OPINION OF LORD CLARKE : OUTER HOUSE, COURT OF SESSION. 8th March 2007

Introduction

[1] In this commercial action the pursuers seek to recover from the defenders £2,000,000 with interest as damages for breach of a warranty which the defenders provided them with in relation to their design of part of the cargo centre at Glasgow Airport. The premises in question were constructed for occupation under a lease by a company known as UPS Supply Chain Solutions Inc ("the tenants"). The pursuers, together with another company, BAA Lynton PLC, were the employer in relation to the construction of the premises, as the landlords thereof.

[2] It is averred, in the present action, that the pursuers undertook to the tenants, in terms of Clause 2.2 of an Agreement for lease (No. 6/1 of process) of the premises *"to procure that the Landlord's Works will be carried out in a good and workmanlike manner in accordance with good building practice using good quality materials of their several kinds"*. It is, furthermore, averred that the tenants, after taking occupation of the premises, experienced serious problems with the floor slab in the premises. In the present proceedings, the pursuers blame the defenders for the problem as arising from breach of their duties as consultant engineers. The defenders' contract for their work, in relation to the premises, was with another company, Kensteel Structures Limited, who were the main contractors for the construction of the premises. It was, in that context, that the warranty, upon which the pursuers sue in the present action, was granted by the defenders to the pursuers. It is 6/2 of process. The pre-amble of the warranty is in the following terms:

"WHEREAS

A. The Employer has entered into an agreement with Kensteel Structures Limited ('the Building Contractor') under which the Building Contractor is to design and construct the Phase 2 Building A Shell and Fit Out Works at the Air Cargo Centre, Douglas Terrace, Abbotsinch Road, Glasgow Airport ('the Works').

B. By an appointment ('the Appointment') dated 10th day of November 1997 the Contractor has appointed the Sub-Consultant to carry out and complete the Services as described in the Appointment".

The "Sub-Consultant" is, in terms of the warranty, the defenders. The warranty then provides:

"NOW IT IS HEREBY AGREED

1. The Sub-Consultant warrants that it has exercised and will continue to exercise reasonable skill, care and diligence in the performance of the Services under the Appointment. In the event of any breach of this warranty:

(a) The Sub-Consultant's liability for costs under this Agreement shall be limited to that proportion of such costs which it would be just and equitable to require the Sub-Consultant to pay having regard to the extent of the Sub-Consultant's responsibility for the same and on the basis that the Contractor and its sub-consultants and sub-contractors shall be deemed to have provided contractual undertakings on terms no less onerous than this Clause 1 to the Employer in respect of the performance of their obligations in connection with the Works (other than those obligations which relate to the Services) and shall be deemed to have paid to the Employer such proportion which it would be just and equitable for them to pay having regard to the extent of their responsibility".

[3] The pursuers have been met with claims from their tenant in respect of the defects in the premises including claims in respect of loss and disruption of business and loss of profit. An action has been raised by the tenants against the pursuers in respect of these matters. In the present proceedings the pursuers seek to recover, under the warranty, sums which they say are due to them because of the defenders' breach of that warranty. The sum sued for includes sums claimed from them by the tenants in respect of the disruption to their business and loss of profits.

[4] Sometime after the action had been raised the defenders were given leave to amend their defences. The Minute of Amendment is No.26 of process. A debate was then sought with regard to the parties' respective contentions in respect of the wording of the warranty. I allowed a debate.

The Defenders' Submissions

[5] At the commencement of the hearing senior counsel for the defenders, Mr McNeill, Q.C., sought leave to amend further the defenders' defences by deleting the last sentence of Answer 10. This was not opposed and I allowed the amendment to be made. The averments, thereafter, upon which the defenders based their attack on the relevancy of the pursuers' claim are as follows: *"Further, any liability of the defender to the pursuer is limited to costs and does not extend to any damages payable by the pursuers to UPS Supply Chains Solutions Inc. Reference is made to the terms of Clause 1(a) of the collateral warranty. Properly construed the "costs" recoverable by the pursuers under the collateral warranty are limited to costs of repair or renewal and/or reinstatement of any part or parts of the Works".*

