OUTER HOUSE, COURT OF SESSION

[2018] CSOH 22

CA74/16

OPINION OF LORD DOHERTY

In the cause

OIL STATES INDUSTRIES (UK) LIMITED

Pursuer

against

LAGAN BUILDING CONTRACTORS LIMITED

Defender

Pursuer: Moynihan QC; CMS Cameron McKenna Nabarro Olswang LLP
Defender: Borland QC, Manson; DAC Beachcroft Scotland LLP

13 March 2018

Introduction

[1] The pursuer's business includes the fabrication of equipment for the oil industry. On 15 October 2014 the pursuer and the defender entered into a building contract in terms of which the defender was to design and construct a new production facility for the pursuer at Heartlands Industrial Estate, Whitburn. The contract was in the form of the SBCC's Design and Build Contract for use in Scotland DB/Scot (2011 Edition), as amended by a Schedule of Amendments annexed and signed as relative thereto.

[2] During the course of the contract the pursuer's agent issued certain contract instructions to the defender which bore to be issued in terms of clause 3.5 of the contract

conditions. By letter dated 13 July 2016 the pursuer gave notice to the defender in terms of clause 8.4.1 of the conditions that it was in default, inter alia, in failing to comply with contract instructions numbers 58, 65, 67 and 68. The pursuer avers that the defender did not remedy the default. Accordingly, by letter of 2 August 2016 the pursuer gave notice to the defender terminating its employment (with effect from 4 August 2016).

[3] In this commercial action the pursuer seeks declarator that the defender is in breach of contract in consequence of its failure to comply with those contract instructions. It also seeks declarator that the pursuer is entitled to reparation for the said breaches. Whether or not the defender was in breach in respect of non-compliance with the instructions, the pursuer also maintains that the defender is in breach of contract because elements of the design work are not in accordance with the contract and that the defender has failed to carry out the works in a proper and workmanlike manner. It seeks damages for the defender's breaches of contract. The matter came before me for a debate on the commercial roll. In advance of the debate the parties lodged written notes of argument.

The contract

[4] Clauses 2.11, 2.12, 2.13, 2.17, 3.5 and 3.8 of the contract conditions provide:

> "**Preparation of Employer's Requirements**
>
> 2.11 The Contractor shall be responsible for the contents of the Employer's Requirements and for verifying the adequacy of all design contained within them. The Contractor hereby accepts full responsibility in all respects for the whole of the design of the Works … including any design comprised and/or referred to within the Employer's Requirements or other Contract Documents and in relation thereto; …
>
> **Employer's Requirements – inadequacy**
>
> 2.12.1 If an inadequacy, a mistake, an omission or an error is found in any design in the Employer's Requirements then, if or to the extent that the inadequacy, mistake,

omission or error is not dealt with in the Contractor's Proposals, the Employer's Requirements shall be corrected, altered or modified accordingly.

2.12.2 Any correction, alteration or modification under clause 2.12.1 shall not be treated as a Change.

Notice of discrepancies etc.

2.13 If the Contractor becomes aware of any inadequacy, mistake, omission or error as is referred to in clause 2.12 or any other discrepancy or divergence in or between any of the following documents, namely:

.1 the Employer's Requirements;
.2 the Contractor's Proposals;
.3 any instruction issued by the Employer under these Conditions; and
.4 any drawings or documents issued under clause 2.8;

he shall immediately give notice with appropriate details to the Employer, who shall issue instructions in that regard.

…

Design Work – liabilities and limitation

2.17.1 The Contractor warrants and undertakes to the Employer that, without prejudice to any express warranties or any warranties implied by common law or statute:

2.17.1.1 in relation to the design of the Works all the skill, care and diligence to be expected of a properly qualified and competent architect or other appropriate designer who is experienced in preparing such design in relation to works of a similar size, scope, nature, complexity and value as the Works has been exercised and shall continue to be exercised; …

…

Compliance with instructions

3.5 The Contractor shall forthwith comply with all instructions issued to him by the Employer in regard to any matter in respect of which the Employer is expressly empowered by these Conditions to issue instructions …

...

