EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2007] CSIH 47

CA5/05

OPINION OF THE COURT

delivered by LORD KINGARTH

in

RECLAIMING MOTION

in the cause

GLASGOW AIRPORT LIMITED

Pursuers and Respondents;

against

MESSRS KIRKMAN & BRADFORD

Defenders and Reclaimers:

_____

Lord Kingarth

Lord Eassie

Lord Wheatley

Act: Woolman, Q.C., Gardiner; Brodies (Pursuers and Respondents)

Alt: Moynihan, Q.C., Fairley; Dundas & Wilson CS, LLP (Defenders and Reclaimers)

6 June 2007

[1] In 1998 the pursuers and Fritz Companies Inc. (now known as UPS Supply Chain Solutions Inc.) ("the tenants") entered into missives and an Agreement for Lease relative to Block 2, Unit A, Ayr Cargo Centre, Douglas Terrace, Glasgow Airport. In terms of clause 2 of the Agreement for Lease the pursuers were obliged to proceed with the construction of "the Landlord's works", which were defined as "the works to be carried out by or on behalf of the Landlord in the construction of the Premises ... as more particularly shown on and described in the Plans and Specifications." In terms of said clause 2, the pursuers further undertook "to procure that the Landlord's Works will be carried out in a good and workmanlike manner in accordance with good building practice using good quality materials of their several kinds ...". It was understood under the Agreement for Lease that the relevant works would be carried out under and in terms of a building contract to be let by the pursuers for the design and construction of the premises. The pursuers, as employers, (together with another company, BAA Lynton plc) entered into the relevant building contract with Kensteel Structures Limited as main contractors. In relation to the floor slab the defenders, who are consulting engineers, were engaged in respect of its design, and A.J. Clark Construction Limited were engaged as specialist sub-contractors. The defenders were engaged by virtue of an Appointment dated 10 November 1997 by the main contractor. Their liability thereunder was limited to £2 million.

[2] In the present action the pursuers seek to recover £2 million with interest as damages for breach of a collateral warranty provided by the defenders on 18 June 1999. It is averred that the tenants, after taking occupation of the premises, experienced serious problems and difficulties with the floor slab. The pursuers claim that the problems were the result of the defenders' failure to exercise reasonable skill and care in the

performance of their duties under the Appointment. The defenders deny liability and further claim *inter alia* that any liability to the pursuers has prescribed.

[3] The preamble and clause 1(a) of the warranty (in which the pursuers and BAA Lynton plc are referred to as "the Employer" and the defenders are referred to as "the Sub-consultant") are in the following terms:

"WHEREAS

A. The Employer has entered into an agreement with Kensteel Structures Limited ('the Building Contractor') under which the Building Contractor is to design and construct the Phase 2 Building A Shell and Fit Out Works at the Air Cargo Centre, Douglas Terrace, Abbotsinch Road, Glasgow Airport ('the Works').

B. By an appointment ('the Appointment') dated 10th day of November 1997 the Contractor has appointed the Sub-Consultant to carry out and complete the Services as described in the Appointment.

NOW IT IS HEREBY AGREED

1. The Sub-Consultant warrants that it has exercised and will continue to exercise reasonable skill, care and diligence in the performance of the Services under the Appointment. In the event of any breach of this warranty:

(a) The Sub-Consultant's liability for costs under this Agreement shall be limited to that proportion of such costs which it would be just and equitable to require the Sub-Consultant to pay having regard to the extent of the Sub-Consultant's responsibility for the same and on the basis that the Contractor and its sub-consultants and sub-contractors shall be deemed to have provided contractual undertakings on terms no less onerous than this Clause 1 to the Employer in respect of the performance of their obligations in connection with the Works (other than those obligations which relate to the Services) and shall be deemed to have paid to the Employer such proportion which it would be just and equitable for them to pay having regard to the extent of their responsibility".

[4] Other relevant clauses provide:

"1(b) The Sub-Consultant shall be entitled in any action or proceedings by the Employer to rely on any limitation in the Appointment and to raise the equivalent rights in defence of liability as it would have against the Contractor under the Appointment. ...

6 The Sub-Consultant shall take out and maintain professional indemnity insurance in an amount of two million pounds (£2,000,000) for any occurrence or series of occurrences except for pollution and contamination which will be for any one claim and in total during each twelve month period arising out of any one event for a period of 12 years from the date of Practical Completion of the Works under the Building Contract ... .

7 This Agreement may be assigned twice by either party comprising the Employer to another person taking an assignation of the Employer's interest in the Works without the consent of the Sub-Consultant being required and such assignation shall be effective upon written notice thereof being given to the Sub-Consultant. No further or other assignation of this Agreement shall be permitted save as is expressly provided for herein.

9 No action or proceedings for any breach of this Agreement shall be commenced against the Sub-Consultant after the expiry of 12 years from the date of Practical Completion of the Works under the Building Contract."

