FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 21
CA70/16

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion by

MIDLOTHIAN COUNCIL

Pursuers and Reclaimers

against

BRACEWELL STIRLING ARCHITECTS

First Defenders and Respondents

Pursuers and Reclaimers: Howie QC, DM Thomson QC; Shepherd and Wedderburn LLP
First Defenders and Respondents: Duncan QC, Reid; CMS Cameron McKenna LLP

27 March 2018

Introduction

[1] This is a reclaiming motion against an interlocutor of the commercial judge, dated 11 August 2017, dismissing the action against the first defenders. The action is one for payment of £12 million in damages in respect of the loss of a development of 64 social homes at a site in Gorebridge, Midlothian. The homes were rendered uninhabitable as a result of the ingress of carbon dioxide from disused mine workings. The pursuers maintain

that the ground investigations, which were carried out on their instructions by the second defenders (Raeburn Drilling & Geotechnical Ltd) in about 2005, had revealed concentrations of the gas which ought to have prompted a recommendation to install a ground gas defence system. The pursuers sue the second defenders for failing to make that recommendation. They sue the third defenders (RPS Planning & Development Ltd), who had been appointed by them in 2004 to "peer review", *inter alia,* the second defenders' reports. This appeal does not concern the pursuers' cases against either the second or the third defenders.

[2] The pursuers sue the first defenders, whom they had appointed as lead Consultant in terms of a Framework Agreement in 2005, on the basis that, according to the pursuers' interpretation of the contract, the first defenders had assumed responsibility for the work, including the ground investigations, carried out by the second defenders, and the review conducted by the third defenders. The sole issue is one of contractual interpretation; in particular, whether, in terms of the Agreement, the first defenders are liable for work carried out by the other defenders.

Framework Agreement

[3] The contract between the pursuers and the first defenders was contained in a Framework Agreement, dated 8 and 10 November 2005, designed to cover a number of individual development sites, each known as a "Build". There were also short Build Specific Agreements relative to each Build. In the Framework Agreement, the pursuers were described as the "Council" and the first defenders as the "Consultant". "Build Services" were (clause 1.8) those required for a particular Build. "Contractor" was defined (1.14) as any person appointed to carry out, *inter alia,* any construction or engineering works. "Other Consultants" meant (1.28) any person appointed by the pursuers in connection with the

developments. "Services" were described (1.34) as those in Schedule Part 1 "and any other ... services provided or for which the Consultant is responsible". "Sub-Consultant" included (1.36) "all sub-consultants, contractors or other persons ... appointed or engaged at any tier (either directly or by any other person providing part of the Build Services) to carry out any part of the Build Services".

[4] The Agreement, so far as relevant for present purposes, provides that:

> "2 APPOINTMENT
>
> 2.1 The Consultant undertakes that within 14 ... days of receiving notice from the Council ... that the Council intends to proceed with a Build ... the Consultant shall ... submit a draft Build Specific Agreement for such a Build, incorporating details of (a) the Build Services, [and] (b) any further Services that the Consultant exercising the standard of skill and care referred to at clause 7.1 believes are necessary to design the Build ...
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> 2.8 The Consultant warrants and undertakes ... that it has the competence and resources to fulfil the obligations of a designer ... pursuant to the [Construction (Design and Management) Regulations 1994] and ... the Consultant shall:
>
> 2.8.1 Liase, consult, meet and co-operate with the Other Consultants ... to allow such parties to fulfil the obligations incumbent upon them pursuant to the CDM Regulations ...
>
> 2.9 The Consultant shall be deemed to be aware of all CDM Regulations, codes of practice and guidance relating to the discipline, role, services and/or duties to be carried out by the Consultant or insofar as required to comply with the level of skill and care required under this Agreement.
>
> 3 SERVICES
>
> 3.1 The Consultant shall provide all Services applicable to this Agreement ... The Consultant shall provide all Build Services pursuant to each Build Specific Agreement in accordance with each relevant Programme, which the Consultant will use all reasonable endeavours to agree with the Council ... The Consultant shall use all reasonable endeavours to prevent any delay or disruption to the progress of the Build
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> ...
>
> 3.3 The terms of this Agreement shall apply to all Services and all Build Services provided by or on behalf of the Consultant ... whether carried out before or after the dates of signing of (a) this Agreement or (b) the relevant Build Specific Agreement as if ... entered into ... prior to the commencement of the Services or relevant Build Services

...

