (Claimant in the Arbitration)

Before: Hon Kwan VP, Yuen JA and Barma JA in Court

Date of Hearing: 16 September 2020 (remote hearing)

Date of Judgment: 16 October 2020

J U D G M E N T

Hon Kwan VP:

1. On 30 August 2018, M Chan J granted leave to the plaintiffs ("the JV") to appeal[1] on two questions of law arising out of the 2nd Interim Award of the arbitrator, Sir Vivian Ramsey, QC, published on 3 January 2018 as corrected on 3 March 2018. The judge handed down her judgment on the appeal on 9 April 2019 ("the Judgment"). She allowed the appeal of the JV in respect of one of the questions, namely, whether there was compliance with the conditions precedent to give notice under clauses 21.1 and 21.2 of the Sub-Contract between the JV and the defendant ("Bauer")[2]. She held that Bauer had failed to give proper notice under clause 21.2, and that the arbitrator's decision to the contrary was wrong in law[3].

2. Bauer appealed to this court against the Judgment with leave granted by the judge on 3 June 2019[4].

3. The ambit of this appeal is very narrow, and turns on the proper construction of clause 21.2.1 of the Sub-Contract.

Background

4. The relevant background matters for the proper understanding of the issue in this appeal may be related as follows.

(1) General background and a short chronology

5. The JV was the main contractor under two contracts (Contracts 823A and 823B) entered into with the Mass Transit Railway Corporation ("MTRC" or "the Employer") for the construction of tunnels for the Hong Kong to Guangzhou Express Rail Link. The JV entered into sub-contracts with Bauer for the excavation for and installation of diaphragm wall works for each of the contracts. Disputes arose between the JV and Bauer and the arbitrations (known as the 823A Arbitration and the 823B Arbitration), which were dealt with in tranches, were heard by the same arbitrator. The arbitrator delivered his 1st Interim Award in the 823B Arbitration on 22 June 2016[5], the 2nd Interim Award on 3 January 2018[6] and the 3rd Interim Award on 12 March 2018[7]. The question of law on notice compliance under clause 21.2 arose in the 2nd and 3rd Interim Awards.

6. The arbitrator gave a short chronology in the 2nd Interim Award at §§62 to 76. The relevant parts read as follows:

> "62. … a brief chronology of some of the more important matters which arose after commencement of the diaphragm wall work in the Cut and Cover ("C&C") section on 21 June 2011 and in the ERS [Emergency Rescue Sidings] on 28 June 2011.
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> 63. Progress during the first month of operations was slow and Bauer makes a claim for the disruption which it says it suffered to the first 17 panels in the ERS constructed up to 17 August 2011 and the first 4 panels in the C&C constructed up to 25 July 2011.
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> 64. Discussions had taken place between the JV and Bauer about Delay Recovery Measures to make up time which had been lost because of the later start to diaphragm wall construction caused be the delayed possession of the Site. … This forms the basis for the claim for Sub-Contract DRM1.
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> 65. On 27 and 28 July 2011 meetings took place between Bauer and the JV to discuss the poor progress which was being achieved and which did not match the planned production rate 1 panel per day in the ERS and 1 panel every 1.5 days in the C&C, shown by the Preliminary Programme. Bauer stated that the reason for the slow progress was the additional quantities of rock excavation and greater difficulties in excavation of the rock due to the increase in socket depth and inclined rock head surfaces for the panels constructed so far, together with other factors.
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> 66. On 27 July 2011 the JV gave notice to MTRC that the existing level of Category 1(c) and Category 1(d) rock obtained for Granodioritic rock to be encountered in the excavation of the ERS and C&C obtained from per-drilled boreholes indicate that the levels are generally higher than the corresponding Baselines for rock levels included in the GBR [Geotechnical Baseline Report].
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> 67. On 5 August 2011 the JV instructed Bauer to take measures to expedite based on certain additional resources. … on 28 September 2011, the JV confirmed that Bauer was required to appoint Intrafor and Bachy to carry out specific parts of the Sub-Contract Works. This forms the basis for the claim for Sub-Contract DRM2. …
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> 70. At a meeting held on 3 November 2011 between MTRC, the JV and Bauer to discuss rock excavation quantities both MTRC and Bauer put forward the quantities of Category 1(c) material from the GBR and the actual quantity of material based on the predrills. MTRC identified that the mixed rock and hard layers above the Category 1(c) line might also have affected progress.
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> 71. Bauer had engaged Geo-Design to produce Baseline quantities and actual quantities of Category 1(c) and 1(d) rock and material with SPT [Standard Penetration Test] ˃200 and mixed ground. A table was produced by Geo-Design on 4 November 2011 and subsequently Geo-Design produced a report in December 2011 and further reports … "

(2) Bauer's claims in respect of unanticipated ground conditions

7. In the arbitration, Bauer made claims in relation to a change in the quality and an increase in the quantity of rock which it said it was required to excavate to construct the diaphragm walls. As stated in the 2nd Interim Award:

> "97. Bauer's primary contention is that it is entitled to claim on the basis of a variation for unanticipated ground conditions. It submits that the GBR formed part of the Sub-Contract and, in addition, constituted an express contractual statement of the geological conditions that it was anticipated that Bauer might encounter during the execution of the Sub-Contract Works. Further, it submits that the Geotechnical Baselines in Section 7 of the GBR formed part of the Sub-Contract for the purposes of determining if Bauer had encountered unanticipated geological conductions during the execution of the Sub-Contract Works in relation to a claim against the JV. In particular, Bauer contends that additional quantities and changes to the qualities of the rock from the quantities and quality identifiable and/or referred to in the GBR constituted a Variation and/or Sub-Contract Variation for which Bauer is entitled to an extension of time pursuant to Clause 14.3.3 and *additional payment pursuant to Clauses 19 and/or 21.1.6 of Sub-Contract*. Specifically, it submits that the broad definition of a "Sub-Contract Variation" under Clause 1.2.7A of the Sub-Contract, means that any change in or modification to the Sub-Contract Works would constitute a Sub-Contract Variation.
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> 98. In addition, Bauer submits that, regardless of whether the JV in fact itself has pursued such a claim under the Main Contract, it has a stand-alone right to claim for changed ground conditions *pursuant to Clauses 21.1.1 and 8.3.4 of the Sub-Contract*." (emphasis supplied)

8. The full provisions of clause 21 are set out in an appendix to this judgment. Clause 21.1 provides for a claim for "additional payment or loss and expense" due to one or more of six events, occurrences or matters specified in clauses 21.1.1 to 21.1.6. Of particular relevance are clauses 21.1.1 and 21.1.6 which relate to:

> "21.1.1 any circumstances or occurrence as a consequence of which the Contractor is entitled to additional payment or loss and expense under the Main Contract;"
>
> "21.1.6 any Variation or Sub-Contract Variation".