Provisions empowering instructions

3.8 On receipt of an instruction or purported instruction the Contractor may request the Employer to notify him which provision of these conditions empowers its issue and the Employer shall forthwith comply with the request. If the Contractor thereafter complies with that instruction with neither Party having then invoked any dispute resolution procedure under this Contract to establish the Employer's powers in that regard, the instruction shall be deemed to have been duly given under the specified provision."

Counsel for the defender's submissions

[5] Mr Borland accepted that an inquiry of some sort would be necessary in order to dispose of the action, but he maintained that it was possible to decide at this stage that certain parts of the pursuer's pleadings were irrelevant or so lacking in specification that they should not be admitted to probation.

[6] First, in article 12 of condescendence the pursuer averred:

"12. A design and build contractor, such as the defender, exercising reasonable skill and care has a duty to comply with normal best practice. The defender had a duty to warn the pursuer that the external floor slab did not comply with best practice due to the facts that:

(a) It was not laid to a fall of 1:60;
(b) It did not provide slip and skid resistance.
(c) It did not incorporate air entrainment for external exposure."

Mr Borland submitted that the relevant contractual obligations were to carry out and complete the works in a workmanlike manner (cl 2.1.1) and to exercise the care and diligence of a properly qualified and competent designer (cl 2.17.1.1). Neither obligation imposed a duty to comply with "best practice" or "normal best practice". Reference was made to *Eckersley & Others* v *Binnie & Others* [1955-1995] PNLR 349, per Bingham LJ at pp 382-3. Nor did clauses 2.11 or 2.13 assist the pursuer in this regard. Moreover, in order to plead a relevant case of a duty by a contractor to warn the Employer about a matter contained within the Employer's Requirements, the pursuer must show (i) that the design or

the works were obviously and significantly dangerous, and (ii) that the defender knew or ought to have known that this was the case (*Plant Construction plc* v *Clive Adams Associates (No 2)* [2000] BLR 137, per May LJ at p 147; *Aurum Investments Limited* v *Avonforce Limited* [2001] 78 Con LR 114, per Dyson J at paragraph 11; *Stagecoach South Western Limited* v *Hind* [2014] EWHC 1891 (TCC), per Coulson J at paragraphs 101-102; *Goldswain & Hale* v *Beltec Limited* [2015] EWHC 556 (TCC), per Akenhead J at paragraph 7). In any case, the suggested breach was not linked to any specified loss the pursuer was said to have suffered.

[7] Second, contract instructions numbers 67 and 68 had not been valid contract instructions in terms of cl 3.5 of the contract. Instruction no 67 was dated 29 February 2016. It stated:

> "Roof Cladding
>
> The Roof has not been constructed in accordance with the contract. We instruct you to carry out any Works necessary to remedy this.
>
> Please provide a copy of your proposals together with a Programme for undertaking these works."

Instruction no 68 was dated 2 March 2016. It stated:

> "Internal Floor Slabs – Fabrication and Machine buildings
>
> These works have not been constructed in accordance with the Contract, consequently we instruct you to carry out the necessary Works to remedy this non-compliance.
>
> We request that you provide your proposals, together with the programme, for these remedial works."

Mr Borland submitted that neither instruction had been sufficiently clear and unambiguous to enable the defender to understand (i) the nature of the issue raised, and (ii) the particular action demanded to remedy the issue. Reliance was placed, by analogy, upon *QOGT Inc* v *International Oil & Gas Technology Limited* [2014] EWHC 1628 (Comm), per Popplewell J at