3.5 The Consultant shall liase, consult, meet and co-operate with the Other Consultants and any Contractor as necessary to achieve the proper performance of the Build Services ...

3.8 ... [W]here the Consultant is engaged in connection with a Build, the Consultant shall be the lead consultant and lead design consultant as part of the Build Services and ... shall have overall responsibility for co-ordinating the Other Consultants (if any) and co-ordinating and integrating the input (including the detailed design prepared by or on behalf of) of all designers, the Council and the Contractor

...

3.15A Notwithstanding the stage to which the design of a Build ... has been developed prior to the Consultant having been appointed, the Consultant shall be fully responsible for the whole design and for the obtaining of all Consents in respect of such design. Without prejudice of (*sic*) the foregoing the Consultant shall:

3.15A 1 review and/or check any design or documentation prepared and/or provided by others in connection with such Build ...

3.15A 2 notify the Council if any exemplar designs ... do not or cease to meet or comply with the Council Requirements or Legislation

3.16 ...The Consultant shall perform the Services ... exercising the standard of skill and care required in terms of clause 7.1 so that no act, omission, default or negligence of the Consultant ... shall constitute, cause or contribute to any breach by the Council of any obligations ... under ... agreements ...

...

3.29.2 The Consultant shall seek to identify ... each of the risks inherent in the Build and shall use reasonable endeavours to see that these are incorporated into a risk management process and eliminated, or mitigated or managed ...

...

5 SITE INVESTIGATION WORKS & SURVEYS

5.1 The Consultant shall as part of the Build Services carry out any Site Investigation Works and surveys as may be necessary and shall use reasonable endeavours to see that reference to such is included in the Build Specific Agreement produced by [it] in terms of clause 2.1 hereof The Consultant shall be wholly responsible for the Site Investigation Works and surveys, if any, referred to in the Build Specific Agreement and that irrespective of any Sub-Consultants, Contractor(s) or others appointed (including without limit site investigation contractors and laboratories). The Consultant shall ... include provision for any investigations, reports, analysis or output in connection with site investigations to be capable of being relied upon by the Council and the Consultant in respect of the Build in question. The Consultant shall, in procuring any element of the Site Investigation

Works procure collateral warranties from the contractor who carries out the Site Investigation Works ...

5.2 A desktop survey of the site will be provided by the Council. The Consultant is to ratify/comment on/adopt this report and confirm further action, including intrusive investigation, required. The desktop ... will include the following for each site:

...

5.2.7 Previous investigation information (where available)

...

5.3 The Consultant shall be responsible for advising the Council on the adequacy of any brief or scope for such Site Investigation Works and the consequences for time, cost, and quality and risk allocation in connection with the Build

5.5 The Consultant shall use reasonable endeavours to see that each Sub-Consultant is of the appropriate discipline, and has and maintains the appropriate skills, resources, qualifications, certificates and accreditation, and carries the appropriate licences required by Legislation and, in addition, those usually carried by those in the Sub-Consultant's trade/profession and, if any, those referred to in the Build Specific Agreement. ... The Consultant shall use reasonable endeavours to see that each Sub-Consultant complies with all relevant Legislation and other guidance or procedures in respect of the services provided by the Sub-Consultant and in respect of works of the type involved in the Build generally.

5.6 The Consultant shall use reasonable endeavours to see that the output of all investigations/surveys is circulated to the relevant participants in the Build and is taken into account in the design of the Works and in the Works.