9. The arbitrator rejected Bauer's primary claim pursuant to clause 19 and/or clause 21.1.6 for these reasons[8]:

> "Whilst, as set out below, I have found that the final changes to the founding level were instructed as Variations or Sub-Contract Variations and that such changes were instructed, I do not consider that Bauer is entitled to a Variation or Sub-Contract Variation merely because there was a change in the conditions which could have been foreseen and that this had an effect on the work. An essential part of the variation mechanism is that there has to be an instruction by the Engineer and/or by the JV. Where in carrying out the diaphragm wall work, Bauer encountered unanticipated ground conditions, it was still obliged to carry out the same work in terms of the volume of material which had to be excavated and there was no change to the scope of the work. Nor was there any instruction. I therefore accept the JV's submission that the changed ground conditions do not, in themselves, give rise to payment as a Variation or Sub-Contract Variation, in the absence of an instruction."

10. That leaves the alternative claim pursuant to clause 21.1.1, which was described as a "like rights" claim in that it was premised on the JV's entitlement to additional payment or loss and expense under the relevant provisions of the Main Contract. Clause 21.8 provides that "in respect of any claim made under Clause 21.1.1 and subject to the Sub-Contractor's compliance with the condition precedents set out in this Clause 21", on receiving any amount in respect of the corresponding claim that the Contractor is able to claim under the Main Contract, the Contractor shall assess the

proportion that Sub-Contractor would be entitled to, and such proportion shall be added to the next interim payment or final payment to the Sub-Contractor following receipt by the Contractor of payment by the Employer for the corresponding claim.

11. In contrast, it is provided in clause 21.6 that "in respect of any claim to which Clause 21.1.1 does not apply and on condition that the Sub-Contractor has complied with the conditions precedent set out in Clause 21.1 and 21.2", the Contractor shall assess the Sub-Contractor's compliance with the terms of clause 21 and its entitlement to any additional payment, loss and expense and any payment shall be added to the next interim payment following the assessment. There is no requirement to wait for any receipt of payment by the Contractor from the Employer. Further, for a claim for payment for valuation of a Variation or Sub-Contract Variation, as this may be made pursuant to clause 19 or clause 21.1.6, the notice provisions in clause 21 do not apply[9].

12. The arbitrator had found that *prima facie*, the evidence established that Bauer had four heads of claim for its claims based on rock excavation: (1) additional excavation by reason of higher Category 1(c) rockhead; (2) additional rock excavation caused by increased inclination of rockhead compared to the GBR; (3) additional rock excavation caused by instructions to deepen founding levels; and (4) excavation of hard transitional layer ("HTL") which was not shown in the GBR[10]. He further held that the claim in (3) was based on a Variation or Sub-Contract Variation, and so would not be subject to the requirements of notice under clause 21. The other three heads of claim, being "like rights" claims under clause 21.1.1, would need to comply with the conditions precedent in clause 21[11].

The provisions in clause 21

13. Clause 21[12] provides for a series of notices and submissions to be given by the Sub-Contractor to the Contractor at various stages[13].

14. The first notice is under clause 21.1 and is stated to be a "condition precedent to the Sub-Contractor's entitlement to any such claim" under this provision. This is a "notice of [the Sub-Contractor's] intention" to make a claim and is required to be given to the Contractor "within fourteen (14) days after the event, occurrence or matter giving rise to the claim became apparent or ought reasonably to have become apparent to the Sub-Contractor".

15. The second notice is under clause 21.2 and is again stated to be a "condition precedent to any entitlement". This notice has to be given "within twenty eight (28) Days after giving of notice under Clause 21.1". As for the contents of this notice or submission, the Sub-Contractor is required to state:

> (1) "the contractual basis together with full and detailed particulars and the evaluation of the claim" (clause 21.2.1);
>
> (2) "details of the documents and any contemporary records that will be maintained to support such claim" (clause 21.2.3); and
>
> (3) "details of the measures which the Sub-Contractor has adopted and proposes to adopt to avoid or reduce the effects of such event, occurrence or matter which gives rise to the claim" (under clause 21.2.4).

16. In the situation "where an event, occurrence or matter has a continuing effect or where the Sub-Contractor is unable to determine whether the effect of an event, occurrence or matter will be continuing, *such that it is not practicable for the Sub-Contractor to submit full and detailed particulars and the evaluation in accordance with*

Clause 21.2.1" (emphasis supplied), it is provided in clause 21.2.2 that "a statement to that effect with reasons together with interim written particulars" must be provided. By the opening paragraph of clause 21.2, this must be done "within twenty eight (28) Days after giving of notice under Clause 21.1". Then at intervals of not more than 28 days (again expressly stated as "condition precedent to any entitlement"), there have to be submitted to the Contractor "further interim written particulars" until the full and detailed particulars are ascertainable, at which stage as soon as practicable but in any event within 28 days, there have to be submitted "full and detailed particulars and the evaluation of the claim".

17. Clause 21.3 makes clear that "The Sub-Contractor shall have no right to any additional or extra payment, loss and expense, any claim for an extension of time or any claim for damages under any Clause of the Sub-Contract or at common law unless Clauses 21.1 and 21.2 have been strictly complied with."

18. Clause 21.4 provides that whenever the Contractor is required by the terms of the Main Contract to give any return, account or notice to the Engineer or to the Employer, the Sub-Contractor shall in relation to the Sub-Contract Works give a similar return, account notice or such other information in writing to the Contractor as will enable the Contractor to comply with such terms of the Main Contract. Clause 21.5 provides further that the Sub-Contractor shall endeavour to support the Contractor to recover such monies from the Employer under the Main Contract which the Sub-Contractor is entitled to be paid by the Contractor under the Sub-Contract.

19. The provisions in clauses 21.6 and 21.8 have been referred to earlier. These provisions again state that any claim made under clause 21 is "subject to the Sub-Contractor's compliance with the condition precedents set out in this Clause 21".

The findings by the arbitrator and the evidence

20. The arbitrator held that Bauer was only obliged to give notices under clause 21 as from 2 August 2011[14] in respect of events which had occurred prior to that date. He also held there was no requirement for one notice to be given and notice could be given by reference to previous documents and that the notice had to be construed in light of the background knowledge which the parties would reasonably have[15]. These holdings are not the subject of challenge in the present appeal.

21. The relevant factual findings may be related as follows.

22. On 27 and 28 July 2011, meetings were held between Bauer and the JV to deal with "slow progress", during which Bauer explained the main cause of the slow progress was the additional quantity of toe-in rock which had to be excavated[16].