[5] In the present action the damages claimed by the pursuers are said in the pleadings to cover sums relating to the replacement of the floor slab and sums in respect of the pursuers' liability to meet claims by the tenants for losses sustained by them due to the remedial works. Parties were agreed in submission that the

background to the claim is that the tenants have raised an action against the pursuers seeking damages of £2.15 million, in which they seek to recover their expenses in relation to the replacement of the floor slab (in the sum of £775,000) and their losses in respect of disruption to their business and loss of profits. Although in their pleadings the defenders admit that they were advised that the tenants were to be the end users of the premises, they aver (in Answer 10) *inter alia*:

"Further, any liability of the defender to the pursuer is limited to costs and does not extend to any damages payable by the pursuer to UPS Supply Chain Solutions Inc. Reference is made to the terms of clause 1(a) of the collateral warranty. Properly construed, the 'costs' recoverable by the pursuer under the collateral warranty are limited to the costs of repair, renewal and/or reinstatement of any part or parts of the works."

[6] Following debate, the Lord Ordinary, by interlocutor dated 8 March 2007, excluded these last-quoted averments from probation. It is against that interlocutor that the defenders have now reclaimed.

[7] In presenting his submissions on behalf of the defenders and reclaimers, senior counsel explained that the background to the present action was that the main contractors were insolvent. Although the court should be aware of the general contractual background (and that a number of collateral warranties were given by and to different parties, and that a number of actions had been raised) the short question of construction of the collateral warranty raised in the reclaiming motion could essentially be decided by reference to the terms of the collateral warranty itself. It was not necessary for the court to have sight of the main contract or of the Appointment or of any other warranties given. Properly understood, the defenders' "liability for costs", referred to in the collateral warranty, was confined to any sums which the pursuers required to pay in respect of repair or reinstatement of the floor slab, whether incurred directly by themselves or indirectly by way of damages payable to the tenants in respect of expenditure incurred by them on such repair or reinstatement. Their liability did not extend to consequential losses. While no doubt the general purpose of the collateral warranty was to give the pursuers direct rights against the defenders which they would not otherwise have had, absent privity of contract, any such collateral warranty granted by a contractor or sub-contractor could, depending on its terms, involve the undertaking of a more restricted liability than was undertaken under the relevant contract or sub-contract. Reference was made to *Greater Nottingham Co-op Society Ltd* v *Cementation Piling and Foundations Ltd* 1989 Q.B. 71 and *Alfred McAlpine Construction Ltd* v *Panatown Ltd* 2001 1 A.C. 518. On any view it was clear that the defenders' liability under the collateral warranty could not have been for more than the "liability for costs" referred to in clause 1(a). In particular it would not make commercial sense to restrict their liability to a net contribution in respect of some losses (which, on any view, was one purpose of clause 1(a)) leaving them exposed to joint and several liability for other losses.

[8] As to what was meant by "liability for costs" senior counsel did not seek to argue, by reference to dictionaries or the like, that the word "costs", looked at simply as a matter of language, was more consistent with the defenders' contention rather than the pursuers'. The word was wide enough, depending on the context, to cover a payment of damages (*Bank of Scotland* v *Dunedin Property Investment Co Ltd* 1998 S.C. 657). Although a provision of a contract limiting liability required to be clear (*Ailsa Craig Fishing Co Ltd* v *Malvern Fishing Co Ltd* 1982 S.C. (H.L.) 14), and matters could have been better expressed, it was reasonably clear that the opening part of clause 1(a) served the purpose of limiting, restricting or defining the defenders' liability under the warranty, and that in the way for which the defenders contended - the rest of the clause serving as a net contribution clause. Although it was accepted that the claims presently made by the pursuers could not have been resisted on the basis that they were too remote by the main contractor if sued under the building contract, nor by the defenders if sued in turn by the main contractor under the Appointment, it was reasonable to suppose that in granting the collateral warranty the defenders undertook liability only for losses which would comply with the first rule of *Hadley* v *Baxendale* [1854] 9 Exch. 341 ("such as may fairly and reasonably be considered ... arising naturally"), namely costs of repair or reinstatement (reference being made to *Chitty on Contracts* (29th ed.) at para.37-208), but not for losses which could only, in ordinary course, be claimed if they complied with the second rule ("such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it"), such as any consequential loss (reference again being made to

Chitty, para.37-210). This was particularly so given that the benefit of the warranty could be assigned, and the defenders might accordingly be liable in the future to indeterminate parties in unknown circumstances. So construed, the collateral warranty would in its effect be broadly consistent with the Scottish Building Contract Committee standard form collateral warranties referred to in *Stair Memorial Encyclopaedia,* vol.3, para.158. It was reasonable to suppose that the defenders would undertake liability not only for expenditure on repair or reinstatement directly incurred by the pursuers themselves, but also for damages payable in respect of such expenditure incurred by the tenants. Reference was made to Lord Millett's (dissenting) speech in *Alfred McAlpine Construction Ltd* v *Panatown Ltd*, at p.595.