paragraphs 7, 21, 96 and 109-113). The contractor was obliged to comply "forthwith" with an instruction. That word should be given its ordinary meaning of "immediately" or "without delay". To be valid an instruction had to be sufficiently clear and detailed to allow the contractor to act upon it forthwith. In the case of instruction no 67 the defender's case was particularly strong, because the pursuer neither averred nor relied in its Note of Argument on any suggested context to the instruction said to have been provided by correspondence before or after its issue. In the case of instruction no 68 the pursuer did rely on correspondence prior to and after the date of the instruction (Mr Borland did not take any technical pleading point is so far as correspondence was founded upon in the Note of Argument but not in the pleadings). However, the correspondence did not assist the pursuer. In so far as it pre-dated the instruction it was not clear that the suggested non-compliance had been sufficiently identified in the correspondence. The later correspondence was irrelevant. It could have no possible bearing on how the reasonable recipient would have construed the instruction at the time of its receipt.

Counsel for the pursuer's submissions

[8] Mr Moynihan pointed out that the defender's attack on the pursuer's averments of best practice had not been flagged up before the debate. The contention advanced in the defender's Supplementary Note of Argument had been that a relevant case of a duty to warn had not been pled. In fact, notwithstanding the references to best practice in article 12 of condescendence, the pursuer did not intend to suggest that the defender had an obligation to comply with best practice. In order to make that clear Mr Moynihan moved to amend article 12 to remove the references to best practice and substitute references to

normal practice. Unsurprisingly, there was no opposition to that amendment and I allowed it.

[9] Mr Moynihan explained that the pursuer's primary case in articles 10 and 11 of condescendence is that the defender was in breach of contract in respect of the design and construction of the external floor slab. It should have been designed and constructed so as to comply with Concrete Society Technical Report 66 ("CSTR 66") recommendations, with a drainage fall of 1:60 (rather than the 1:120 which the defender had used to the east of the slab), and with a tamped or broomed finish (rather than a pan finish). However, it had been anticipated (having regard to the way matters had proceeded in adjudications between the parties) that the defender would argue that in using a pan finish it had merely constructed the external floor slab in accordance with the Employer's Requirements. The averments of a duty to warn in articles 10 and 12 were a secondary case to meet that anticipated defence. This was not a case where an obligation to warn required to be implied (cf *Plant Construction plc* v *Clive Adams Associates (No 2), supra,* and the cases following it). Here the source of the duty to warn was the defender's express contractual obligations in clauses 2.11 to 2.13. The pursuer had made relevant and specific averments of the existence of an inadequacy in the design and of the defender's failure to give the pursuer notice of it. Moreover, although it was not essential to the relevancy of this aspect of its case, the pursuer averred that a pan finished external surface posed a significant health and safety risk to the workforce during winter.

[10] So far as the instructions were concerned, Mr Moynihan submitted that *QOGT Inc* v *International Oil & Gas Technology Limited, supra* was distinguishable. The contract in that case had contemplated a "self-contained" notice. That was not the case here - the Contractor was entitled to request the Employer to notify it which provision of the contract empowered

the issue of the instruction (cl 3.8). So the instruction was not "self-contained". While the word "forthwith" in cl 3.5 must signify a degree of immediacy, there had to be some latitude. That was clear from the cl 3.8 procedure, including the possibility of resort to the contractual dispute resolution procedure (articles 7 and 8 of the Agreement and cl 9 of the contract conditions) in the event of a dispute. In relation to instruction no 68, there was a background to the instruction which was set out in paragraphs 9-13 of the pursuer's Note of Argument. When regard was had to the background correspondence it was clear that the non-compliance was sufficiently specified. The reasonable recipient, aware of the background, would have understood the respects in which there was said to have been non-compliance with the contract. There were three letters which pre-dated the instruction and two which post-dated it. There was also correspondence which assisted in understanding the non-compliance which instruction no 67 referred to, but it was accepted that specification of the correspondence had not been provided in the pursuer's averments or in its Note of Argument. If the court accepted that in each case it may be appropriate to look at the instructions and the correspondence together, Mr Moynihan sought an opportunity to produce the documentation relevant to instruction no 67. It had not been necessary for the pursuer to specify any particular remedial measures in either instruction. Doing so would have encroached upon the defender's design responsibility under the contract.