23. Following the first day's meeting on 27 July, the JV sent claim notices to the Engineer "in respect of delay and disruption to the Works by adverse physical conditions", one in respect of the ERS and one for the C&C. The notices stated that the event giving rise to the claim was: "The existing level of Cat 1(c) and Cat 1(d) rock obtained for Granodiorite rock to be encountered in the excavation … obtained from pre-drilled boreholes indicate that the levels are generally higher than the corresponding Baselines for rock levels included in the GBR."[17]

24. On 1 and 2 August 2011 Bauer sent letters to the JV, which the arbitrator considered to be notices under clause 21.1. The arbitrator also regarded the further letters of Bauer to the JV on 10 and 20 August 2011 acted as a clause 21.1 notice[18]. As mentioned earlier, he held that these notices have to be read against the background knowledge which the JV clearly had by this time. The holding that Bauer had complied with the notice requirement in clause 21.1 was not challenged by the JV.

25. The letters were placed before this court, and although these parts of the letters of 1 and 2 August 2011 were not specifically set out in the 2nd Interim Award, they are clearly relevant:

> "Please be advised these additional quantities and change in quality represent variations to our Sub-Contract Works under Clause 17.1 of our Sub-Contract Agreement which shall be valued under Clause 19 and for which we are entitled to and will claim an extension of time in accordance with Clause 14.3.3 and additional costs as provided for under Clause 21.1.6."[19] (letter dated 1 August 2011)
>
> "This letter is to be read together with our earlier correspondence and notices to you concerning the subject matter, which includes (but not limited to) the following: … Our letter Dated 1 Aug 2011 …
>
> As notified in the above correspondence and in meetings held with your goodselves the quantity and quality or [sic] rock excavation we have been instructed to excavate below rockhead level have increased substantially from those provided under the Sub-Contract and these amount to a variation of our Sub-Contract Works. …
>
> This substantial increase in the quantity and quality of our work represents a variation under Clause 17.1 of our Sub-Contract Agreement which shall be valued under Clause 19 of Sub-Contract Agreement. In addition, we are entitled to an extension of time under Clause 14.3.3 for execution of the aforementioned additional works …
>
> In accordance with the Sub-Contract Agreement we are entitled to claim additional costs under Clause 21.1.6 in respect of the instructed variations and resultant extension of time to Sub-Contract Works which is a course we will follow. At the present time we are unable to accurately ascertain the full particulars and extent of the additional costs we have incurred, we will revert to you in due course on this subject matter. …"[20] (letter dated 2 August 2011)

26. Thus, in two of the letters held by the arbitrator to constitute notices under clause 21.1, the claim in respect of additional payment or loss and expense was stated to be made pursuant to clause 21.1.6, which relates to "any Variation or Sub-Contract Variation".

27. On 19, 20 and 25 August 2011, Bauer sent further letters to the JV. The arbitrator found that they provided "further details of the claims for the purpose of Clause 21.2" and considered that "certainly by the time of Bauer's letter of 29 August 2011 it had complied with Clause 21.2.2". The arbitrator noted that in the letter dated 29 August, it was stated: "Please be further notified that as the aforesaid matter has a continuing and/or ongoing effect, it is still not practicable for Bauer to submit the full and detailed particulars and evaluation of our claim for additional payment arising from the said matter under Clause 21.2 of the Sub-Contract Agreement". He held that Bauer had complied with clause 21.2.2, which provides for a case where "an event, occurrence or matter has a continuing effect", and Bauer had included "a statement to that effect with the reasons". The reasons were set out earlier where Bauer referred to the continuing effect and the excavation works continuing to encounter more rock. In those circumstances, he considered that in the letter of 29 August Bauer had provided the "interim written particulars" required by clause 21.2.2[21].

28. It is pertinent to note also this paragraph in the letter of 29 August 2011, which appeared just before the paragraph quoted by the arbitrator as mentioned above and it came under the heading "[Bauer]'s Claim for Additional Payment": "[Bauer] hereby claims for additional payment under Clause 21 of the Sub-Contract Agreement. As stated earlier, our claim for additional payment due to the increase in quantity and

quality of rock excavation is principally founded upon Clause 21.1.6 (that is, the additional quantity and quality of rock excavation are clear variations of our works) of the Sub-Contract Agreement".

29. The arbitrator found that the requirement of clause 21.2.3 (to provide "details of the documents and any contemporary records that will be maintained to support such claim") was met, as the letter of 29 August 2011 concluded by saying: "In addition, we shall carefully maintain all the relevant and contemporary documents including (but not limited to) all correspondence, drawings, Daily Reports in support of our claims". And this letter must be read with the letters of 2, 10 and 20 August 2011, which referred to the records[22].

30. The arbitrator also found compliance with clause 21.2.4 (which requires "details of the measures which the Sub-Contractor has adopted and proposes to adopt to avoid or reduce the effects of such event, occurrence or matter which gives rise to the claim") in the letter of 29 August 2011, which concluded with: "As mitigation, we are putting in all necessary resources to ensure the timely completion of the works affected by the delays and shall minimise any delaying effects to other parts of the works"[23].

31. The arbitrator considered that Bauer had complied with the obligation to submit "further interim particulars" by further emails, its interim payments applications, the progress reports it provided each month and by much of the correspondence it wrote between 29 August 2011 and, at the latest, 14 December 2012, by which time Bauer had provided "full and detailed particulars and included the evaluation of the claim which was then ascertainable", with a geological assessment report of Geo-Design a specialist it engaged, such that the notice provision in clause 21.2.2 was finally complied with[24].

32. To recap, the arbitrator found there was compliance by Bauer with these requirements in clause 21 of its heads of claim based on rock excavation: to give notice of intention to claim for additional payment (clause 21.1); to provide a statement that the matter is of continuing effect with reasons such that it is not practicable to submit full and detailed particulars and the evaluation of the claim (clause 21.2.2); to provide interim written particulars from time to time with the final submission of full and detailed particulars and the evaluation of the claim (clause 21.2.2); to provide details of the documents and contemporary records that will be maintained to support such claim (clause 21.2.3); to provide details of the measures which the Sub-Contractor has adopted and proposes to adopt to avoid or reduce the effects of such event, occurrence or matter which gives rise to the claim (clause 21.2.4).

33. The only outstanding requirement that must be met as a condition precedent is to state "the contractual basis" of the claim "within twenty eight (28) Days after giving of notice under Clause 21.1", as provided in clause 21.2.1.

34. The JV raised this in a letter to Bauer dated 12 March 2012 on being supplied with the geological assessment report of Geo-Design, noting that whilst the report appeared to contain information relevant to Bauer's claim for extension of time and additional costs, it does not "address the contractual basis for the claims made by [Bauer]".

