FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 28
CA70/22

Lord President
Lord Pentland
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the cause

LAGAN CONSTRUCTION GROUP LIMITED (IN ADMINISTRATION) AND IAN LEONARD AND STUART IRWIN AS THE JOINT ADMINISTRATORS THEREOF

Pursuers and Respondents

against

(FIRST) SCOT ROADS PARTNERSHIP PROJECT LIMITED;
(SECOND) FERROVIAL CONSTRUCTION (UK) LIMITED

Defenders and Reclaimers

Pursuers and Respondents: Barne KC; Morton Fraser LLP
Defenders and Reclaimers: McLean KC; Lindsays LLP (first defenders); Dentons UK and Middle East LLP (second defenders)

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18 July 2023

Introduction

[1] This litigation concerns construction of a contractual provision containing a defined term. The clause states that certain monies are to be returned to "the Contractor". The contractor is defined as a joint venture between the pursuers and the second defenders, namely Ferrovial Agroman (UK) Ltd as they were then called. The first defenders have paid

the monies to that joint venture. The pursuers maintain that they should not have done so. They say that "the Contractor" should be construed as referring solely to themselves, ie Lagan Construction Group Ltd. The commercial judge sustained the pursuers' approach.

The Contract

[2] In June 2013 the pursuers and the second defenders formed a joint venture, using the name Ferrovial Lagan JV. The joint venture agreement is governed by the law of England and specifically excludes the joint venture from being a partnership (clause 3.4.1 and 3.2.1). The purpose of the joint venture was to carry out works for the first defenders on several motorways. On 13 February 2014 a New Works Agreement (NWA) was entered into between the first defenders (Project Co) and the joint venture, with each of the pursuers and second defenders signing the contract.

[3] The NWA has some 80 clauses and 26 schedules (some "not used"). It is over 200 pages long. It has over 30 pages of defined terms. It has the air of being stitched together from similar contracts, rather than being bespoke. All parties had legal advice before signing the final version, there appearing to have been some 21 earlier versions.

[4] Two defined terms are at the core of the dispute. First, in the instance, "(the Contractor)" is said to be "Ferrovial Lagan JV, an unincorporated joint venture between" the second defenders and the pursuers. Secondly, as a defined term (clause 1(1)), "Contractor Company" means "any company forming part of the Contractor". It is made clear that "Contractor" and "Contractor Company" mean different things for the purposes of the contract.

[5] The NWA required the Contractor to "procure that each Contractor Company shall perform its obligations" under the Construction Documents (clause 5.1). It provided that the

Contractor shall deliver to Project Co "Acceptable Letter of Credit procured by each Contractor Company in favour of Project Co" in a particular form (5.3.5 and schedule 24). These letters, in conjunction with performance bonds and parent company guarantees, were designed to ensure that the contract works were carried out and any defects either remedied or compensated for. Should an insolvency event occur (eg administration), the relevant Contractor Company required to advise Project Co (5.5.3) and either to replace the letter of credit or instruct the issuer of the letter to transfer the amount in the letter into "the Contractor Security Account" (5.5.4), which failing Project Co could demand such a payment be made under the letter into that account. The account is defined as that into which payment is to be made in terms of clauses 5.5.4 and 12.1A. The latter entitles Project Co to deduct from the account, or demand payment under the Letter of Credit of, an amount sufficient to remedy any defects. Although not expressly referred to, the holder of the account would be Project Co.

[6] Both Contractor Companies obtained Letters of Credit; the pursuers' letter being about 20% of the total amount to be the subject of the Letters. The pursuers' letter was from Danske Bank and was for about £3.7m as at the date of final completion (20 June 2019). The letters were duly delivered to Project Co by the joint venture. On 5 March 2018, the pursuers went into administration. This resulted, under the joint venture agreement (clause 6.7), in the pursuers' exclusion from further participation in the management and profits of the joint venture; albeit they would continue to be liable to share any losses. Project Co insisted on payment of the Letter of Credit sum into the account and that was done by the Bank. In due course (20 June 2020) the "Letter of Credit Discharge Date" arrived. This triggered the application of the following clause:

> "5.5.6 Return of Letter of Credit Monies

> Project Co shall return to the Contractor by transfer into a bank account specified by such Contractor, an amount equal to such Contractor Company Contractor Security Account Balance …".

The balance, after deduction of sums attributable to defects, was just over £1m. This was paid by Project Co into an account nominated by the joint venture by letter dated 26 July 2021. This was an account in the same name as the joint venture, albeit that it would, by that time, have been controlled by the second defenders.

