

Legal Briefing

Ted Lowery looks at a decision concerning confusing contract documents

John Sisk & Son Limited v Capital and Centric (Rose) Limited [2025] EWHC 594 (TCC)

In the Technology and Construction Court

Before His Honour Judge Stephen Davies

Judgment delivered 14 March 2025

The facts

On 20 May 2022, C&C entered into a contract with Sisk for the design and construction of a residential and retail redevelopment at Weir Mill in Stockport. The contract was based upon the 2016 JCT Design and Build form and included extensive bespoke amendments together with Volumes 1–4 of additional contract documents. Within the amended contract conditions, clauses 2.42.1–2.42.3 made Sisk responsible for all risks in relation to the existing site and structures including in the event of inaccuracies within information provided by C&C. However clause 2.42.4 made clause 2.42 subject to item 2 of “*the Clarifications*”, which were defined as comprising the clarifications headed “*Contract Clarifications*” contained within Volume 2 at Appendix 2.9 to the Employer’s Requirements.

Both the electronic and paper versions of the contract included an Excel spreadsheet entitled “*2.9 Clarifications*” dated 17 May 2022 and initialled by the parties, which at item 2 listed the existing structures risk against which the comments column included the words “*Employer Risk*” and noted that C&C would insure the existing buildings/works. Included within the electronic version but not the paper copy was a further spreadsheet entitled “*tender submission clarification*” dated 15 March 2022, which recorded Sisk’s proposal that C&C should warrant that the structural condition of the existing fabric was suitable for the new works and C&C’s response that this was not accepted.

Sisk and C&C subsequently disagreed over the effect of the Clarifications. Sisk relied upon item 2 within Appendix 2.9 as transferring to C&C all risks associated with the existing site and structures. C&C contended that the tender submissions clarifications document reflected an unchanging contractual position of Sisk responsibility for the existing structures, consistent with the terms of clause 2.42, being a risk that Sisk had unsuccessfully attempted to avoid during the pre-contract negotiations.

Following an adjudication in which the adjudicator decided the issue in favour of C&C, during 2024, Sisk commenced Part 8 proceedings seeking declaratory relief as to the proper construction of the contract.

The issue

Did the contract allocate the risks associated with the existing structures on the site to C&C?

The decision

C&C submitted that the exchanges preceding 20 May 2022 were admissible, falling within the exception that evidence of pre-contractual negotiations can be admitted in order to establish a fact known to both parties, i.e. that Sisk would bear the risks associated with the existing structures. The judge did not agree, finding that references to the pre-contractual negotiations were primarily aimed at buttressing C&C’s arguments as to the proper construction of the contract agreed on 20 May 2022, and, in this context, these references remained inadmissible.

The judge also rejected C&C’s argument that the tender submission clarifications document dated March 2022 represented the parties’ last word on risk allocation because to consider same would require a review of the evidence of negotiations leading up to 20 May 2022, and that was not permissible, save in the case of a claim for rectification and/or estoppel, neither of which was before the court.

The judge considered that the proper construction of clause 2.42.4 should be undertaken by reference to the documents comprising “*the Clarifications*” as expressly defined. Upon review of the wording appearing in the comments column at item 2 in Appendix 2.9, the judge concluded that the more likely meaning of these words

Legal Briefing

was that C&C was the risk owner for the contractual risk as to the suitability of the existing structures, including their suitability to support and facilitate the contract works.

Where Sisk had not specifically pleaded that it was excluded, the judge noted that the tender submission clarifications document formed part of and therefore could still be considered when it came to construing the contract overall. However, he concluded that the document was not persuasive: on an objective analysis, the words "*Employer Risk*" within item 2 in Appendix 2.9 could not mean anything other than the risk associated with the suitability of the existing structures.

Commentary

The judge observed that, as was typical for a substantial development, the design and build contract was a voluminous agreement. He noted that many of the constituent documents were themselves not "*models of linguistic clarity*" leading to a final contractual position of "*some complexity*", exacerbated by the differences between the hard and soft copies of the contract.

[The judgment](#) is worth reading in full as an illustration of how the courts will approach ostensibly contradictory provisions across multi-tiered contract documents, including in the face of attempts to circumvent the general rule against the admissibility of pre-contract negotiations.

Ted Lowery
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