35. Bauer responded to this by a letter of 21 April 2012 stating:

> "The varied conditions under which we had to execute the sub-contract works such as (but not limited to) the substantial additional rock sockets and rock quantum, changes in character and difficulties of work, changes in sequencing method of work, varied ground conditions and our reasons have been notified to you from the very start of the sub-contract works. We have diligently written to you regularly about our contractual entitlements in respect of time and money from the beginning of throughout the execution of the sub-contract works with reference to or touching upon the relevant clauses and sub-contract provisions which are among others Clause 8.3 (including Sub-Clauses 8.3.1 to 8.3.7), Clause 14.3, Clause 17, Clause 19.1 and Clauses 21 and/or in the alternative for reasons such as the contractor encounters ground conditions which could not have been reasonably foreseen by the contractor at the time of tender."[25]

36. The arbitrator apparently recognised that Bauer's alternative claim in the arbitration for additional payment, being a "like rights" claim pursuant to clause 21.1.1, was not mentioned in any of the letters he had considered as set out above. The only reference in some of those letters (dated 1, 2 and 29 August 2011) was to clause 21.1.6, which was in respect of "any Variation or Sub-Contract Variation", a claim rejected by the arbitrator. Hence, he raised in the closing submissions "whether the contractual basis of the claim made under Clause 21.2 had to be the same as the contractual basis of the claim made in the arbitration". He noted that Mr Clayton, SC (who appeared for the JV throughout) said "he would have sympathy for a party who put a notice in on one basis and then in an arbitration changed the legal basis for the claim" and Mr Boulding, QC (who appeared for Bauer throughout)[26] said "the contractual basis did not need to be the same"[27].

37. The arbitrator resolved the requirement to state "the contractual basis" of the claim in this way:

> "332. I consider that both as a matter of sympathy and as a matter of construction, the contractual basis of the claim stated in the Clause 21.2 notice does not have to be the contractual basis on which the party in the end succeeds in an arbitration. First, to expect a party to finalise its legal case within the relatively short period and be tied to that case through to the end of an arbitration is unrealistic. Secondly, what is important from the point of view of the Contractor is to know the factual basis for the claim so that it can assess it and decide what to do.
>
> 333. Indeed, as can be seen on the facts here, the JV's view of the appropriate legal basis for the claim was that it was a Clause 38 [of the Main Contract][28] unforeseen physical conditions claim as well as a Variation claim, as shown in the notices which were then given to the MTRC. It therefore follows that the fact that Bauer have made its claims on the basis of the relevant claim being a Variation or Sub-Contract Variation does not preclude Bauer from making the claim on a new legal basis based on notices given by reference to a different legal basis."

The Judgment of M Chan J

38. The judge disagreed with the arbitrator. She took the view that the arbitrator "failed to pay heed and give effect to the express provisions of Clause 21.2, which is clearly stated to be a condition precedent for any claim to additional payment or loss and expense, and is required by the express provisions of clause 21.3 to be "strictly complied with" "[29]. In the judge's view, "there can be no dispute, and no ambiguity, from the plain and clear language used in Clause 21, that the service of notices of claim in writing referred to in Clause 21.1 and 21.2 are conditions precedent, must be "strictly" complied with, and failure to comply with these conditions will have the effect that [Bauer] will have "no entitlement" and "no right" to any additional or extra payment, loss and expense"[30].

39. The relevant parts of the Judgment read as follows:

"26. … The Arbitrator appears to base his findings on the fact that notice had been adequately given to the [JV], at the meetings and in the August correspondence, of the "ground conditions" encountered by [Bauer], and the fact that there was a substantial increase in the quantity and quality of the work encountered. He made it clear that [Bauer's] claims made in the Arbitration were on a "new legal basis" or "a different contractual basis", compared to the basis referred to in the August correspondence comprising the Clause 21.1 notice. Yet, the Arbitrator considered that as the [JV] were able in this case to notify MTRC in the Claim Notices of delay and disruption to the Works by adverse physical conditions, the principal purpose of Clause 21 - to enable the contractor to know the factual basis for the claim so that it can assess it and decide what to do - had been complied with.

27. Again, with due respect to the Arbitrator, what [Bauer] had done by service of the letters of 1, 2 and 10 August 2011 was simply to give notice of the ground conditions encountered at the site, and the additional quantities and quality of the rock to be excavated. At most, these form the factual basis which may, or may not, give rise to a claim under the Sub-Contract. The facts may result in different consequences and give rise to different rights and entitlement of the Sub-Contractor. Clause 21.1 itself envisages different bases for claims of additional payment or loss and expense: namely, circumstances as a consequence of which the Contractor is entitled to additional payment or loss and expense under the Main Contract; alleged breach of the Sub-Contract, delay or prevention by the Contractor; claim for discrepancy between Sub-Contract drawings and documents; any claim under common law; extension of time granted; and/or any Variation.

28. Clause 21.2 requires [Bauer], again as a condition precedent, to submit "the contractual basis", together with the detailed particulars and evaluation of the claim which [Bauer] wished to pursue after the service of the Clause 21.1 notice. The sub-clause refers not only to the submission of the detailed factual particulars, but "the contractual basis" together with the full detailed particulars. What is required under Clause 21.2 therefore must be the basis which [Bauer] claims it is entitled under the Sub-Contract to maintain and pursue its claim, by reason or as a result of the factual circumstances which have arisen. There may be one, or more, contractual bases, which can be stated in the Clause 21.2 notice, but the "contractual basis" under Clause 21.1[31] is one or more of the different causes or events set out in Clause 21.1.1 to Clause 21.1.6 as giving rise to a claim.

29. The August letters found by the Arbitrator to constitute the notices under Clause 21.1 state the factual basis of changed ground conditions, and further state the contractual basis of [Bauer's] claims to be Variations. There is no basis to find that [Bauer] had complied strictly with Clause 21.2.1, in relation to any "like rights" claim made under Clause 21.1.1 and maintained under Clause 21.2. As such, by operation of Clause 21.3, [Bauer] should have no right to the additional extra payment, loss and expense claimed.

30. The Arbitrator pointed out that it was unrealistic to expect a party to finalize its legal case within a relatively short period of time and to be tied to that case through to the end of an arbitration. As Leading Counsel for the [JV] pointed out, [Bauer] had 42 days from the event or occurrence giving rise to the claim to serve the notice required under Clause 21.2. That is not an unrealistic timeframe to identify the contractual basis of a claim.