[9] For the pursuers and respondents senior counsel argued that there was no warrant in the language or structure of the warranty to construe it in the way which the defenders sought to do. The liability undertaken in the first full paragraph of the warranty in clause 1 was unrestricted, and, unless restricted elsewhere, the pursuers would be entitled to recover all losses caused by breach of that warranty subject, of course, in any case, to satisfying ordinary common law tests of remoteness, such as those set out in *Hadley* v *Baxendale* and other later cases. Clause 1(a) was not, as a matter of language, apt to restrict such losses. Its only purpose was to provide for a net apportionment. In these circumstances the costs referred to covered any financial detriment suffered by the pursuers as a result of the defenders' breach of the warranty, subject to ordinary rules of remoteness. Clause 6 and clause 1(b) were wholly consistent with such a construction. The fact that the warranty was assignable, which, it was to be noted, was to a restricted class, did not assist the defenders.

[10] In light of the parties' arguments it is clear that certain matters are not seriously in dispute. In the first place, while the broad aim or object of the collateral warranty, objectively ascertained, could be said to be to give the pursuers directly enforceable rights against the defenders which they would not otherwise have had, beyond that it is difficult to say more. While it would make commercial sense from the point of view of the pursuers to obtain the same rights that they would have in any claim against the main contractor, equally it would make commercial sense for the defenders, who were accepting a liability which they would not otherwise have had, to restrict that liability so far as could reasonably be negotiated. Secondly, it seems clear that whatever the words "liability for costs" mean (for which liability there was to be a net apportionment of responsibility in terms of clause 1(a)) they must describe the defenders' whole liability under the warranty. It would not, on the face of it, make commercial sense for them to have undertaken liability for wider losses, to be met on a joint and several basis. Further the parties are agreed that, purely as a matter of language, the word "costs" could not be said to favour one or other of the interpretations contended for, and that the answer to the point at issue depends upon the context.

[11] In our view this narrow question of construction falls to be resolved by consideration of the express terms of sub-clause 1(a) and its relationship with the general warranty granted at the outset. Sub-clause 1(a) refers to "the Sub-Consultant's liability for costs under this Agreement" in terms which clearly suggest that it is elsewhere under the agreement (and in particular earlier) that the basis for that liability is to be found. It is, in particular, not language apt to suggest an intention to restrict the liability of the defenders from that which would otherwise flow from the terms of the agreement. It does not, in terms, say that the liability of the defenders shall be restricted to costs. The only place where "liability for costs" can be said to arise is from the warranty granted at the outset. That warranty is granted in general and unqualified terms and would, unless clearly restricted, entitle the pursuers to recover all losses directly caused by its breach, subject always to ordinary common law rules of remoteness of damage, as set out in *Hadley* v *Baxendale* and other cases. That apparent liability of the defenders is, it seems, then made subject to (i) a net apportionment having regard to the responsibility of others (clause 1(a)), (ii) any limitation or rights in defence of liability as the defenders would have against the main contractor (clause 1(b)), and (iii) a 12 year limitation (clause 9). Sub-clause 1(b), read along with clause 6, is, indeed, in our view entirely consistent with the construction contended for by the pursuers. We are not persuaded that the fact that the warranty is assignable has the significance contended for by the defenders. In these circumstances it is, we think, clear that the defenders' liability for costs within the meaning of the collateral warranty falls to be given the wider meaning contended for by the pursuers, and would therefore include, subject to ordinary common law rules of remoteness, consequential losses suffered by the pursuers as a direct result of the defenders' breach. By contrast it would appear, at least

from the commentary in the *Stair Memorial Encyclopaedia* to which we were referred, that the language and structure of the SBCC collateral warranties is very different.

[12] That is enough to dispose of the question raised in the reclaiming motion. In addition, however, we think there are certain difficulties with the particular narrower construction which the defenders now seek to advance, accepting as they do that the word "costs" would cover not only the pursuers' own expenditure on repair or reinstatement, but also any corresponding liability in damages to the tenants. Although senior counsel now appearing for the defenders and reclaimers understood that his submission did not represent a change of position from that previously adopted by his predecessor, it is not an argument which is focused in the pleadings, nor is it apparent that it was an argument which was advanced before the Lord Ordinary. At paragraph [6] of his Opinion he records that senior counsel then appearing laid particular stress on the dictionary definition of the word "costs", and argued that it "did not mean the same as damages". Be that as it may, we consider there is no warrant in the language or structure of the warranty for the construction now urged upon us, which might be thought to fall, as it were, between two stools. Nor do we think the defenders' argument gains any assistance on this point from the passage in *Alfred McAlpine Construction Ltd* v *Panatown Ltd* to which we were referred.

[13] In these circumstances the reclaiming motion is refused.