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Clause, Interrupted: Dragados UK Ltd v Port of Aberdeen [2025] CSOH 37 (10 April 2025)

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

Date: 10 April 2025

Judge: Lord Sandison

Key Words:

Settlement Agreement, Contractual indemnity, Contractual interpretation, Clause 7.8.4, NEC3 Engineering and Construction Contract, Design liability, Contractor Design to Complete (CDTC), Verification of redline as-built drawings, Open book administration, Arup Existing Appointment, Liability and reimbursement, Construction Contract amendments, Completion certification, Project Manager instructions, Reasonableness of settlement, Proof before answer, Interpretation of indemnity clauses.

Summary

In this commercial action, Dragados UK Limited (the pursuer) sought £1,247,542 plus interest from the Port of Aberdeen (the defender), alleging entitlement under a Settlement Agreement [1]. The defender contended that much of the claim was irrelevant and should be dismissed without enquiry [1]. The court addressed three key issues: 1) whether the claim was irrelevant due to a global settlement with subcontractor Arup, 2) whether part of the claim related to work already paid for, and 3) how clause 7.8.4 of the Settlement Agreement—concerning reimbursement for Arup's design work beyond a defined scope—should be construed [12–14, 28, 30–31]. It held that the global settlement did not render the claim irrelevant [28] and that the question of whether claims related to previously paid work required proof [31]. However, the court found the claim based on clause 7.8.4 irrelevant, as no instructions had been given by the defender—an essential condition for that clause's operation [45–46]. Accordingly, the clause 7.8.4-based claims were refused probation, while the remainder—mainly under Schedule Part 12 for design verification—were allowed to proceed to proof before answer [22, 46].

Case Law/ Authorities:

1. *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314 — *on settlement values and reasonableness.*
2. *Gray Construction Ltd v Harley Haddow LLP* [2012] CSOH 92; 2012 SLT 1035 — *on proving the reasonableness of a settlement.*

3. *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900 — *principles of contractual interpretation, preferring construction consistent with business common sense.*
4. *Scanmudring AS v James Fisher MFE Ltd* [2019] CSIH 10; 2019 SLT 295 — *interpretation of commercial contracts.*
5. *Lagan Construction Group Ltd (In Administration) v Scot Roads Partnership* [2023] CSIH 28; 2024 SC 12 — *confirming approach to contractual interpretation.*
6. *Murray v Caledonia Crane & Plant Hire Ltd* 1983 SLT 306 — *interpretation of indemnity clauses.*
7. *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 — *further authority on indemnity clause interpretation.*
8. *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; [1980] 2 WLR 283 — *on the modern approach to contract clauses (especially exclusion and indemnity).*
9. *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173 — *unitary approach to contract interpretation.*

Background

The defender, Port of Aberdeen, engaged Dragados UK as main contractor for a harbour expansion at Nigg Bay under a customised NEC3 contract dated 20 December 2016 [2]. Dragados subcontracted design services to Ove Arup & Partners (Arup) on 21 December 2016 [2]. Project difficulties led to a Settlement Agreement on 8 June 2020, with a Settlement Date of 1 May 2020 [2, 8].

Under the Settlement Agreement, Dragados received £17,348,472.90 [6] and was released from most future obligations except for specific design packages termed Contractor Design to Complete (CDTC) [2, 8]. The agreement included provisions for Port of Aberdeen to reimburse Dragados if it continued instructing Arup beyond the CDTC scope to complete the overall design ("Complete Works Design") [20, 3, 8(7.8)] and also for Arup's fees in verifying redline as-built drawings [3, 27, 28, 30].

Dragados did instruct Arup beyond the CDTC scope [2] and Arup issued a final account including claims for that work, verification fees, prolongation costs, and other items [4]. Dragados and Arup reached a global settlement on 7 June 2022 with Arup paying an undifferentiated sum to Dragados [4, 22].

Dragados claimed £1,247,542 from Port of Aberdeen, asserting this reflected liabilities to Arup covered by the Settlement Agreement [4]. The defender argued clause 7.8.4 was not triggered, as it never instructed Dragados to carry out further work [9–12, 16, 18, 19] and challenged the claim's relevancy due to the Arup settlement and the scope of certain design elements [4, 12, 13, 20].

Key Themes:

1. ***Contractual Interpretation:*** *The judgment centres on interpreting the Settlement Agreement, especially section 7 and clauses 5.1, 7.8, and 21.1, applying principles such as examining the contract's language, context, and business common sense [7, 14, 24, 42].*
2. ***Settlement Agreements:*** *The dispute arises from differing views on a Settlement Agreement meant to resolve prior issues between the main contractor and employer in a construction project [2, 6–8, 15].*
3. ***Indemnity and Reimbursement Provisions:*** *Clause 7.8.4's interpretation is key, with the pursuer claiming it provides an indemnity—or reimbursement promise—for costs owed to its design subcontractor, Arup [7, 8, 22, 28].*
4. ***Conditions Precedent:*** *The court held that for clause 7.8.4 to operate, certain conditions had to be met—most critically, that instructions be given by the defender [16–19, 45–46].*

5. ***Subcontractor Liabilities:*** *The claim arises from liabilities the pursuer incurred to Arup after entering into the main Settlement Agreement [4, 22].*
6. ***Relevancy of Claims:*** *A key issue was whether the pursuer's claims were legally relevant, given its undifferentiated settlement with Arup and the Settlement Agreement's specific wording [12–13, 20–23, 28, 29, 31].*
7. ***Scope of Works Post-Settlement:*** *The agreement redefined Dragados's duties, separating the "Contractor Design to Complete" (CDTC) from the broader "Complete Works Design," crucial for determining reimbursement eligibility under clause 7.8.4 [2, 8–11, 15–18, 20, 24–25, 27–28, 30, 32–36, 38, 40, 44–45].*

