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Construction Law Update

Interpreting Contracts: The Need for Clear Words

The principles governing the interpretation of contracts have been the subject of several recent cases in the Supreme Court and whilst those principles may now be settled it is clear that the application of them is far from simple. In the recent case of Midlothian Council (the "Council") v Bracewell Sterling Architects "(Bracewell"), the Scottish Courts explored the interpretation and application of those principles.

Background

In 2005 Bracewell were appointed by the Council as Lead Consultant under a Framework Agreement designed to cover a number of individual building sites, each subject to a short Build Specific Agreement. The Council also appointed Raeburn Drilling and Geotechnical Ltd "(Raeburn") to carry out ground investigations and RPS Planning and Development Ltd ("RPS") to review Raeburn's report.

In around 2014, one of the developments consisting of 64 newly-built homes, became uninhabitable as a result of the ingress of carbon dioxide from disused mine works. The Council claimed £12 million in respect of loss and expense on the basis that investigations ought to have prompted a recommendation to install a ground gas defence system.

The terms of the Framework Agreement

Clause 5.1 of the Framework Agreement provided that, for each site, Bracewell would carry out any site investigation works and surveys as may be necessary. Further, Bracewell was wholly responsible for the site investigation works and surveys irrespective of the appointment of any sub-consultants, contractors or others appointed.

Clause 7.1 provided that Bracewell would exercise all reasonable skill and care in the performance of the services under the framework agreement.

Clause 22 provided that Bracewell would be responsible for any sub-consultants it appointed, but not for the services provided by any party appointed by the Council, save for a residual duty to warn as to their performance.

Was Bracewell responsible for the work of others?

The sole issue in the case was whether, under the terms of the Framework Agreement, Bracewell were responsible for the site investigations carried out by Raeburn and RPS. The Court had to ascertain what the intention of the parties was by determining what a reasonable person, having the background knowledge of the parties, would have understood from the language used by them. If there were two possible constructions, the Court was entitled to prefer the one which is consistent with business common sense.

The Court held that Clause 5.1 was prospective in outlook and therefore only applied to work which was carried out by parties appointed by Bracewell and over which they would have a measure of control. It did not apply to investigations which were carried out by others, such as Raeburn and RPS, on the instructions of the Council.

If another construction of the terms was possible, the Court said that its conclusion was consistent with business common sense. Whilst it was open to a commercial party to assume responsibility for the acts of others, it would be unusual, carry considerable risks and the wording conferring such a responsibility would have to be clear and unequivocal. Further, in this case, it would have been anomalous for Bracewell to exercise reasonable skill and care in respect of its own actions yet strictly liable for the acts of third parties.

Analysis

The Court reiterated the recent decisions of the Supreme Court in respect of contractual interpretation

and noted the application of commercial common sense is only appropriate where there is more than one possible interpretation of the terms. The decision reiterates the need for clear and unambiguous language if the parties intend for one of them to undertake a particularly onerous obligation. Whilst the language used by the parties will be key, the Court will assess the meaning of the words having regard to other parts of the Agreement. In this case, the Court noted that the Council's interpretation would have imposed risks on Bracewell which it may not have been able to insure against and would have imposed a higher standard of care on Bracewell for the work of others compared to its own work. It was therefore unlikely that the parties had reached the agreement put forward by the Council and the appeal failed.