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Legal Briefing

Ted Lowery considers an example of disputed terms in a settlement agreement

Dragados UK Limited v Port of Aberdeen [2025] CSOH 37

In the Outer House, Court of Session

Before Lord Sandison

Judgment delivered 10 April 2025

The facts

During December 2016 Aberdeen engaged Dragados to design, manage and construct a harbour extension at Nigg Bay in the Cromarty Firth. Dragados appointed Arup to carry out design services for the project.

Under a Settlement Agreement dated 8 June 2020, the parties agreed that Dragados would carry out no further works and would be paid £17.3 million in respected of accrued claims. Clause 5.1 in the Settlement Agreement provided for the settlement of all outstanding claims and liabilities.

Clause 7 in the Settlement Agreement concerned design:

- Clause 7.2 required Dragados to compete those outstanding elements of design listed in Schedule 12 to the Settlement Agreement, defined as the Contract Design to Complete ("**CDTC**").
- Clause 7.8 provided that in accordance with Aberdeen's instructions, Dragados would continue to administer Arup's existing appointment to undertake what was described as the Complete Works Design.
- Clause 7.8.2 provided that Dragados would continue to administer Arup's existing appointment on an open book basis in accordance with the Project Manager's instructions.
- Clause 7.8.4 included an indemnity in favour of Dragados in respect of any liabilities to Arup for design/services, including in relation to the Complete Works Design but excluding the CDTC.

The Settlement Agreement also provided that if Arup incurred additional fees for checking the accuracy of the design drawings as part of a verification review, such fees would be reimbursed to Dragados by Aberdeen. Arup subsequently carried out the verification review and claimed from Aberdeen the fees for same and associated prolongation costs.

On 22 June 2020, the Project Manager issued an instruction that completion of the works was deemed to have occurred on 1 May 2020, and that no further services, other than the CDTC, were required from Dragados. On 28 January 2021, the Project Manager notified Dragados that Aberdeen would not be issuing any instructions for Arup to undertake the Complete Works Design and that, beyond completion of the CDTC, it expected no further or additional design services from Dragados or Arup. The CDTC was completed circa 14 April 2021.

During June 2022 Dragados and Arup entered into their own settlement agreement which provided for a payment of £4.5 million to Arup. Dragados considered that of the £4.5 million, some £1,247,542 was payable by Aberdeen pursuant to the 2020 Settlement Agreement.

Aberdeen refused to pay so in 2024 Dragados commenced proceedings. Aberdeen contended that Dragados' claims were legally irrelevant and should be dismissed without enquiry where: (i) Dragados had failed to explain what elements of its settlement with Arup were captured by clause 7.8.4: (ii) some £377,307.98 of the claim concerned design provided before the Settlement Agreement or as part of the CDTC and was therefore irrecoverable; and (iii) that as a matter of construction, the indemnity in clause 7.8.4 was not otherwise engaged.

The issue

Should all or part of Dragados' claims be dismissed?

The decision

The judge rejected Aberdeen's first submission on grounds that all Dragados had to show was that it had incurred a liability to Arup which was covered by the terms of clause 7.8 or encompassed Arup's fees for the verification review. That any such liability was subsumed into a wider settlement with Arup that did not attribute discrete values was immaterial if as was the case here, the court would be able to determine the values by reference to the terms of the Arup appointment and/or the Settlement Agreement.

On the second submission, where both parties intended to rely upon expert evidence as to the nature of the Arup design work covered by the £377,307.98, the judge concluded that it was not presently possible to decide if this element of Dragados' claims should be dismissed without such expert evidence having been heard and evaluated.

Determination of Aberdeen's third submission depended upon the proper construction of the wording of clause 7 in the Settlement Agreement. Having observed that examination of the commercial background did not assist, and applying the test of what meaning the language of the Settlement Agreement would convey to the hypothetical reasonable reader who was familiar with the background circumstances, the judge decided in favour of Aberdeen: he found that as a matter of construction, the clause 7.8.4 indemnity would only be engaged if Aberdeen or its Project Manager had issued instructions to Dragados to administer Arup's existing appointment so as to procure from Arup design work other than the completion of the CDTC. Where it was common ground that no such instructions had been issued – the Project Manager had made this clear on 22 June 2020 and 28 January 2021 – Dragados' case based on clause 7.8.4 fell away.

The judge directed that Dragados review/amend its pleaded case to focus on the residual claim for £377,307.98.

Commentary

This case is a good example of how ostensibly watertight drafting can, with the admitted benefit of hindsight, appear permeable.

Here the judge found that the express wording of clauses 7.8 and 7.8.2, providing that Dragados would continue to administer Arup's existing appointment in accordance with the instructions of Aberdeen or the Project Manager, were decisive, imposing an effective condition precedent to recovery under the indemnity if no such instructions requiring further work by Arup had been issued.

Ted Lowery
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