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Insights

SHIFTING CONTRACTUAL RISKS AND MANAGING ELECTRONIC CONTRACTS

Apr 09, 2025

SUMMARY

In this Insight, Shy Jackson takes a look at the decision of John Sisk and Son Limited v Capital & Centric (Rose) Limited [2025] EWHC 594 (TCC) where the court had to grapple with interpreting a contract which was kept on a USB drive as well as a bound hard copy, where the key provisions were in a spreadsheet, which included hidden columns, and where the electronic version included a document which did not appear in the paper version.

Not surprisingly, there was an argument between the parties about how it all worked and which party was responsible for the risk of existing structures. In an adjudication, the contractor was unsuccessful and was held responsible for that risk. The contractor therefore commenced a Part 8 claim, seeking a declaration about the interpretation of the contract provisions.

THE CONTRACTUAL PROVISIONS

The works involved the design and construction of two residential buildings, together with the refurbishment of two listed mills and other existing buildings. The parties used the JCT 2016 D&B form of contract, with extensive amendments. Under the standard form, Existing Structures are a defined term and are dealt with under Section 6 as part of the insurance provisions. Here, however, there were extensive amendments that affected the risk allocation.

The amended Third Recital stated, among other things, that, subject to item one of the contract clarifications, the Contractor has examined the Employer's Requirements and was satisfied as to the feasibility and practicality of the Employer's Requirements and accepted full responsibility for any design contained in them. Item one of the contract clarifications, however stated that the Employer retained all risk for the original concept design and feasibility of project.

The third contract clarification stated that "*Employer Risk which will be passed to [contractor] upon receipt of Letters of reliance and/or warranties for all surveys referred and included within ER's. All*

other surveys (including those in the ER's) remain responsibility of the contractor".

There were also bespoke clauses that addressed the related risks. Clauses 2.42.1 to 2.42.3 made it clear that the Employer was giving no warranty or representation as to the condition of the site and existing structures or any site date and that the Contractor was deemed to have inspected and satisfied itself as to the site conditions and has had the opportunity to inspect the physical condition of the site and existing structures.

Clause 2.43.4, however, said that clause 2.42 was subject to item 2 of the contract clarifications, a document defined as contained within Volume 2, Appendix 2.9 of the Employer's Requirements.

The contract documents schedule identified that Section 2.9 was a "Clarifications Schedule", which was produced jointly as an excel workbook. Article 4 identified the Employer's Requirements as documents contained on the USB stick under folder Volume 2 and scheduled in the contract register. It was therefore clear that the electronic version was a contract document, as was the hard copy.

The electronic version of the workbook however had two clarification documents, one headed "Contract Clarifications" and one headed "Tender Submission Clarifications" as two separate worksheets.

The "Contract Clarifications" document had three columns, the first was numbered and the other two were headed "[Contractor] Clarification" and "Comments/Risk Owner". The paper copy was identical and initialled on behalf of both parties. Under the "Comments/Risk Owner" column it was stated "*The Employer is to insure the Existing buildings/ works. Employer also to obtain warranty from Arup with regard to the suitability of the proposed works. Employer Risk*".

The other worksheet headed "Tender Submission Clarification" was not referred to in the contract schedule and was not included in the hard copy. It had nine columns and it became clear that column F, which included the Employer's response was hidden, although the judge observed this was done to avoid unnecessary scrolling to the right, as this columns had been overtaken (and there was no suggestion this was a deliberate strategy).

The relevant item had more detailed comments, including a request for the Employer to warrant site conditions that was rejected, but the final two columns stated, under 'Position Agreed/Discussed in Meeting on 22.03.2022' that "*Confirmed in the meeting that this is to clarify the employer is to insure the buildings in line with JCT option C*" and in the final column under 'Sisk Response 24-03-22' it stated "*Agreed*".