7 LEVEL OF CARE

7.1 The Consultant shall exercise all reasonable skill and care in the performance of the Services in connection with this Agreement (and in the performance of the Build Services in connection with each Build Specific Agreement) as would be expected of a competent and qualified professional of the appropriate disciplines for performing the Services including any specialist qualities or experience or expertise for which the Consultant was appointed, experienced in carrying out services comparable with the Services and discharging obligations comparable to those herein in relation to projects of a similar size, scope and complexity to the Project and the relevant Build

15 DELEGATION AND ASSIGNATION

15.1 ... The Consultant shall be responsible for the performance of any obligations or Build Services by any party to whom it delegates, sub-consultants (*sic*) or sub-contracts any right or obligations notwithstanding that the consent of the Council has been obtained and 'performance' shall for the purpose of this Condition include failure to perform or inadequate performance

16 COLLATERAL WARRANTIES

...

16.2 The Consultant shall within 10 days of appointment of a Sub-Consultant deliver to the Council collateral warranty agreements ... from each Sub Consultant ... in favour of the Council in terms of the relevant draft collateral warranty agreement (or, where the Sub-Consultant is solely undertaking Site Investigation Works, in terms of the draft form of reliance letter) ...

17 INSURANCE

17.1 The Consultant shall (and shall procure that each of its Sub-Consultants shall in respect of their services, obligations and liabilities) ... maintain a professional indemnity insurance policy covering all of its obligations and liabilities arising out of or in connection with this Agreement and each Build Specific Agreement ...

22 LIMITATIONS

…

22.2 Without prejudice to:

22.2.1 the Consultant's responsibility for any sub-consultants of whatever tier appointed by the [first defenders] or on its behalf, or

22.2.2 the Consultant's responsibility (if any) for monitoring, commenting upon, co-ordinating and integrating the design, workmanship or services of any other party; or

22.2.3 any other obligations of or services provided or to be provided by the Consultant whatsoever,

the Consultant shall not be held responsible in terms of this Agreement for the services provided by any other party appointed by the Council but without prejudice to the Consultant's duty to warn the Council of any concerns as to the performance by any Other Consultants or Build Partner."

The Schedule Part 1, provided that:

"...

2. The Consultant shall provide the normal and ancillary services expected in connection with the services detailed in a Build Specific Agreement ... in order to provide an integrated and comprehensive service to the Council. The Consultant shall co-ordinate, monitor, check, report, consult or liase with any Other Consultants, Build Partners or parties involved in ... to the extent necessary to enable the proper performance of the Build Services.

3. In carrying out the Build Services the Consultant shall investigate Documents and information relating to each Build including without limitation any reports, drawings, manuals or other information or Documents which exist and are accessible or made accessible to the Consultant. The Consultant's reliance on any Documents or information made available by or on behalf of

the Council shall not relieve or diminish the Consultant's obligations or liabilities in any way or to any extent

4. The Consultant shall advise on the need to carry out any further or additional investigations and/or forthwith advise the Council of any concerns or matters which arise out of investigations or carrying out of the Build Services having regard to the Build and the Council's Requirements"

[5] There was then a detailed specification (30 pages) of the services to be carried out by the Consultant under the headings: Project Manager, Architect, Quantity Surveyor, Structural Engineer, Building Services Engineer, Civil Engineer and Landscape Architect. The first of these included making recommendations to the Council on the need for any site investigations, in order to ascertain whether any ground was contaminated (A1.1.4). In relation to the Architect's duties, the Consultant was to make recommendations on the need for any specialist contractors, but design responsibility was to "remain fully with the Consultant" (A2.2.2). The duties of the Building Services Engineer included arranging for the carrying out of any geotechnical or other investigations authorised by the Council, interpreting the results and making recommendations to the Council (A5.1.4). Much of the rest of the specification was to do with co-ordination and administration.

[6] The parties entered into a Build Specific Agreement, in respect of the Gorebridge site, dated 30 May and 6 June 2006. This Agreement required the first defenders to provide the services detailed in an appendix. Part 15 of the Appendix, entitled "Site Specific Conditions/ Matters" included "Normal site investigations plus possible mine shaft capping and possibly grouting works".

