FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 37
CA72/23

Lord President
Lady Wise
Lord Beckett

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

in the cause

FES LIMITED

Pursuers and Reclaimers

against

HFD CONSTRUCTION GROUP LTD

Defenders and Respondents

Pursuers and Reclaimers: G MacColl KC; Brodies LLP
Defenders and Respondents: O'Brien KC; Dentons UK and Middle East LLP

25 October 2024

Introduction

[1] This reclaiming motion (appeal) raises a question of contractual interpretation. The relevant clauses are based on the Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot) (2016 Edition).

Background and relevant contractual provisions

[2] In 2020, the parties entered into a contract, whereby the pursuers agreed to fit out a new Grade A office building at 177 Bothwell Street, Glasgow. The contract took the form of the Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot) (2016 Edition), with some bespoke amendments.

[3] Clause 4.20.1 provides that the pursuers can recover loss and expense for certain delays encountered during the contract works, subject to clause 4.20.2, and to compliance with clause 4.21. In full, it states:

> "Matters materially affecting regular progress
>
> 4.20.1 If in the execution of this Contract the Contractor incurs … any direct loss and/or expense as a result of any deferment of giving possession of the site … or because regular progress of the Works … has been or is likely to be materially affected by any Relevant Matter, he shall, subject to … compliance with the provisions of clause 4.21 be entitled to reimbursement of that loss and/or expense."

[4] Clause 4.21 of the contract contains certain notice provisions. It states:

> "Notification and ascertainment
>
> 4.21.1 The Contractor shall notify the Architect/Contract Administrator as soon as the likely effect of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from a deferment of possession becomes (or should become) reasonably apparent to him.
>
> 4.21.2 That notification shall be accompanied by or, as soon as reasonably practicable, followed by the Contractor's initial assessment of the loss and/or expense incurred … together with such information as is reasonably necessary to enable the Architect/Contract Administrator or Quantity Surveyor to ascertain the loss and/or expense incurred."

The clause continues by requiring updates (4.21.3) on the assessment of loss and by detailing (4.21.4) the subsequent obligation on the Architect etc. to determine the amount of the loss and/or expense. Time limits for this are specified.

[5] Something then goes awry with the inclusion of the bespoke clauses. Clause 4.21.5 reads:

> "have made reasonable and proper efforts to avoid or reduce such loss and expense".

Clause 4.21.6 states:

> "not be entitled to any loss and/or expense to the extent that the delay … is attributable to the negligence … of the Contractor …".

It may be that the words "The Contractor shall" should have appeared at the start of these clauses, but they do not. Clause 4.21.7 may be complete, although it commences with a lower case "any". It deals with concurrent causes of delay.

[6] During the project, the pursuers encountered various delays, including site closure due to the COVID-19 pandemic. A dispute arose about the pursuers' entitlement to an extension of time and their claim for related loss and expense. On 4 October 2022, the pursuers gave notice that they intended to refer that dispute to adjudication. An adjudicator was appointed. He issued his decision on 10 March 2023. He found that the giving of notice under clause 4.21.1 was a condition precedent of any entitlement to loss and expense under clause 4.20.1. Since the pursuers had not given the required notice, they had no entitlement to claim direct loss and expense. The adjudicator relied particularly on the words "subject to … compliance with the provision of clause 4.21" in clause 4.20.1.

[7] The pursuers raised the present action, in which they contend that the adjudicator erred in his interpretation of clauses 4.20 and 4.21. They seek declarator that the notice provisions in clause 4.21.1 are not conditions precedent to their entitlement to reimbursement for direct loss and expense. Following upon a debate, the commercial judge dismissed the action. He determined that the provisions did create a condition precedent.

The commercial judge's decision

[8] The commercial judge determined that the dispute turned on the correct construction of clause 4.20.1 and, in particular, whether it created a condition precedent to the contractor's entitlement. The rules on the interpretation of contracts were well-established. The court required to ascertain the intention of the parties. These are most obviously found by ascertaining the objective meaning of the language used. That involved a consideration of what a reasonable person, who had all the background knowledge available to the parties, would have understood the parties to have meant by that language in the context in which it was used. More or less weight would require to be given to elements of that wider context, depending on the nature, formality and quality of the drafting of the contract.

