

## Legal Briefing

### Ted Lowery looks at a dispute over the scope of the construction contractor's obligations in a PFI project

*Solutions 4 North Tyneside Ltd v Galliford Try Building 2014 Ltd* [2022] EWHC 2372

Before Mr Justice Eyre

In the Technology and Construction Court

Judgment delivered 21 September 2022

#### The facts

In March 2014 Solutions entered into a PFI project agreement with North Tyneside Council for the construction of ten new sheltered housing blocks, refurbishment works to sixteen existing properties and the provision of facilities management services at all of the sites during the services period which was to run for 27 years following works completion. Solutions sub-contracted the construction works to Galliford and the facilities management services to Morgan Sindall Property Services Ltd.

The project agreement included an output specification setting out the council's design and construction requirements. Amongst other criteria, section 2.9 in the output specification required the construction works to achieve the design lives set out in section 2.10, which for individual elements of the works stipulated a design life and also a residual life at the date the properties were to be handed back to the council at the end of the services period. Section 2.10 required that the roof structures should have a design life of sixty years and a residual life at handback of thirty years. The project agreement also provided that as at the date of handback, the works should meet the Handback Standard, a defined contractual term requiring the properties to comply with the output specification criteria when handed back to the council.

The construction sub-contract provided that the output specification in the project agreement was deemed incorporated as if fully transposed. However, the construction

sub-contract did not use or define the Handback Standard nor include any express obligations regarding the condition of the works at the end of the services period.

The facilities management sub-contract required maintenance and lifecycle replacement to be carried out over the services period so as to satisfy the requirements of the project agreement and the Handback Standard at the end of the services period.

Certificates of Availability (completion) for the new build and refurbishment works were issued during 2017 but within 12 months, Solutions claimed that there were defects in the roofs of the refurbished properties. Solutions did not bring a specific claim for breach and damages but commenced court proceedings in 2021 seeking various declarations as to the proper interpretation of the construction sub-contract, including that for the refurbishment works, the sub-contract required Galliford to achieve the design life and residual life expectancies as at the date of handback detailed in section 2.10 of the output specification.

#### The issue

Did the construction sub-contract impose on Galliford any obligations concerning the condition of the refurbishment works at the date of handback?

#### The decision

Looking at the contract documents overall, including the facilities maintenance sub-contract, the judge concluded that Galliford's obligations were concerned with completing the refurbishment works to the standard required for the Certificates of Availability, in contrast to the obligations of Solutions and Morgan Sindall which encompassed the condition of the properties at the end of the services period. This was consistent with the project agreement and the facilities management sub-contract referencing the Handback Standard but not the construction sub-contract.

The judge was satisfied that Galliford's obligations arising from sections 2.9 and 2.10 concerned the new build works and not the refurbishment works in which respect, Galliford's obligations were limited to works that were necessary to achieve completion: Galliford was not required to replace elements that were otherwise in sound condition and bringing existing buildings up to a sound standard was different to putting them into a condition such that they would not need further significant refurbishment as they aged over the services period.

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The judge also observed that the interpretation advanced by Solutions would impose on Galliford an obligation to undertake unnecessary refurbishment works well in advance of the date such works would otherwise be required and given this would be an unusual and wasteful arrangement, any such obligation should have been set out in clear terms.

The judge therefore agreed with Galliford that the construction sub-contract did not include a requirement that the refurbishment works would, at the date of hand back, have the residual lives specified in section 2.10 of the output specification.

### Commentary

Having observed that the length and complexity of PFI documents makes infelicities in the drafting inevitable, the judge's approach of construing the construction sub-contract in the context of the PFI arrangements overall, taking into account the differing obligations owed by Solutions and Morgan Sindall, was sensible and pragmatic.

Also worth noting is the judge's view that caution should always be exercised when considering applications for declaratory relief in the abstract, unaccompanied by allegations of specific breaches and/or money claims.

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