31. In any event, however much sympathy the contractor may deserve, Clause 21 employs clear and mandatory language for the service and contents of the notices to be served, with no qualifying language such as "if practicable", or "in so far as the sub-contractor is able" (cf *Multiplex Construction (UK) Ltd v Honeywell Control Systems (No 2)* [2007] 111 Con LR 78). As the passage in *Keating on Construction Contracts*[32] recognizes, exemption clauses in construction contracts should be seen as part of the

> contractual apparatus for distributing risk. There is commercial sense in allocating risks and attaining finality by designating strict time limits for claims to be made and for the contractual basis of claims to be specified. In particular, the language used in Clause 21.1[33] is in my view clear on its plain reading, and the decisions in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 and *Arnold v Britton* [2015] AC 1619 highlight the importance of the language used in the provision to be construed, notwithstanding the need to read such language in the proper factual and commercial context. There is no basis for a court or tribunal to rewrite the Sub-Contract or Clause 21 for the parties after the event."

Bauer's arguments in this appeal

40. Bauer sought to justify the arbitrator's determination in this appeal. Its main contentions may be summarised as follows.

41. Mr Boulding emphasised that this is not a case where Bauer failed to state any contractual basis in the notices. Bauer had submitted a notice timeously with a contractual basis stated therein, as well as full and detailed particulars and the evaluation of the claim. The issue is whether such notice complied with the requirements of clause 21.2.

42. Regarding the true meaning and effect of clause 21.2.1, Mr Boulding made these submissions:

> (1) This provision does not require Bauer to identify the contractual basis upon which its claim for additional payment or loss and expense ultimately succeeded in the arbitration. Had this been the intention of the parties, the provision would need to have been expressed clearly to have that effect.
>
> (2) Further, this provision does not expressly state, nor can it be inferred, that Bauer is precluded from amending or substituting a contractual basis or that the effect of such an amendment or substitution would nullify the entitlement of Bauer to additional payment.
>
> (3) Alternatively, this provision was at the least ambiguous as to whether the notice needed to state the contractual basis upon which the claim ultimately succeeded or whether a party is precluded from pursuing a claim on a different contractual basis from that stated in the notice. As such, it should have been construed narrowly, applying the principle of common sense that "parties do not normally give up valuable rights without making it clear that they intend to do so" (*Seadrill Management Services Ltd v OAO Gazprom* [2010] 1 CLC 934 at §29, per Moore-Bick LJ, cited with approval by Briggs LJ in *Nobahar-Cookson & Anr v Hut Group Ltd* [2016] 1 CLC 573 at §§18 and 19).
>
> (4) This provision referred to "contractual basis" in the singular, rather than the plural. It cannot be "strictly complied with" as stipulated in clause 21.3, because the factual basis for Bauer's claim provided not one but two contractual bases – as Variations or Sub-Contract Variations, and as a "like rights" claim. Even if all the relevant facts were known to Bauer at the relevant time, it would be left with the invidious and potentially prejudicial choice of selecting just one contractual basis.
>
> (5) A party should not be prevented from advancing a claim after the expiry of a time bar merely because it placed a different legal label in the notice submitted when the substance of which was presented in time, praying in aid the words of Bingham J (as he then was) in *The Oltenia* which were quoted with approval on appeal ([1982] 3 All ER 244 at 249e to f). See also *The Abqaiq* [2012] 1 Lloyd's Rep 18 at §65.

43. Mr Boulding made the following further submissions.

44. As for the reasons given by the arbitrator for his determination in §332 of the 2nd Interim Award, his first reason ("to expect a party to finalise its legal case within the relatively short period and be tied to that case through to the end of an arbitration is unrealistic") is a finding of fact and is unimpeachable as a matter of law, by virtue of section 5(3) of Schedule 2 of the Arbitration Ordinance[34]. The judge was wrong to ignore the arbitrator's finding of fact in stating that the timeframe to identify the contractual basis of the claim required in clause 21.2.1 (42 days from the event or occurrence giving rise to the claim) is not unrealistic.

45. Further, it is pertinent to consider that clause 21 as a whole plainly contemplates and provides for a developing understanding of the factual causes or events for which notification is required, and this in turn informs the contractual basis or bases of the claim, as borne out in this instance by the most substantial head of claim concerning HTL[35]. Where there is a developing state of affairs and there is provision for interim written particulars under clause 21.2.2, it is manifest that the stated contractual basis under clause 21.2.1 may be amended or substituted to reflect the understanding at that time.

46. The second reason of the arbitrator ("what is important from the point of view of the Contractor is to know the factual basis for the claim so that it can assess it and decide what to do") is a correct statement of the law, having regard to the commercial purpose of the notification clause. Support for this may be found in the words of Bingham J in *The Oltenia*: "The commercial intention underlying this clause seems to me plainly to have been to ensure that claims were made by the owners within a short period of final discharge so that the claims could be investigated and if possible resolved while the facts were still fresh." ([1982] 3 All ER 244 at 249d) The important commercial purpose of clause 21.2 is whether the receiving party is able to make a proper evaluation of the claim as presented, not whether all the relevant boxes have been ticked.

47. The judge's holding that "there is commercial sense in allocating risks and attaining finality by designating strict time limits for claims to be made and for the contractual basis of claims to be specified" is simply to restate the purported effect of the clause and then use this as the rationale. Her reliance on *The Sabrewing* [2008] 1 All ER (Comm) 958 at §§16 and 17 and *The Yellow Star* [2000] 2 Lloyd's Rep 637 at 641 §5 was erroneous as these cases are distinguishable and she was wrong to apply the concept of finality dogmatically and with no regard to the commercial purpose of the clause.

48. Lastly, it was submitted in the alternative that the arbitrator's determination was on a mixed question of fact and law, and for an appeal to succeed on a mixed question of fact and law, it has to be shown that the arbitrator's determination was outside the permissible range of solutions open to him, citing *The Mathew* [1990] 2 Lloyd's Rep 323, per Steyn J at 326 and *Arbitration Law* by Robert Merkin (2004 ed) at §21.8[36].

Discussion

49. In this appeal, the court is concerned with a "like rights" claim for which notice under clause 21.1 of the intention to claim was given by one or more of the letters dated 1, 2, 10 and 20 August 2011. There is no dispute that for a "like rights" claim, the notice provisions in 21.2 must be strictly complied with as conditions precedent to any entitlement to a claim for additional payment under clause 21.

50. Under clause 21.2, the notice in clause 21.2.1 would need to be given within 28 days after the giving of notice under clause 21.1. In this instance, it would not be later than 28 days from 20 August 2011. In the notification served by Bauer within that

period, Bauer made its claim on the contractual basis of a Variation or Sub-Contract Variation under clause 21.1.6 and there was no mention of a “like rights” claim, which is a different contractual basis under clause 21.1.1.

51. The question is on the proper interpretation of clause 21, whether Bauer was precluded from amending or substituting the stated contractual basis by making its claim on a different contractual basis outside the 28 days of the relevant notice given under clause 21.1.