[9] Clause 4.20.1 had been drafted by skilled professionals. It came from the Standard Building Contract with Quantities (2016 Edition) which had been prepared by the Scottish Building Contract Committee. Exactly the same wording could be found in clause 4.20.1 of the JCT Standard Form of Building Contract (2016 Edition). The language used was clear and straightforward. It indicated that that the contractor's entitlement to reimbursement was "subject to… compliance with clause 4.21". That critical phrase would require to be ignored in order to interpret the clause, as the pursuers argued, as not creating a condition precedent.

[10] Although the pursuers had submitted that, as clause 4.20.1 did not spell out the consequences of non-compliance with the provisions of clause 4.21, the parties could not have intended the clause to be a condition precedent, the wording made it clear that, without such compliance, the contractor was not entitled to reimbursement. Clauses 4.21.1 to 4.21.4 contained procedural provisions. They set out a practical and workable set of steps for notification by, and the provision of information from, the contractor. Similarly worded provisions (*Walter Lilly* v *Mackay* [2012] BLR 503 at paras 461-466) did not give rise to any doubt

as to the existence of a condition precedent (cf *Scottish Power UK* v *BP Exploration Operating Co* [2016] 1 All ER (Comm) 536 at paras 194-196 and 204-223). The fact that clause 4.21.4 imposed obligations on the architect etc., and therefore could not be a condition precedent to the contractor's entitlement under clause 4.20.1, did not assist the pursuers. It was the contractor's compliance that was required and constituted the condition precedent. That construction flowed from a natural reading of the standard form clause 4.20.1.

[11] Construction of differently worded clauses was of limited assistance. The approach taken to the notification of loss claims in earlier editions of the JCT standard form were a useful aid. The pre-existing position in respect of JCT 63 and 98 was that the notification provisions created a condition precedent to the contractor's entitlement (*London Borough of Merton* v *Stanley Hugh Leach* (1985) 32 BLR 51 at 95 and *Walter Lilly* at paras 463-464).

[12] The parties' intention was clear from the language used in clause 4.20.1. Where the language clearly disclosed the parties' intention, it was not for the court to second guess what business common sense might otherwise have dictated (*Lagan Construction Group* v *Scot Roads Partnership* 2024 SC 12 at paras [10] and [11]). Even if such factors had to be considered, they did not favour the pursuers' construction. Construing clause 4.20.1 as a condition precedent served an intelligible purpose. That was recognised within the construction industry more widely (*Hudson's Building and Engineering Contracts* (14th ed), at para 5-040). The obligation to comply with clause 4.21 was not an unduly onerous one. The pursuers' argument was an example of retrospective invocation of business common sense against which the courts had warned (*Arnold* v *Britton* [2015] AC 1619, Lord Neuberger at para 19).

Submissions

Pursuers

[13] The commercial judge erred in holding that the notice provisions of clause 4.21 were conditions precedent. The judge failed to place sufficient weight upon the whole terms of the contract and the general legal and commercial context in which they were drafted. He placed too much weight on the use of the phrase "subject to…compliance with the provisions of clause 4.21".

[14] Clear words were required if a term were to be construed as a condition precedent (*Heritage Oil and Gas* v *Tullow Uganda* [2014] EWCA Civ 1048; at para 33). In the absence of clear language, the courts would not treat a provision as a condition precedent, but rather as a procedural requirement falling short of such a condition (*Obrascon Huarte Lain* v *Attorney General for Gibraltar* [2014] BLR 484 at para 312; Hudson, *Building & Engineering Contracts* (14th ed), para 6-068(1)). Whether a clause was a condition precedent depended on its form, its relationship to the contract as a whole and on general considerations of law (*Bremer Handels* v *Vanden-Avenne Izegem* [1978] 2 Lloyd's Rep 109 at 113). Express wording, reflective of the parties' intention that the clause would be enforced as a condition precedent, and the perils of non-compliance, was required (*Scottish Power UK* v *BP Exploration Operating Co* at paras 206–223).