The Contractor argued that the "Tender Submission Clarification" was not part of the contract and that the "Contract Clarifications" made it clear the Employer took the risk of existing structures. The Employer argued the exchanges in the "Tender Submission Clarification" showed the Employer did not agree to take that risk.

THE COURT'S APPROACH TO INTERPRETATION

Before looking at the contractual wording, the judge considered that it was necessary to look at the consultant's position, noting that Arup was employed to undertake pre-contract investigations and there was provision for Arup to be novated, so that the Contractor could make claims in respect of services that were provided before the novation.

In addition, the judge also thought it was necessary to look at the insurance provisions, noting that Option C.1 applied. In his view, the Specified Perils would not include intrinsic defects or unsuitability in existing structures and the All Risks Insurance might provide some cover but not consequential losses such as delay related costs. He observed that using Option C.1, together with the contract clarification, demonstrated an internal consistency as well as, possibly, unnecessary surplusage.

Having identified the wider context, the judge also made it clear that there was no basis in this case for looking at the pre-contractual negotiations. He therefore proceeded to look at the contract documents on their own, and he held that based on the contractual definition, the qualification in clause 2.42.4 to the wider risk transfer in clauses 2.42.1 to 2.42.3 could only mean the specific "Contract Clarifications" and not the entire workbook or the "Tender Submission Clarification".

But it was still necessary to decide what the relevant words meant. The judge considered the wording under the heading of "Comments/Risk Owner" and held that the first sentence reflected the intention to use Insurance Option C.1, which was an allocation of responsibility for insurance but not an allocation of risk.

Moving onto the second sentence that referred to Arup providing a warranty, he recognised this was not clear but, in the context of the clarification against which this comment appears, he found that this could only be understood as a rather loose shorthand for a warranty of the suitability of the existing structures to support and facilitate the proposed works. The judge however stated that the risk of unforeseen obstacles may or may not be related to a breach by a consultant. In his view, these words were simply meant as a comment that the Employer was responsible for obtaining any such warranty.

This meant the judge had to consider the final words, "Employer Risk". He held that these words, when read against the column heading and the clarification, meant that the Employer was the "risk owner", i.e. it held the contractual risk as to the suitability of the existing structures including their suitability to support and facilitate the contract works. This was consistent in his view with the first contract clarification, as well as the third contract clarification which referred to risk passing to the Contractor on provision of letters of reliance or warranties (which the judge observed was different from the novation process).

The Contractor was therefore successful in obtaining a declaration to the effect that the Employer was responsible for the risks associated with the existing structures.

CONCLUSION

It is not unusual for parties to include various tender communications as a contract document and this is sometimes done in order to add clarity as to what has been agreed. This case, however, demonstrates the risks of such an approach, which meant in this case the full effect of any risk allocation has to be derived from the combination of the various contractual provisions, some of which appear in the main body of the contract and some of which are part of an appendix to the Employer's Requirement. In practice, tender communications are not drafted in order to set out contractual obligations and there are likely to be less certain and precise than standard or bespoke contractual clauses.

In this case, matters were further complicated by the fact that the spreadsheet included two worksheets referring to clarification, both of which were held to be contract documents, but only one of which was included and initialled in the hard copy. In this case, neither party made an argument based on estoppel or contract rectification and while such arguments may be an option in such situations, such arguments will not be straightforward and will require additional evidence.

This decision is also a useful reminder that the courts will not usually look at pre-contractual communications in order to interpret a provision, which emphasises the need to get the wording right. Similarly, this is also a reminder that clauses should not be considered in isolation, and in this case the insurance provision, as well as the arrangements with the consultant, were taken into account by the judge. Overall, the facts in this case were perhaps unusual, but they serve to highlight the importance of making sure the documents included in the contract are considered together as a whole and how interpretation should be approached where there is a potential inconsistency.

RELATED PRACTICE AREAS

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Shy Jackson

London

shy.jackson@bclplaw.com
+44 (0) 20 3400 4998