Commercial judge's reasoning

[7] The commercial judge considered that the principles to be applied in interpreting the

Agreements were well-established. They required the court to focus on the language used and to ascertain what a reasonable person, with all of the knowledge that the parties had, would have understood the language to have meant (*Arnold* v *Britton* [2015] AC 1619, at para 15; *@SIPP Pension Trustees* v *Insight Travel Services* 2016 SC 243 at para 17; *HOE International* v *Anderson* 2017 SC 313 at para 19; *Rainy Sky* v *Kookmin Bank* [2011] 1 WLR 2900 at para 21). In doing so, it was necessary to have regard to all the relevant surrounding circumstances. If there were two possible constructions, the court was entitled to prefer the one that was consistent with business common sense (*Arnold* v *Britton* (*supra*) at para 76).

[8] The imposition of liability on the first defenders for a breach of contract by any of the other consultants or contractors, regardless of their contractual relationship with the first defenders and even if they were appointed before the first defenders had become involved, would be a "striking departure from ordinary legal principle". The wording of clause 5.1 was not clearly and unequivocally to that effect. The inclusion of the words "to such" after the reference to reasonable endeavours suggested that the obligation was limited to the site investigation works carried out by the first defenders and not to site investigation works generally. The reference to such works in the following sentence could also be read as being limited to those carried out by the first defenders. The rest of clauses 5.1 and 5.3, was similarly concerned with conferring rights on the pursuers in respect of work carried out by them, or on their instructions.

[9] On that interpretation of clause 5.1, the first defenders assumed no responsibility for site investigations carried out by anyone other than themselves or their sub-consultants or sub-contractors. Part 15 of the Appendix to the Build Specific Agreement was not inconsistent with that interpretation. It envisaged that the first defenders would carry out, or instruct, site investigations. It did not necessarily refer to site investigation works which

had been carried out by others. This interpretation was consistent with clause 22.2, which provided that the first defenders were not to be responsible for services provided by "any other party appointed by the Council"; ie "Other Consultants" (clause 1.28). Responsibility for Other Consultants did not fall within any of the "carve-out" provisions in clause 22.2. For sub-clause 22.2.1 to deem that any consultant fell within the category of a sub-consultant, by virtue of clause 5.1, would deprive clause 22.2 of practical effect. Sub-clause 22.2.2 was concerned specifically with the first defenders' own duty to monitor and comment on designs and services provided by others. It did not impose a wider duty. Sub-clause 22.2.3 was concerned only with services provided by the first defenders.

[10] This interpretation avoided the anomaly whereby, on the pursuers' preferred construction, the first defenders would be strictly liable for breaches of contract by third parties, whilst only being required to exercise reasonable skill and care in the provision of their own services by virtue of clause 7. This was inconsistent with business common sense. It would not accord with the usual practice of a contractor not assuming liability for work carried out by parties with whom they were not in a contractual relationship, or for work which had been carried out before they were involved in the particular project.

Submissions

Pursuers

[11] The pursuers submitted that the relevant principles were not in dispute. They were authoritatively summarised in the cases cited by the commercial judge; supplemented by *Wood* v *Capita Insurance Services* [2017] AC 1173. The aim was to ascertain what a reasonable person, having all of the background knowledge of the parties at the time of the contract, would understand the language to mean. The focus should be on the words actually used,

in their "documentary, factual and commercial context". If the contractual language was clear, effect should be given to that language. If not, the court could prefer a construction which accorded with business common sense.

[12] The plain and unambiguous language of the Framework Agreement and the Build Specific Agreement imposed liability on the first defenders for the acts and omissions of others in connection with the site investigations. The language was sufficiently clear to displace the general principle of *culpa tenet suos auctores*. It was implicit from the wording of clause 22.2.3 and the concluding words of clause 22, that the Agreement imposed obligations on the first defenders which they would not otherwise have had at common law. Clauses 3.8, 3.15A, and 5.1 of the Framework Agreement, and Part 15 of the Build Specific Agreement, imposed these liabilities on the first defenders. Under clause 5.1, it was the first defenders' responsibility to identify the Site Investigation Works and surveys to which reference was to be made in the Build Specific Agreement. The first defenders had agreed, in terms of clause 5.1, to be "wholly responsible" for those matters, "irrespective of any Sub-Consultants, Contractor(s) or others appointed". That phrase imposed liability not just for the contractors appointed by them, but also for others appointed by the pursuers.

