

Insights

CLANCY DOCWRA V E.ON: TAKE CARE WHEN DEFINING THE SCOPE OF WORKS

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SUMMARY

Contracting parties often place too much faith on bespoke amendments and the precedence of contract documents when imposing risk on others, having insufficient regard to the bargain reached between the parties and to the tender correspondence and other documentation included in formal contract bundles.

However, the TCC case of *Clancy Docwra Ltd v E.ON Energy Solutions Ltd [2018]* acts as a reminder that documents appended to the back of a contract can narrow the scope of contract works. Clauses which seek to allocate risk are rendered redundant if they relate to works that are not included in the contract works.

Factual Background

As part of its involvement in a large residential development in London, E.ON Energy Solutions Ltd ("E.ON") was required to install an underground district heat network, involving excavating trenches into which pipework would be installed. After the tender process, Clancy Docwra Ltd ("Clancy") was engaged as subcontractor for this work.

In an email accompanying each of its tender submissions, Clancy stated that its offer was made on a particular basis. Amongst other things, there was no allowance for hand digging, the breaking out of obstructions in the trench and the diversion of mains and services.

The parties entered into a subcontract based on the JCT Standard Building Subcontract with Subcontractor's Design (2011) and a bespoke schedule of amendments. A "*diffuse collection of documents*" including plans, emails, bills of quantities, Clancy's tender bid and post-tender review minutes were appended to the subcontract. These reiterated the exclusions contained in Clancy's tender bid cover email. There was a precedence clause which stated that if any inconsistency occurred between the subcontract and the documents appended to the back of it, the subcontract would take priority.

In March 2017, the relationship between the parties deteriorated when Clancy encountered adverse ground conditions and was asked to investigate a concrete heading. The extent of Clancy's obligations, which works fell within the definition of "Sub-Contract Works" and the allocation of risk in respect of ground conditions was disputed.

Clancy argued that "Sub-Contract Works" were defined by reference to the documents appended to the back of the subcontract. Any work that they carried out should take account of the exclusions that had been set out in its tender clarifications and the post-tender review minutes. If E.ON required Clancy to perform works falling under any exclusion, Clancy was entitled to a variation.

E.ON's position was that Clancy had undertaken to carry out the Sub-Contract Works, which were defined in the Scope of Works document and included "all civil works". The schedule of amendments at clause 2.7.1 had clearly allocated risk to Clancy in respect of ground conditions. Clancy argued that the allocation of this risk was modified by the appended documents.

Court's findings

It was fundamental to establish the scope of the work that Clancy had contracted to perform – the "Sub-Contract Works". To do this the court had to look at the contract documents as a whole. It found that the Sub-Contract Works were defined by reference to the documents appended to the back of the subcontract, including the tender clarifications and post-tender review minutes. It did not matter that the appended documents were poorly presented and in a jumbled order. They were all included for a reason and had a role to play.

In responding to the invitation to tender, Clancy had made it clear what work it would and would not do and what it would take responsibility for. E.ON could not rely on the allocation of risk in the schedule of amendments, because Clancy had not contracted to carry out the work that it was instructed to perform. The ground conditions clause applied to Clancy's agreed scope of works only and did not have the effect of extending that scope.

E.ON argued that the court taking into account the appended documents in defining the scope of works was inconsistent with the precedence of documents clause in the contract. The court rejected that argument.

E.ON also argued that it was "business common sense" that Clancy would uncover mains and services and that, in undertaking the works, hand digging may be required. It argued that both parties would have intended that Clancy bear the risk of unforeseen ground conditions. Mrs Justice Jefford said that argument could cut both ways - "business common sense" is exactly why Clancy would seek to exclude certain items of work from its scope. On its proper interpretation, the sub-contract excluded certain ground conditions and so when Clancy encountered them (in this case, the breaking of an obstruction), it was entitled to seek a variation instruction.

Separately, Clancy raised an argument for rectification based on common mistake. The court stated that it did not need to consider this, as it had found in Clancy's favour. If it had needed to decide this, it would have refused to order rectification as there was no common understanding between the parties. E.ON had genuinely believed that the bespoke amendments imposed all risk on Clancy.

Lessons Learnt

Although no new law is created by this case, contracting parties should be reminded that:

1. How the scope of works is defined is critical. Without clear wording, clauses that allocate risk will be interpreted within the parameters of the scope of works as defined in the contract. The scope of work is typically defined by reference to appended documents. So parties should ensure that the scope is correctly set out within those documents.
2. There is a direct relationship between the documents that are included in contract bundles and the risk of dispute. Parties should carefully consider what documents are incorporated into a contract, and how they are appended. Any clarifications or exclusions set out in tender documents should be properly understood and agreed.
3. Parties should be wary of relying on common bespoke amendments allocating risk, particularly if they are aware that the other contracting party relies on exclusions. Here, broad contractual provisions allocating risk did not assist E.ON because they only applied to the sub-contract works.
4. A priority of documents clause does not make a contractor or subcontractor responsible for items of work that have been excluded from the scope of works.

RELATED CAPABILITIES

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- Construction Disputes

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