Legal Issues and Analysis

- **Relevancy based on Arup Settlement:** The defender argued the claim was irrelevant since the pursuer could not specify how much of its global settlement with Arup related to the claims now advanced, citing Biggin & Co Ltd and Gray Construction Ltd [13–14]. The pursuer responded that it was seeking reimbursement based on liability, not damages, and offered to prove the liability itself [22]. The court agreed, holding that the claim concerned liability covered by the agreement, not the settlement amount, and was therefore relevant [28–30].
- **Relevancy based on Design Scope:** The defender contended that £377,307.98 of the claim related to design already completed or paid for under the CDTC [20]. The pursuer denied this and offered to prove the claims arose from post-CDTC work or design verification [27, 30]. The court treated this as a factual issue requiring expert evidence and declined to dismiss it at this stage [31].
- **Construction of Clause 7.8.4:** This was the central legal issue. Clause 7.8 outlined arrangements if no direct Arup/Employer contract was made [8]. Clause 7.8.4 stated the defender would indemnify the pursuer for sums due to Arup for completing the Complete Works Design beyond the CDTC [8, 28]. The defender argued this was conditional on it instructing the pursuer to operate the Arup appointment, which never occurred [16, 18–19]. The pursuer contended the obligation was automatic post-CDTC, with instructions only guiding administration if issued [25].
    - The court examined the wording of clause 7.8, noting it applied "Following completion of the Contractor Design to Complete" [36]. It also noted the stipulations that the pursuer was to "continue to operate the Arup Existing Appointment... in accordance with the instructions of the Employer" and "administer the Arup Existing Appointment... in accordance with the instructions of the Employer or the Project Manager only" [38-39].
    - Applying principles of contractual interpretation [14, 24], the court considered the language and potential business common sense of each interpretation [42, 43]. It found the language, particularly the word **"only"** in clause 7.8.2, strongly indicated that the operation or administration of the Arup appointment under clause 7.8 was **strictly conditional** on the issuance of instructions by the Employer or Project Manager [45].
    - The court concluded that the "reasonable reader" would understand that the clause 7.8 arrangement, and consequently the indemnity in clause 7.8.4, would only become operative **if the defender issued instructions** for the pursuer to procure design work from Arup beyond the CDTC [45]. Since it was undisputed that no such instructions were issued (and indeed, the defender had indicated they would not be issued) [45-46], the condition precedent for the clause 7.8.4 indemnity was not met.

Conclusion

The court held that the pursuer's claim was not irrelevant solely because its settlement with Arup was

global and undifferentiated; it was entitled to prove the underlying liability [28–29]. Whether parts of the claim related to work already covered by the settlement sum (Design Provided to Date or CDTC) was a factual issue requiring proof [31]. However, the court accepted the defender's argument on the construction of clause 7.8: the mechanism, including clause 7.8.4's indemnity, was conditional upon instructions being issued by the defender or Project Manager for the pursuer to procure design work beyond the CDTC [45]. As no such instructions were given, the pursuer's claim under clause 7.8.4 was found irrelevant and refused probation [45–46]. The remaining claims, relating to design verification under Schedule Part 12, were allowed to proceed to proof before answer [22, 46].

Key Takeaway:

Contractual provisions—especially indemnities—are strictly construed, and conditions precedent must be met for them to apply [45]. Phrases like "in accordance with the instructions... only" impose clear conditions that cannot be bypassed by appeals to business common sense or project goals [38–39, 42–43, 45]. Where reimbursement depends on instructions being issued, their absence prevents the mechanism from operating [45–46]. The judgment also confirms that to succeed in a reimbursement claim based on liability to a third party, a claimant may need to prove the liability itself, not its allocation within a global settlement [28–29].

Parting Thoughts

In a judgment that can best be described as a masterclass in precision dissection (with all the warmth of a scalpel), Lord Sandison delivered what might as well be a contractual autopsy. The headline? Dragados' case based on clause 7.8.4 is dead on arrival—largely because no one remembered to send the memo. Literally.

Despite a valiant effort from Dragados, the Court was unimpressed by arguments that clause 7.8.4 indemnity rights could somehow spring into being without the formal trigger—explicit instructions from the defender or Project Manager. Unfortunately for Dragados, those instructions were not merely forgotten in a desk drawer; the defender had actively stated they would not be issued. As the Court dryly observed, when a clause says "in accordance with the instructions... only," it means precisely that—no creative re-interpretation required or, indeed, permitted [45].

And yet, not all was lost. The Court declined to dismiss the entire action. Claims tied to Schedule Part 12—related to the design verification process—lived to fight another day. The argument over whether certain elements of the claim had already been paid for? A question for expert witnesses, not summary judgment [30].

The real legacy of this case lies in its doctrinal clarity: settlement agreements—especially those attempting to tame the hydra of NEC3 modifications, post-completion liabilities, and open-book administration—require surgical attention to conditional triggers. If you want indemnity, you'll need not just a clause but a clearly audible instruction. No instruction, no indemnity. No exceptions. Not even if your subcontractor is Arup and your paperwork heroic.

It's a judgment that reaffirms what construction professionals and lawyers have long suspected: in complex post-settlement arrangements, wishful thinking is not a valid substitute for proper notice.

And as Lord Sandison has just demonstrated, sometimes a clause doesn't merely fail to operate—it never even woke up.

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#CourtOfSession #LegalJudgment #ContractDispute #DesignLiability #Relevancy

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