[6] Senior counsel for the defenders categorised Clause 1(a) of the warranty as *"a net contribution clause"*. In determining its meaning and effect there was no need, he submitted, to look beyond the words so, for example, there was no need to have regard to the principal building contract between the employer and the main contractor or any other contractual document. Clause 1(a), it was submitted, performed two functions, namely, not only did it put a ceiling or limit on the quantum of liability of the defenders, but it also defined the extent of that liability in law. The parties to the warranty had, it was submitted, chosen to regulate the issue as to liability between them by means of a formal warranty rather than leave matters to the "*uncertainties of the law of delict"*. It was the use of the word "*costs"* which made it clear that the provisions did not only set the limit of quantum, but also defined the liability which might arise as between the parties to the warranty. The word "*costs"* is not a term of art. In normal language, it meant the price at which something might be obtained. Reference was made to the Oxford English Dictionary and the first definition therein which is namely *"that which must be given or surrendered*

in order to acquire, produce, accomplish, or maintain something; the price paid for a thing". It did not mean the same as damages. The pursuers themselves, in their own pleadings, recognised a distinction between the two terms. In Article 10 of Condescendence the pursuers aver as follows: *"Accordingly the pursuer is entitled to reparation in respect of its obligations to pay damages (including damages for the loss of profit which would have been made from the ordinary commercial use of the property) and costs to UPS Supply Services Inc"*.

Reference was made to the case of ***Bank of Scotland v Dunedin Property Investment Co Ltd*** 1998 S.C.657, particularly at pages 660-661 and page 665 per Lord President Rodger where a broad interpretation of the word "costs" was approved of in the context of that case. In the present case, the meaning, it was said, was a narrower one. There was no context demanding a broader approach as had been the case in *Bank of Scotland*. Senior counsel for the defenders, after some discussion, accepted that, even if his argument was correct, he could not seek dismissal. While the pursuers' pleadings regarding quantum, as they stand, were somewhat lacking in specification, he understood the position to be that a substantial part of the claim was in respect of remedial works which he accepted would be covered by the word "costs".

[7] Senior counsel, in closing his submissions, sought to meet, head on, an argument set out in para.5 of the pursuers' further Note of Arguments (No.32 of process) which is to the following effect: *"Even if the defenders' construction of the word 'costs' is held to be correct the effect of the net contribution clause is to limit the sum recoverable in respect of reinstatement costs and not to limit recovery of other losses"*.

Such a result, senior counsel for the defenders, submitted would be bizarre because it would normally be anticipated that wording of this kind would deal with the whole potential liability of parties granting the warranty. One would not expect parties to provide for allocation of certain liabilities under the net contribution clause, but to choose to have other aspects of liability dealt with elsewhere. Such an unsatisfactory approach to matters was avoided if the defenders' argument regarding the construction of the clause was accepted to be correct. The point, in the present case, was that while one might have expected to find a provision in the warranty expressly addressing liabilities arising therefrom, separate from the provisions regarding net contribution, there was no such separate provision and it was for those reasons that Clause 1(a) fell to be regarded as dealing both with the extent of potential liability and the capping of quantum of any such liability.

The Pursuers' reply

[8] In reply senior counsel for the pursuers, Mr Murphy, Q.C., invited the Court to delete the particular averments in Answer 10 upon which senior counsel for the defenders founded. Senior counsel for the pursuers submitted that the word "costs" in accordance with its ordinary natural sense, was apt to include financial detriment to the pursuers due to the defenders' breach of warranty. It was a word wide enough to cover reinstatement and repair costs plus any other costs "laid at the door" of the pursuers due to the defenders' breach of warranty. There were two provisos to what had just been submitted. The first was that the "costs" had to have been reasonably foreseeable as a consequence of the defenders' breach of contract. The second proviso was that Clause 1(a) sought to put a cap on the extent of any such liability. It was important, in this context, to focus on the question of costs as they arrived at the door of the pursuers, rather than costs to the tenants, the context being that the pursuers had procured the design and construction of a building.

[9] Senior counsel referred to other definitions of "costs" to be found in the Oxford English Dictionary and expressions in which the word appeared. For example reference was made to the phrase "at anyone's cost" as meaning "at his expense; hence, to his loss or detriment" and "to anyone's cost" as meaning "resulting to his expense; hence, to his loss or detriment". The word "costs" could embrace words like "detriment" and "expense" arising from breach of warranty.

[10] It was accepted that the pursuers' pleadings, in Article 10 of Condescendence, as they presently stood, were not happily worded in that they seemed to accept a distinction being drawn between damages, on the one hand, and costs on the other. Senior counsel for the pursuers, accordingly, sought leave to amend. The amendment proposed was to exclude from Article 10 of Condescendence the words from "damages" to the word "and" at lines 8 to 10 and to substitute therefor "costs, including without prejudice to the foregoing generality, damages for loss of profit arising out of non-use of the property". There was no opposition to the motion to amend from the defenders and I granted it.