52. According to the plain wording of clause 21.2.1, the notice or submission that is required to be given within 28 days of the notice of intention to claim must cover three things: the contractual basis, full and detailed particulars and the evaluation of the claim. In respect of the latter two – full and detailed particulars and the evaluation of the claim – clause 21.2.2 allows for submissions to be made at subsequent periods, where an event, occurrence or matter has a continuing effect or where the Sub-Contractor is unable to determine if an event, occurrence or matter will be continuing, such that it is not practicable to comply with clause 21.2.1. By clause 21.2.2, the developing understanding of the factual causes or events is permitted to have an impact only on the provision of full and detailed particulars and the evaluation of the claim. The allowance there to make subsequent submissions clearly does not extend to the obligation to state the contractual basis.

53. The wording of clause 21.2.1 is clear and unambiguous. Within the stipulated time, the Sub-Contractor is required to give notice of the contractual basis, not any possible contractual basis which may turn out not to be the correct basis. The reference to “the contractual basis” would not preclude identifying more than one basis in the alternative or stating more than one basis in the notice or serving more than one notice each stating a contractual basis. Clause 1.4.1 of Sub-Contract 823B provides that the following rule of construction applies: “The singular includes the plural and vice versa”.

54. There is no justification in giving clause 21.2.1 a narrow construction or strained interpretation. The passage in *Keating on Construction Contracts* (3rd cumulative supplement to the 10th ed at §3-105A) quoted in the Judgment at §24 encapsulates the relevant principles and correct approach:

> “Ambiguity in an exclusion clause may be given a narrow construction because it cuts down or detracts from the ambit of an important obligation in a contract or a remedy conferred by the general law, such as an obligation to give effect to a contractual warranty by paying compensation for breach of it. Parties are not likely to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect. However, this approach is not now regarded as a presumption nor a special rule justifying the giving of a strained meaning to a provision merely because it is an exclusion clause. Instead, all the tools of linguistic, contextual, purposive and common-sense analysis should be deployed to establish the proper construction of the provision. Only if that approach still results in an ambiguity in the meaning of the exclusion clause may it have to be resolved by a preference for a narrower construction. In construction contracts, exemption clauses should be seen as part of the contractual apparatus for distributing risk and there should be no pre-determined mindset to cut them down.”[37]

55. In *Taberna Europe CDO II plc v Selskabet AF 1* [2017] QB 633 at §23, Moore-Bick LJ again stated that the modern view “is to recognise that commercial parties … are entitled to make their own bargains and that the task of the court is to interpret fairly the words they have used. The *contra proferentem* rule may still be useful to resolve cases of genuine ambiguity, but ought not to be taken as the starting point.”

56. There is no ambiguity in clause 21.2.1 that needs to be resolved by invoking the *contra proferentem* rule.

57. Regarding the timeframe of 42 days to state the contractual basis of the claim, the arbitrator has not made a finding of fact that the time stipulated is unrealistically short. What he said about this at §332 of the 2nd Interim Award is a statement of opinion, rather than a finding of fact[38]. And as submitted by Mr Clayton, if the Sub-Contractor is genuinely uncertain about the contractual basis, it is open to him to state more than one basis or serve more than one notice.

58. The realisation of the impact of HTL was a developing matter, as found by the arbitrator who set out the relevant exchanges of the parties from August 2011 to April 2012. In respect of the unforeseen ground conditions, Bauer did give notice in August 2011 stating the contractual basis as Variation or Sub-Contract Variation under clause 21.1.6. On the same factual basis, it could have given notice of a "like rights" claim under clause 21.1.1, whether alternatively or cumulatively, within the stipulated time, and there is no finding of the arbitrator to the contrary. Under clause 21.1, the period of 42 days only commences "after the event, occurrence or matter giving rise to the claim became apparent or ought reasonably to have become apparent to the Sub-Contractor." And if notice had been given of a "like rights" claim, it would mean that interim payments would be dealt with differently, as provided in clause 21.8. The contention premised on a developing understanding of the factual events is not a valid argument.

59. As for the commercial purpose for identifying the contractual basis within the stipulated period, there would appear to be two other purposes apart from providing the factual basis for the claim so that the Contractor can investigate in time (which was mentioned by Bingham J in *The Oltenia*), as submitted by Mr Clayton.

60. One is finality, as noted by the judge[39] who cited Gloster J in *The Sabrewing* (said in the context of demurrage time-bar clauses, just as in *The Oltenia*, *The Abqaiq* and *The Yellow Star*) at §17: "The commercial purpose of such clauses is also to achieve finality." In *The Yellow Star*, Judge Hallgarten, QC said at 641: "It was submitted that the commercial purpose … was as stated at the outset of the passage from the judgment of Mr Justice Bingham in *The Oltenia* …, to ensure that claims are made in such time as to allow the recipient to assess their validity at a time when the facts giving rise to such claim are still fresh. I agree that this represents an important commercial purpose, but in my view it is not the sole commercial purpose: finality is also of moment to commercial men. In any event, as I see it, an essential step in the validity of the claimants' claim was the opportunity to verify that such represented the *passing on* of a claim made by the owners against them …". The arbitrator's interpretation of clause 21.2.1 would negate the commercial purpose of achieving finality, as a claim can be advanced on a different contractual basis in an arbitration which may be years down the line.

61. The other commercial purpose for this provision is similar to what was mentioned above in *The Yellow Star*. In a chain contract situation, the Contractor would wish to know whether the Sub-Contractor's claim would need to be passed up the line. If the claim is based on other matters, such as breach of the Sub-Contract by the Contractor (clause 21.1.2), it would not need to be. The arbitrator's interpretation may prejudicially affect this commercial purpose as well.

62. As regards the contention that a party should not be precluded from advancing a claim after the expiry of a time bar merely because it placed a different legal label in the notice and the reliance placed on Bingham J's statement in *The Oltenia*, it is necessary to read what was said in that case in context.