[15] The parties had chosen to use the Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot) (2016 Edition) as the basis for their contract. That standard form was founded upon the JCT Standard Building Contract. The JCT had issued guidance that its terms did not provide for notifications to be conditions precedent to any entitlement for loss and expense. That guidance was written by one of the authors of the Standard Building Contract and was published by the JCT. The SBC/G/Scot *Standard Building Contract Guide for Use in*

Scotland (2016 Edition) made no reference to clause 4.21 being a condition precedent. The commercial judge's dismissal of this guidance, or his reading of it as merely relating to the issue of specific time limits within clause 4.21.1, was an error.

[16] Clause 4.20 did not state that clause 4.21 was a condition precedent. That phrase was not used in clause 4.20 or 4.21, but it had been used elsewhere in the contract (Schedule 7, Paragraph A.4.2). The parties had chosen not to deploy this clear choice of words in clause 4.20. The absence of an express statement of consequences pointed away from clause 4.20.1 containing a condition precedent (*Bremer Handels*; *Scottish Power*). Clause 4.20.1 meant that non-compliance with the notice provisions of clause 4.21 was a breach of contract which could sound in damages.

[17] It would not make commercial or practical sense if a breach resulted in *no* entitlement to recover loss or expense. The words "subject to … compliance with clause 4.21" ought to be construed as meaning that any failure to comply with clause 4.21 would be reflected in any ultimate assessment of loss or expense, but would not bar any and all recovery. This approach avoided the brutal literalism that the court had cautioned against (*Ashtead Plant Hire Co* v *Granton Central Developments* 2020 SC 244 at para [16]). The consequences of the judge's approach were illogical and bordered on the oppressive. They resulted in a situation in which if, at any stage in the process of a claim, any one of the requirements of clauses 4.21.1 to 4.21.7 were breached, the pursuers would be disentitled from any reimbursement. The judge had sought support for his analysis from Hudson, but it only stated that the giving of an initial notice was "usually" a condition precedent. Hudson noted, under reference to *Obrascon Huarte Lain*, that the courts were generally reluctant to treat the requirement of initial notices as preclusive.

[18] It was not reasonable to suggest that the parties would intend to make compliance a condition precedent if it was unclear exactly what compliance required. For example, initial notice was to be given under clause 4.21.1 "as soon as the likely effect" of an event was known or should have been known. Both the trigger and the time limit for giving that notice were imprecise and uncertain. The claim for the delay was some £1.8m. Parties were not likely to have contracted on the basis that the whole claim would be lost if it were thought that the claim had not been made "as soon as" the loss became apparent.

Defenders

[19] The clauses had to be interpreted in accordance with the well-established principles (*Lagan Construction Group* v *Scot Roads Partnership* at paras [10]-[11]). The commercial judge correctly interpreted clause 4.21 as a condition precedent to any claim under clause 4.20. Whether a clause created a condition precedent was a question of contractual interpretation, to which the normal principles applied (*Teeside Gas Transportation* v *CATS North Sea* [2019] EWHC 1220 (Comm)). In deciding whether a clause was a condition precedent, the court would consider the form of the clause, its relation to the contract as a whole, and general considerations of law (*Bremer Handels* v *Vanden Avenne Izegem* at 113). No particular words were required (*Heritage Oil & Gas* at para 35). If a particular clause were a condition precedent, the court could take that fact into account when assessing what was required by way of compliance. This suggested that a reasonably broad and practical standard would be applied in assessing whether the condition had been met (*Obrascon Huarte Lain* at paras 311-312).

[20] Clauses 4.20 and 4.21.1 to 4.21.4 were taken from the standard form contract. Clauses 4.21.5 to 4.21.7 were bespoke. The key parts of clause 4.20 were the words "subject to…compliance with the provisions of clause 4.21". To achieve compliance with the provisions

of clause 4.21, the pursuers required to: give notice under clause 4.21.1; provide an initial assessment under clause 4.21.2; and provide monthly updates of that assessment under clause 4.21.3. These clauses identified the circumstances in which the right to reimbursement was to be allowed. Clauses 4.21.5 and 4.21.6 were not procedural but dealt with quantum.

[21] The words in clause 4.20.1 were unambiguous (cf *Scottish Power UK* v *BP Exploration Operating Co*). Their natural and ordinary meaning was that the entitlement to reimbursement was subject to a condition. That condition was compliance with clause 4.21. The words "subject to … compliance with the provisions of clause 4.21" stood in contrast to the words "subject to clause 4.20.2" in the same clause. It made no difference that the words "condition precedent" were not used. The relevant clauses were the work of skilled professionals. That pointed towards an emphasis on textual analysis and the natural and ordinary meaning of the words. The pursuers' interpretation of the clause required the court to delete or ignore the words "subject to … compliance with the provisions of clause 4.21".