[11] Senior counsel for the pursuers went on to submit that the defenders' approach involved the Court requiring to rewrite the parties' contract for them by placing a qualification on the extent of the warranty when no such qualification appeared. That was an illegitimate approach to the construction of commercial contracts (compare *City Wall Properties (Scotland) Ltd* v *Pearl Assurance PLC* 2004 S.C.214). The function of the first part of Clause 1 was to define a broad warranty. The remainder of the Clause was designed to allow the Court to adjust sums to be paid in circumstances of shared responsibility where otherwise a joint and several obligation might have been founded upon. The wording used was not designed to restrict, or limit, liability, otherwise owed by the warrantor to the person to whom the warranty was granted. If that had been the parties' intention then one would have expected to see clear wording to that effect. Reference, in that connection, was made to the case of ***Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd*** 1982 S.C.(H.L.) 14 per Lord Fraser of Tullybelton at pages 60-61.

[12] In Clause 1(a) the only limitation that was created by its wording, properly construed, was in relation to recovery of loss. It was not the function of a net contribution clause to restrict or exclude liability in relation to categories of damage.

[13] Senior counsel for the pursuers drew the Court's attention to the provisions of Clause 6 of the warranty which provide, *inter alia*, as follows: *"The Sub-Consultant shall take out and maintain professional indemnity insurance in an amount of two million pounds (£2,000,000) for any occurrence or series of occurrences except for pollution and contamination which will be for any one claim and in total during each twelve month period arising out of any one event for a period of 12 years from the date of Practical Completion of the Works under the Building Contract, provided always that at the date of this Agreement and thereafter such insurance is available at commercially reasonable rates....."*.

The reference there to "*occurrence or series of occurrences*" demonstrated, it was submitted, that the parties were providing for insurance cover in respect of events rather than in relation to any particular categories of loss. That was entirely consistent with the construction of Clause 1, advanced on behalf of the pursuers.

[14] Lastly, senior counsel made reference to paragraph 5 of the pursuers' further Note of Argument referred to above.

Defenders' Reply

[15] In reply senior counsel for the defenders contended that the defenders' approach did not involve the rewording or rewriting of the pursuers' agreement. It was simply a matter of properly construing the word "*costs*" and holding that that word provided the defined extent of the benefit conferred by the warranty. Reference was made to ***National Children's Home v Stirrat Park Hogg*** 2001 S.C.324.

Decision

[16] I am of the opinion that the pursuers' arguments, in this matter, are to be preferred. While it can be said, (as I think, as was accepted by counsel for the pursuers), that the provisions of Clause 1 are inelegant, their purpose seems clear. The warranty was intended to place the pursuers in the shoes of the building contractor in relation to contractual claims which the contractor might have had against the defenders rather than, as counsel for the defenders put it, leaving matters "*to the uncertainty of the law of delict*". That is what the first sentence of Clause 1 provides for. The provisions of sub-paragraph (a) are, in my judgement, designed simply to provide for the allocation as between the defenders, and other parties, of sums due to be paid as a consequence of their respective liabilities to the pursuers. I do not read them as having another and quite distinct purpose, namely, to restrict or limit the liability created by the first sentence of Clause 1, the effect of which was to place the pursuers (the employer) in the shoes of the building contractor. The word "*costs*" is not, perhaps, the most appropriate word to be employed in such a provision but, on the other hand, I am of the opinion that, in its context, it does not fall to be read in the way contended for by the defenders or as having the consequent effect argued for on their behalf. The remedies for breach of warranty, at common law, insofar as they might include money damages or payment of other sums recoverable, from the defenders and other parties might, in my judgement, appropriately be regarded as "costs" which the defenders are liable for under the warranty. In this respect, it appears to me, it is important to have regard to the words "*The Sub-Consultant's liability for costs*" and the words "*having regard to the extent of the Sub-Consultant's responsibility for the same*". Looking at matters that way, and focusing on the wording I have just referred to, I see no reason to read "costs" as applying only to the kinds of costs potentially or actually incurred by the employer or his tenant arising from reinstatement or repair of the subjects and admittedly, potentially, recoverable from the Sub-Consultant under the warranty. Such an approach finds, in my opinion, no support in any other wording in the warranty and I agree with senior counsel for the pursuers that the provisions of Clause 6 appear to argue against the approach adopted by the defenders. There seems to me there was also some force in the point made on behalf of the pursuers that if the defenders' construction of the word, as advanced, was correct, then the result may simply be that the net contribution provision would only have the effect of allocating liability in respect of reinstatement and repair costs, leaving other types of liability on the part of the defenders and other parties to be dealt with on a joint and several basis. It does not seem to me that that is a result which the parties to these contractual arrangements intended to achieve.

[17] For all the foregoing reasons I reject the submissions made on behalf of the defenders as to how the warranty falls to be construed. I shall therefore exclude the averments in Answer 10 referred to above from probation. As to the rest the case shall be put out By Order so that further procedure can be discussed.

Pursuers: Murphy, Q.C., Gardiner; Brodies
Defenders: McNeill, Q.C., Fairley; Dundas & Wilson