The defender's reply

[11] In a brief reply Mr Borland submitted that, notwithstanding the amendment, the averments as to a duty to warn remained irrelevant. The validity of instruction no 67 should be decided on the basis of the pleadings and the pursuer's Note of Argument. The pursuer had had sufficient opportunity before the debate to produce and specify any documentation

said to be relevant to the construction of this instruction. It was illegitimate to seek to construe either instruction by reference to post-instruction correspondence. In terms of clause 3.5 the obligation was an obligation to comply with the instruction - not the instruction and any subsequent correspondence. In the absence of any suggestion that the initial purported instructions had been varied by the later correspondence, the later correspondence was irrelevant.

Decision and reasons

Duty to warn

[12] The pursuer's averments anent a duty to warn appear to me to be suitable for inquiry. I am not satisfied that the pursuer is bound to fail to establish that the obligation founded upon was incumbent upon the defender in terms of the contract conditions. In those circumstances the pursuer does not need to rely upon cases such as *Plant Construction plc* v *Clive Adams Associates*, *supra,* to support the existence of the disputed obligation. However, even if it had to, I would not have been persuaded at this stage that the pursuer would have been bound to fail on that approach. In that regard I think it significant that although the pursuer does not say in terms that the slab as designed would present an obvious danger in winter weather, that appears to me to be the reasonable import of the averments in article 10 of condescendence.

[13] I am unimpressed by the submission that this suggested breach was not sufficiently linked to any specified loss the pursuer was said to have suffered. In my opinion, on a fair reading of the pursuer's pleadings, the pursuer's case is that the failure to warn was a cause of the loss and damage suffered in respect of the external floor slab.

The instructions

[14] In *QOGT Inc* v *International Oil & Gas Technology Limited, supra,* Popplewell J observed at paragraphs 109-113:

> *"Notice of Breach inadequate?*
>
> 109 In *Mannai* v *Eagle Star Assurance Ltd [1997] AC 749*, the House of Lords considered the efficacy of notices to determine two leases which gave the date of termination a day too early. Lord Steyn said at p767G that:
>
> > 'the approach to construction of the notices was to determine how a reasonable recipient would have understood them; and in considering this question the notices must be construed taking into account the relevant objective contextual scene.
>
> 110 In this respect the process of construction is the same as that for any contractual term. It is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time: *Investors Compensation Scheme* v *West Bromwich Building Society [1988] 1 WLR 896* at 912H; *Chartbrook v Persimmon Homes [2009] 1 AC 1190* at [14]; *Rainy Sky SA* v *Kookmin Bank [2011] 1 WLR 2900* at [14].
>
> 111 In *Mannai* Lord Steyn went on to observe at p768F-H that:
>
> > 'notices under break clauses in a lease were not in a unique category; and that all notices exercising rights reserved under a contract should be construed in the same way: they must be sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to the contractual right being invoked; and as to how and when the notice is intended to operate. See also per Lord Hoffmann at p776D; and *Geys* v *Societe General [2013] 1 AC 523* per Baroness Hale at [52].
>
> 112 The present case is concerned with a contractual right to give notice of persistent or material breach, failure to remedy which gives rise to a right to terminate the contract. Its purpose is to enable the recipient to understand what contractual right is being relied upon, and what he is alleged to have done wrong, with sufficient clarity that he can assess the validity of the notice and take such steps as are open to him to remedy the alleged breach. The level of detail which is necessary for these purposes will differ from case to case, and may be affected by the express terms of the relevant clause. It will not generally be necessary for the notice giver to identify the steps necessary to remedy the breach, if they can sufficiently clearly be understood from the details given of the breach itself; but where the notice does so, the steps identified as necessary to remedy the breach will usually help the

> recipient to understand the nature of the breach being alleged. The notice must be interpreted as a whole.
>
> 113 Accordingly in the current context I would formulate the general principle as being that the notice must be sufficiently clear and unambiguous to enable a reasonable recipient (that is to say one having all the background knowledge reasonably available to the recipient at the time of the notice) to understand the contractual basis for the notice and the nature of the breach which is alleged to have occurred, so as to be able to assess the validity of the notice and take such steps as are open to him to remedy the alleged breach."