63. *The Oltenia* concerned a clause in a charterparty which provided that charterers shall be discharged and released from all liability in respect of any claims owners may have "unless a claim has been presented to Charterers in writing with all available supporting documents" within 90 days from completion of discharge of the cargo. The relevant extract at 248h to 249g is as follows:

> "The natural meaning … was that the owners should within the period communicate the factual ground of the claim … and supply documents relevant to that … This the owners did. Having done so, they were free to raise other claims arising from the same factual premise … It was not incumbent on the owners to provide full documentation to support a detailed quantification of any claim. …
>
> The commercial intention underlying this clause seems to me plainly to have been to ensure that claims were made by the owners within a short period of final discharge so that the claims could be investigated and if possible resolved while the facts were still fresh … This object could only be achieved if the charterers were put in possession of the factual material which they required in order to satisfy themselves whether the claims were well founded or not. I cannot regard the expression "all available supporting documents" as in any way ambiguous: documents supporting the owners' claim on liability would of course be included, but so would a document in relation to quantum only, just as a doctor's bill would be a document supporting a claim for damages for personal injury. *The owners would not, as a matter of common sense, be debarred from making factual corrections to claims presented in time …, nor from putting a different legal label on a claim previously presented, but the owners are in my view shut out from enforcing a claim the substance of which and the supporting documents of which (subject always to de minimis exceptions) have not been presented in time*. … *One possible, though strict, interpretation, that the presentation of any claim has the effect of preserving all claims, was not embraced by [counsel for the owners] with any show of enthusiasm, and indeed it borders on the absurd*." (Emphasis supplied)

64. The demurrage time-bar clause in *The Oltenia* does not require "the contractual basis" of the claim to be stated. What the owners were required to do within the stipulated time was to communicate to the charterers "the factual ground of the claim … and supply documents relevant to that". Even in that situation, the presentation of a claim does not have the effect of preserving all claims, and factual corrections may be made only to a claim the substance of which and the supporting documents of which have been presented within time. *The Oltenia* does not provide support for the contention that so long as a contractual basis is stated in a notice served within time, this would have the effect of preserving the right to substitute a different contractual basis for the claim.

65. Mr Clayton made a valid point that if the only purpose were to inform the Contractor of the factual basis for the claim so it can investigate the claim in time, clause 21 would be worded in a similar way to clauses 82.1 and 82.4 of the Main Contract. These clauses provide for the situation where the Contractor fails to give notice of claim for additional payment (stating the intention to claim and the clause or clauses pursuant to which the claim is made) within 28 days of the happening of the event giving rise to the claim, and it is stated that the Contractor shall not be entitled to any payment in respect of such claim save only to the extent that the Engineer is satisfied that the Engineer has not been substantially prejudiced by such failure in conducting his investigation and if the Engineer is so satisfied, he shall certify for payment to the Contractor such sum in relation to the claim as appears to him fair in all the circumstances.

66. But that is not how clause 21 was worded. It is not permissible to interpret clause 21.2.1 in such a manner as to re-write the plain language of the provision.

67. In this particular situation, the proper interpretation of clause 21.2.1 is a question of law, not a mixed question of fact and law. It is readily distinguishable from the situation in *The Mathew* (where the question was which of two events constituted the proximate cause of the claimant's loss) or in *MC v SC* [2020] HKCFI 2337 (where the question was whether the breach found by the arbitrator was repudiatory in nature). It is not appropriate to adopt the approach whether the arbitrator's determination was outside the permissible range of solutions available to him.

Conclusion and costs

68. For the above reasons, I would dismiss Bauer's appeal against the Judgment. There is no dispute that costs of the appeal should follow the event. There would be such a costs order accordingly.

Hon Yuen JA:

69. I agree.

Hon Barma JA:

70. I agree.

(Susan Kwan)	(Maria Yuen)	(Aarif Barma)
Vice President	Justice of Appeal	Justice of Appeal

Mr Peter Clayton SC instructed by Pinsent Masons, for the 1st and 2nd Plaintiffs (Respondents)

Mr Philip Boulding QC and Mr James Niehorster, instructed by Bryan Cave Leighton Paisner LLP, for the Defendant (Appellant)

Appendix

Clause 21 of Sub-Contract 823B provides as follows:

"21. Claims

21.1 If the Sub-Contractor intends to claim any additional payment or loss and expense pursuant due to:

> 21.1.1 any circumstances or occurrence as a consequence of which the Contractor is entitled to additional payment or loss and expense under the Main Contract;
>
> 21.1.2 any alleged breach of the Sub-Contract, delay or prevention by the Contractor or by his representatives, employees or other sub-contractors;
>
> 21.1.3 any claim for discrepancy between Sub-Contract Drawings and documents pursuant to Clause 8.4;
>
> 21.1.4 any claim under Common Law, statute laws or by-law;
>
> 21.1.5 any extension of time granted to the Sub-Contractor with exception to those cases which the delay are caused by typhoon signal no. 8 and/or force majeure etc.
>
> 21.1.6 any Variation or Sub-Contract Variation, as a condition precedent to the Sub-Contractor's entitlement to any such claim, the Sub-Contractor shall give notice of its intention to the Contractor within fourteen (14) days after the event, occurrence or matter giving rise to the claim became apparent or ought reasonably to have become apparent to the Sub-Contractor. For the avoidance of doubt, the Sub-Contractor shall have no entitlement to any additional payment or any additional loss and expense and no right to make any claim whatsoever for any amount in excess of the Sub-Contract Sum in respect of any event, occurrence or matter whatsoever unless this Sub-Contract sets out an express right to that additional payment, additional loss and expense or claim.

21.2 If the Sub-Contractor wishes to maintain its right to pursue a claim for additional payment or loss and expense under Clause 21.1, the Sub-Contractor shall as a condition precedent to any entitlement, within twenty eight (28) Days after giving of notice under Clause 21.1, submit in writing to the Contractor:

> 21.2.1 the contractual basis together with full and detailed particulars and the evaluation of the claim;
>
> 21.2.2 where an event, occurrence or matter has a continuing effect or where the Sub-Contractor is unable to determine whether the effect of an event, occurrence or matter will be continuing, such that it is not practicable for the Sub-Contractor to submit full and detailed particulars and the evaluation in accordance with Clause 21.2.1, a statement to that effect with reasons together with interim written particulars. The Sub-Contractor shall thereafter, as a condition precedent to any entitlement submit to the Contractor at intervals of not more than twenty eight (28) Days (or at intervals necessary for the Contractor to comply with his obligations under the Main Contract, whichever is shorter) further interim written particulars until the full and detailed particulars are ascertainable, whereupon the Sub-Contractor shall as soon as practicable but in any event within twenty eight (28) Days (or as necessary for the Contractor to comply with his obligations under the Main Contract, whichever is shorter) submit to the Contractor full and detailed particulars and the evaluation of the claim;
>
> 21.2.3 details of the documents and any contemporary records that will be maintained to support such claim; and
>
> 21.2.4 details of the measures which the Sub-Contractor has adopted and proposes to adopt to avoid or reduce the effects of such event, occurrence or matter which gives rise to the claim.