[13] The first defenders' liability for site investigations, as with their liability for design matters under clause 3.15A, was not merely in respect of work prospectively undertaken by it, but also in respect of those site investigations works which had already been undertaken. Part 15 of the Appendix rendered the first defenders "wholly responsible" for those works on a plain reading of the Agreement. Clause 5.1 was not undone by clause 7. In any question between the pursuers and the first defenders, the latter's liability would have to be strict, as otherwise it would only truly be undertaking liability for its own fault and negligence, and not the works of others.

[14] Even if the contractual language was not clear and unambiguous, there was no material before the commercial judge to support his assertion that entering into such an onerous obligation would not accord with usual commercial practice. There was nothing uncommercial about a contractual scheme which imposed primary liability on the lead consultant, particularly when the lead consultant had identified the site investigation works for which they were to be wholly responsible. There were attractions in there being a single point of contact and, no doubt, the first defenders would have obtained a greater fee for assuming that responsibility. It was accepted that the first defenders would not normally be able to secure insurance to cover another's breach of contract, especially where there would be no liability at common law.

First Defenders

[15] The principles applicable to contractual interpretation were not in dispute. The commercial judge was correct to reject the central proposition advanced by the pursuers, that the first defenders were liable for the work of others, whether or not they were their sub-contractors and whether or not the work had been carried out and accepted by the pursuers before they had contracted with the first defenders. That proposition was contra-indicated by the general scheme of the Framework Agreement. It was inconsistent with the usual position in law, and it was unsupported by any other provision in the Agreement.

[16] The judge correctly interpreted clause 5.1. Its language was inconsistent with the assumption of liability for work which had already been done by others. Such works would not be "necessary" works, as they would have already been done. "Build Services" was forward looking. The words "wholly responsible" required to be read in the context of clause 5.5, which provided that the first defenders required only to "use reasonable

endeavours". The requirement to use reasonable endeavours was inconsistent with the strict liability interpretation contended for by the pursuers.

[17] The words "wholly responsible" related to Sub-Consultants, Contractor(s) or others appointed, and not to Other Consultants, which included the other defenders. The omission of "Other Consultants" was consistent with clause 22.2, which specifically absolved the first defenders of liability for their acts. Clause 7 and clause 22.2 contra-indicated the pursuers' interpretation of clause 5.1. Clause 22.2 dealt with precisely the present circumstances, in which the pursuers had instructed other parties to advise them on specific aspects of the development and now sought to criticise that advice. The complaint related to advice given to the pursuers by the second and third defenders about ground investigations. This was provided entirely independently of the first defenders. There was no explanation for the plain terms of clause 22.2 to be relaxed so as to render the first defenders liable in those circumstances. They would be unable to insure for such a liability.

[18] The pursuers' interpretation of clause 5.1 was not assisted by clause 3.8, which gave the first defenders "overall responsibility" for "co-ordinating" the Other Consultants. It did not support a "strict liability" interpretation of clause 5.1. It was not assisted by clause 3.15A, which gave the first defenders responsibility for the whole design relating to the "Build". That was a defined term which did not include Site Investigation Works. Part 15 of the Build Specific Agreement did not assist either. The words were too slender a basis upon which to impose strict liability for advice provided by other consultants. Part 15 concerned normal site investigations, and not Site Investigation Works, which was a defined term and with which clause 5.1 was concerned. The terms of the Build Specific Agreement were generally broad and uninformative. They contained no obligatory statement.