The commercial judge

[7] The commercial judge summarised the competing arguments. The pursuers submitted that "Contractor", when used first and secondly in clause 5.5.6, ought to have read "Contractor Company". He reasoned that the origins of the clause may have been in a contract in which there was only one Letter of Credit from one contracting party, as distinct from two letters from each of two companies in a joint venture. He wondered why clause 5.5.6 required the Contractor to specify the account into which the monies were to be paid while clause 12.1A.5 did not.

[8] The commercial judge asked himself, first, whether the language of clause 5.5.6 admitted of two possible constructions? Only then could he have regard to commercial common sense as he had been urged to do by the pursuers. If there was only one possible meaning, the court would have to give effect to that meaning, no matter how commercially undesirable that may appear (Opinion [2022] CSOH 92 at para [26]). The judge acknowledged that the clause began in an unambiguous manner. The obligation was to pay "the Contractor" by sending the monies to an account specified by "such" Contractor, meaning the Contractor to which reference had just been made. However, confusion, and hence ambiguity, had been created by the two further references to "such Contractor

Company" (the second being to the alternative trigger of the Contractor Company having replaced the original, but defunct, Letter of Credit).

[9] Various factors supported one construction or the other. It was not possible by textual analysis to determine what the parties had intended. Having regard to commercial common sense, the purpose of the account was to provide security for Project Co. Each Contractor Company had an obligation to the Bank, which had provided the Letter of Credit, to account for the balance. It did not make sense to pay the balance to the joint venture, which had no such obligation. This would enable the second defenders to "scoop the jackpot", yet the funds in the account may not have arisen from any default by the pursuers. Had both Contractor Companies become insolvent, it would make no sense for the funds to be retained by the joint venture. It made sense for the funds to be returned to the person who had an obligation to account to the bank. Any inconsistency with clause 12.1A was a product of poor drafting; the drafter being unaware that there were two Letters of Credit. The commercial judge granted declarator sustaining the pursuers' construction and decree for payment by Project Co (the first defenders) to the pursuers of the amount paid to the joint venture.

Decision

[10] The case falls to be determined according to the well-established rules on the interpretation of contracts, recently repeated in *Paterson* v *Angelline (Scotland)* 2022 SC 240 (LP (Carloway), delivering the opinion of the court, at para [32]) citing, *inter alia*, *Arnold* v *Britton* [2015] AC 1619 (Lord Neuberger at para 15). Parties' intention is most obviously gleaned from the language which they have chosen to use. The court should not normally search for drafting infelicities in order to justify a departure from the natural meaning of that

language. It should identify what the parties agreed, not what it thinks that common sense may otherwise have dictated. Contracts are made by what people say, not what they think in their inmost minds (*Muirhead & Turnbull* v *Dickson* (1905) 7F 686 (LP (Dunedin) at 694 cited in *Paterson* at para [37]). Where a contract is a complex and sophisticated one prepared and negotiated by skilled professionals, as is the case here, it may be successfully interpreted principally by textual analysis (*Wood* v *Capita Insurance Services* [2017] AC 1173, Lord Hodge at para 13).

[11] The present case is not dissimilar to *Paterson* and the outcome should be the same. The commercial judge was correct when he acknowledged that the clause began in an unambiguous manner. It states that Project Co are to return the monies to "the Contractor" by transferring an equivalent sum into a bank account specified by "such Contractor". The "Contractor" is, in terms of the instance of the NWA, the joint venture. It is expressly not the component companies, each of which is defined instead as a "Contractor Company". These terms are used carefully throughout the NWA, upon which legal advice was taken. There is no ambiguity and thus no basis upon which a search for an alternative meaning, using commercial common sense or any other aid to the construction of ambiguous phrases, could be embarked upon.

[12] *Quantum valeat* had regard been paid to commercial common sense, the court would have struggled to find that it favoured the pursuers' construction. Where there is an agreement between two persons, one of whom is a joint venture, and surplus funds exist at the end of the contract, the obvious consequence is that those funds be returned by the party holding them (Project Co) to the other party, ie the joint venture. What might happen to them thereafter is something which ought to be regulated by the joint venture agreement

between the Contractor Companies, which failing by the general law. It is, so far as Project Co and the NWA are concerned, *res inter alios.*

[13] The reclaiming motion will be allowed. The commercial judge's interlocutor of 20 December 2022 (and that relative to expenses) will be recalled. The court will repel the pursuers' second and third pleas-in-law and assoilzie the defenders from the first and second conclusions of the summons. Although the commercial judge was under the impression that parties had agreed that this would result in the need for a proof before answer on the alternative case of unjustified enrichment, this was disputed. The case will therefore revert to the commercial judge to determine future procedure.