[22] There was no role for interpretive tools such as commercial common sense. Clauses 4.20 and 4.21 served a clear commercial purpose. Timely notification enabled contemporaneous investigation into a Relevant Matter and its effects. It might enable steps to be taken to mitigate the effects of the delay. The condition precedent prevented prejudice to an employer and prevented a contractor from gaining an advantage. The contractual scheme was that any claims by the contractor were to be made through the clause 4.21 procedure, or not at all. The obligations on the contractor were framed in terms of what was reasonably necessary. The court would take a practical approach in assessing whether compliance had been achieved (cf *Walter Lilly* v *Mackay* [2012] BLR 503, at paras 463-468).

[23] The pursuers' argument could only succeed if the commercial judge were prepared to ignore the words "subject to … compliance" entirely. The JCT's official guidance could not

affect the unambiguous language of clause 4.20. Commercial common sense was not relevant. Even if there had been an ambiguity, such clauses were recognised within the construction industry as having an intelligible purpose. The fact that a breach of clause 4.21 might sound in damages could not detract from unambiguous words.

Decision

[24] Clause 4.20.1 must be construed according to the well-established rules on the interpretation of contracts. The search is for the intention of the parties, gleaned from the language which the parties have chosen to use (*Lagan Construction Group* v *Scot Roads Partnership Project* 2024 SC 12, LP (Carloway), delivering the opinion of the court, at para [10]). Where, as here, the contract has been prepared by skilled professionals, it may be appropriately interpreted principally by textual analysis (*ibid*, citing *Wood* v *Capita Insurance Services* [2017] AC 1173, Lord Hodge at para 13). If there were no words, which indicted that a claim for loss was to be conditional on compliance with what might otherwise be classified as procedural requirements, there would be no reason to read in any such conditionality (*Scottish Power UK* v *BP Exploration Operating Co* [2016] 1 All ER (Comm) 536, Leggatt J at para 206). The fundamental problem with the pursuers' position is that there are such words, *viz.* the clause which states: "subject to … compliance with the provisions of clause 4.21". The pursuers' construction would require the court to ignore those words.

[25] The court is not being asked to assess whether there has been compliance with clauses 4.21.1 or 4.21.2, in the sense of determining whether the pursuers did notify "as soon as" it became "reasonably apparent" that loss had arisen and whether an initial assessment had been sent "as soon as reasonably practicable". All of these terms are relatively flexible and, if it were called upon to do so, the court would approach them in that light; no doubt affording the

pursuers considerable leeway, given the consequences of non-compliance. The question posed to the court is in the accepted context of there having been no notification in terms of clause 4.21.1. The answer to the question must be either that compliance is a prerequisite to recovery or it is not.

[26] Since there is no ambiguity in the wording, there is no need to analyse what may be regarded as commercial common sense. If there were, it would be of little assistance to the pursuers. The need to be duly notified and advised of the potential liability within a limited (but not certain) time span is a reasonable condition before a claim could be considered and ultimately determined. There is no nonsensical or absurd result arising from giving the words in the clause their ordinary or plain meaning in the context of the contract, or clauses 4.20 and 4.21, as a whole.

[27] There could have been some force in the pursuers' contention in relation to non-compliance with clauses 4.21.5 and 4.21.6, if, as seems reasonable, the words "The Contractor shall" were inserted at the start of each one, were it not for the obvious nature of the drafting error whereby clause 4.20 included not only the standard clauses 4.21.1 to 4.21.3, but also the bespoke clauses 4.21.5 and 6. These latter clauses are not requirements for a claim to be made but are concerned with the quantification of any claim. The pursuers' argument on clause 4.21.4 is misplaced because the necessary compliance in clause 4.20.1 is that of the Contractor and not the Architect.

[28] The absence of ambiguity means that, although it may be useful to look at extraneous material to provide context for the debate, that material cannot override the plain meaning of the words used (*Lagan Construction* at para [11]). The result is that the court will refuse the reclaiming motion and adhere to the interlocutor of the commercial judge.