Decision

[19] The legal principles to be applied in relation to the construction of the Agreements are not in dispute. The court must ascertain the intention of the parties by determining what a reasonable person, having the background knowledge of the parties, would have understood from the language selected by them (*Arnold* v *Britton* [2015] AC 1619, Lord Neuberger at para 15, applied in *@SIPP Pension Trustees* v *Insight Travel Services* 2016 SC 243, Lady Smith, delivering the Opinion of the Court, at para [17] and *HOE International* v *Andersen* 2017 SC 313, Lord Drummond Young, delivering the Opinion of the Court, at para [19]). The meaning of the words used must be assessed having regard to other relevant parts of the Agreement. In the event that there are two possible constructions, the court is entitled to prefer one which is consistent with business common sense (*Arnold* v *Britton* (*supra*), Lord Hodge at para 76).

[20] The court agrees with the Lord Ordinary's assessment of the meaning of clause 5.1. The structure of the Agreement is one which appoints the first defenders as the lead consultant (clause 3.8). As such, they are made responsible for the overall progress of the particular "Build"; in this case the Gorebridge site. They carry the full responsibility for the "whole design" of the development (3.15A). However, that obligation is intended to embody the architect's usual responsibilities for overall co-ordination of the design works. It is not to be construed as an acceptance of liability for anything that might ultimately go wrong with the design, no matter what its cause. The nature and extent of the responsibility is not developed fully in section 3, but it is apparent from clause 3.16 that the parties were contemplating a standard which required the Consultant to use only "reasonable endeavours" to achieve an objective.

[21] Clause 5.1 is prospective in outlook; it is referring to work to be carried out in the future in respect of a particular Build. It renders the Consultant "wholly responsible" for the Site Investigation Works and surveys referred to in any Build. In relation to Gorebridge, that is a reference to the "Normal site investigations" to be carried out, and for which the Consultant is to obtain collateral warranties from the relevant contractor. It is not obviously referable to investigations, such as the ground investigations, carried out by the second defenders on the instructions of the pursuers. It is referring to work sub-contracted by the first defenders and thus over which they would have had some measure of control and contractual rights against the sub-contractor.

[22] Clause 5.5 is indicative of the first defenders assuming responsibility for the work of Sub-Consultants, being those appointed (prospectively) by them in relation to the particular Build, but that responsibility relates to their general skills and is limited to "reasonable endeavours" in that regard and in ensuring that the Sub-Consultants comply with legislation, guidance and procedures. Even in relation to the circulation of any report of investigations, clause 5.6 again limits this to making "reasonable endeavours" to ensure that, in relation to a particular Build, all relevant persons are aware of the contents of the report.

[23] It is clause 7.1 which, as the heading states, deals with the standard of skill and care to be used by the first defenders. This is "all reasonable skill and care" in carrying out the Services and the Build Services. This is again forward looking. Although clause 15.1 provides that the first defenders are to be responsible for the performance of obligations or Build Services by certain parties, this is specifically restricted to those to whom they have delegated (sub-consults or sub-contracts) work. It is not referable to "Other Consultants" not appointed by them. In relation to those appointed by the pursuers, the first defenders

have, in terms of clause 22.2, no responsibility other than a residual duty to warn the pursuers of any concerns about their performance.

[24] For these reasons, applying the test in *Arnold* v *Britton* (*supra*) the parties' intention, derived from the language used in its context, was not to impose any responsibility on the first defenders for a breach of contract, including negligent actings, by the second and third defenders. In respect of the work of these defenders, the first defenders required only to use reasonable skill and care.

[25] Even if that construction were not the only possible one, it is that which was consistent with business common sense. Although it may be open to a commercial enterprise to assume responsibility for the actings of another, with whom they have had no contractual relationship, whose specialist expertise would be outwith their own skill base and whose appointment preceded their own, it would be an unusual step and one carrying very considerable risks. These risks may not have been insurable by the first defenders. It would, in addition, be anomalous if the standard of skill and care owed by the first defenders for their own actions was "reasonable" but they were liable for those of the second and third defenders without qualification.

[26] The court will refuse the reclaiming motion and adhere to the interlocutor of the commercial judge, so far as affecting the parties to this motion for review, dated 11 August 2017.