While those observations were made in a different context, in my opinion the general principles discussed are well established and are equally applicable to the contract instructions in the present case. I am not convinced that they apply only to "self-contained" notices or instructions. I turn then to the disputed instructions.

[15] I am not persuaded that I can conclude without inquiry that the pursuer is bound to fail to establish that instruction no 68 was a valid instruction. At this stage I cannot be satisfied that the reasonable recipient, having all the background knowledge reasonably available to it at the time of the instruction, would not have understood the respects in which it was said that the slab did not comply with the contract and that the non-compliance had to be remedied. It seems to me that the pre-instruction correspondence upon which the pursuer founds may provide an arguable basis for maintaining that the instruction was sufficiently clear on these matters. However, I do not think it is possible or appropriate to reach a concluded view at debate. It seems to me that, at the very least, the documents will have to be put in context. There may well be the need for additional background or explanatory evidence.

[16] I doubt whether it was incumbent upon the pursuer to specify in the instruction a particular means of remedying the non-compliance. In the circumstances, where the defender was a design and build contractor, it seems to me that there is a cogent argument

that to have done so would have encroached upon the defender's design responsibility under the contract (cf *QOGT Inc* v *International Oil & Gas Technology Limited, supra,* per Popplewell J at paragraph 112).

[17] The post-instruction correspondence is relevant in so far as it was a response to the defender's cl 3.8 request, but it is more difficult to see how it might otherwise be relevant to the question of the validity of the instruction. I do not understand the pursuer to maintain that the later correspondence was a variation of the instruction, or was itself a further instruction, or that it was the initial purported instruction taken together with the subsequent correspondence which comprised the instruction. Nonetheless, given that inquiry is necessary in any event in relation to this instruction, I think it preferable that the relevance or otherwise of this correspondence is also determined following inquiry.

[18] That brings me to instruction no 67. I understand it to be common ground that if it stands alone, uninformed by any relevant background context, it does not enable the defender to understand the respects in which there is said to have been non-compliance with the defender's obligations and the fact that that non-compliance required to be remedied. Accordingly, the issue is whether there was a background context which informed the instruction and would have allowed a reasonable recipient to be clear on those matters.

[19] In article 17 of condescendence, in response to an averment by the defender (in answer 6.4.4) that "the pursuer sought to procure, at the defender's expense, the removal and replacement of the roof cladding to Bays 1, 2, 3, 4, 5 and 6 … by way of a letter from Ken Scott of ePPS LLP dated 12 November 2015", the pursuer refers to that letter for its full terms beyond which no admission is made. In article 18 of condescendence the pursuer refers to instruction no 67 and avers: "The defender sought further detail from the pursuer regarding

this instruction by letter dated 8 March 2016. This was provided." Apart from the instruction itself, no correspondence from the pursuer or its agents to the defender concerning the instruction was produced at the debate, and none was mentioned in the pursuer's Note of Argument.

[20] As matters stand, the pursuer does not maintain (in its averments or in its Note of Argument) that there was a relevant background context by virtue of which the reasonable recipient of the instruction would have understood what the suggested non-compliance was and that it needed to be remedied. All that the pursuer avers is that it provided further (unspecified) details to the defender following the request of 8 March 2016. Once again, I do not understand the pursuer to maintain that the later correspondence was a variation of the instruction, or was itself a further instruction, or that it was the initial purported instruction taken together with the subsequent correspondence which comprised the instruction. In those circumstances I agree with Mr Borland that the pursuer's averments concerning instruction no 67 are irrelevant.

Disposal

[21] Counsel were agreed that I should issue my Opinion and put the matter out by order to discuss (i) an appropriate interlocutor to give effect to my decision; and (ii) further procedure. I shall accede to that request.