> 21.3 The Sub-Contractor shall have no right to any additional or extra payment, loss and expense, any claim for an extension of time or any claim for damages under any Clause of the Sub-Contract or at common law unless Clauses 21.1 and 21.2 have been strictly complied with.
>
> 21.4 Without prejudice to the generality of Clause 4 and subject to the specific provisions of this Sub-Contract requiring the submission of claims and documents to the Contractor, whenever the Contractor is required by the terms of the Main Contract to give any return, account or notice to the Engineer or to the Employer, the Sub-Contractor shall in relation to the Sub-Contract Works give a similar return, account notice or such other information in writing to the Contractor as will enable the Contractor to comply with such terms of the Main Contract.
>
> 21.5 Subject to the Sub-Contractor complying with Clause 21.4, the Sub-Contractor shall endeavour to support the Contractor to recover such monies from the Employer under the Main Contract which the Sub-Contractor is entitled to be paid by the Contractor under the Sub-Contract.
>
> 21.6 In respect of any claim to which Clause 21.1.1 does not apply and on condition that the Sub-Contractor has complied with the conditions precedent set out in Clause 21.1 and 21.2:
>
> > 21.6.1 the Contractor shall assess the Sub-Contractor's compliance with the terms of this Clause 21 and its entitlement to any additional payment and additional loss and expense after the Sub-Contractor has given to the Contractor all documents required by the Contractor to support the claim; and
> >
> > 21.6.2 any payment shall be added to the next interim payment or final payment following the Contractor's assessment.
>
> 21.7 [this clause has been deleted]
>
> 21.8 In respect of any claim made under Clause 21.1.1 and subject to the Sub-Contractor's compliance with the condition precedents set out in this Clause 21:
>
> > 21.8.1 the Contractor shall assess the additional payment, loss and expense after it has received the assessment from the Engineer;
> >
> > 21.8.2 on receiving any amount in respect of the corresponding claim under the Main Contract, the Contractor shall assess the proportion (if any) of the amount to be paid to the Sub-Contractor that in all the circumstances may be fair and reasonable which proportion shall for the avoidance of doubt limited to the amount (if any) that the Contractor is able to claim under the Main Contract for the corresponding claim; and
> >
> > 21.8.3 such proportion shall be added to the next interim payment or final payment to the Sub-Contractor following receipt by the Contractor of payment by the Employer for the corresponding claim under the Main Contract."

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[1] [2018] HKCFI 2001, pursuant to section 6(1)(b) of Schedule 2 of the Arbitration Ordinance, Cap 609

[2] Judgment, §1(1)

[3] Judgment, §33

[4] [2019] 3 HKLRD 264

[5] The JV obtained leave to appeal on a question of law arising out of the 1st Interim Award and pursued the appeal in HCCT 35/2016.

[6] Corrected on 3 March 2018.

[7] Corrected on 28 March 2018 and re-corrected on 26 April 2018.

[8] 2nd Interim Award, §177

[9] 1st Interim Award, §251; 2nd Interim Award, §300(3).

[10] 2nd Interim Award, §§321, 327

[11] 2nd Interim Award, §322

[12] As amended by Special Conditions 10.36 to 10.42.

[13] The arbitrator summarised clauses 21.1 and 21.2 at §§323 to 325 of the 2nd Interim Award.

[14] When the parties entered into the 823B Sub-Contract.

[15] 2nd Interim Award, §§301, 302

[16] 2nd Interim Award, §328

[17] 2nd Interim Award, §329

[18] 2nd Interim Award, §§330, 343, 346

[19] The heading of this letter was “MTRCL Express Rail Link Contract 823B – Shek Kong Stabling Sidings & Emergency Rescue Sidings Variation to Sub-Contract Works – Increase in Quantity and Quality of Rock”

[20] The heading of this letter was “MTRCL Express Rail Link Contract 823B – Shek Kong Stabling Sidings & Emergency Rescue Siding Variation to Sub-Contract Works – Increase in Quantity and Quality of Rock Excavation below Rockhead Level – Claim for Extension of Time and Additional Payment”

[21] 2nd Interim Award, §334

[22] 2nd Interim Award, §335

[23] 2nd Interim Award, §336

[24] 2nd Interim Award, §§338, 339, 344 to 345, 347 to 357

[25] The relevant parts of the letters of 31 March 2012 and 21 April 2012 were quoted in the 2nd Interim Award at §§354, 355.

[26] With Mr James Niehorster

[27] 2nd Interim Award, §331

[28] Clause 38 does not have an equivalent provision in the Sub-Contract. Clause 38.1 provides *inter alia*: “If however during the Execution of the Works the Contractor shall encounter within the Site physical conditions (other than weather conditions or conditions due to weather conditions) or artificial obstructions which conditions or obstructions he considers could not reasonably have been foreseen by an experienced contractor at the date of the Letter of Clarification, and the Contractor is of the opinion that additional Cost will be incurred which would not have been incurred if the physical conditions or artificial obstructions had not been so encountered, he shall if he intends to make any claim for additional payment comply with Clause 82 …” It was accepted by the JV that in principle and subject to complying with the notice provisions in clause 21, pursuant to clause 21.1.1 Bauer would have a “like rights” claim and be entitled to be paid a proportion of any amount paid under the Main Contract for a Clause 38 claim, see 2nd Interim Award at §95.

[29] Judgment, §18

[30] Judgment, §23

[31] Apparently a clerical error, this should be clause 21.2.1.

[32] 3rd cumulative supplement to the 10th ed at §3-105A, quoted in the Judgment at §24

[33] Apparently a clerical error, this should be clause 21.2.1.

[34] This provision reads: “The Court must decide the question of law which is the subject of the appeal on the basis of the findings of fact in the award.”

[35] 2nd Interim Award, §§346 to 356

[36] See Judgment at §§4 to 6.

[37] The latter part of this passage is a paraphrase of what Briggs LJ said in *Nobahar-Cookson & Anr v Hut Group Ltd* at §19.

[38] On appeal before the judge, the JV adduced evidence on a number of standard forms of construction contract in Hong Kong that require notification of the contractual basis of a claim for additional payment within 21 or 28 days of the event. Four were contracts of the Hong Kong Government (General Conditions of Contract for Design and Build Contracts (1999), General Conditions of Contract for Building Works (1999), General Conditions of Contract for Civil Engineering Works (1999), and Sub-Contract for Building Works (2000)), two were contracts of the Hong Kong Institute of Surveyors/Hong Kong Institute of Architects (HKIS/HKIA Agreement & Schedule of Conditions of Building Contract for use in the HKSAR (2005), and HKIS/HKIA Agreement & Schedule of Conditions of Nominated Sub-Contract for use in the HKSAR (2005)) and two were contracts of the Hong Kong Airport Authority (Airport Authority General Conditions of Contract Building and Civil Works (Issue No 11, August 2015), and Airport Authority General Conditions of Contract for Minor Works (Issue No 5, October 2017).

[39] Judgment, §25