CONTRACTUAL APPENDICES: IGNORE AT YOUR PERIL

By Sarah Sinclair and Katie Keir

Recently, a subcontractor in the UK was relieved of adverse ground conditions risk, despite contract amendments that sought to allocate that risk to the subcontractor- and it all hinged on an analysis of appendices to the contract. Appending documents to a contract without giving due consideration to how they work with the main contract terms is a risky business. While often it is important for such documents (often technical) to be included in a contract, parties need to turn their minds to any potential inconsistencies, ambiguities or misunderstandings that should be addressed prior to signing the contract.

Common practice in the industry

It is common for contracts to include appendices containing additional documents relevant to the contract. In the construction industry, P&G Specification, Site Plans, Drawings & Specifications as well as Contract Price composition information are all commonly appended to a contract. Anything appended to the contract becomes part of the contract and therefore is legally binding on the parties.

To mitigate the risk of inconsistencies in the contract, parties will often include a 'priority clause' which sets out the order of precedence for the contract documents. Usually the main contractual terms take priority, with more technical documents being of lower priority. Parties rely on a priority clause to resolve any possible inconsistencies between information and terms found in different parts of a contract. The issue is that a priority clause doesn't come into play if no inconsistency is found in the first place.

The risk of appended documents has recently been demonstrated in cases in the UK which serve as a reminder of the need for contracting parties to be careful in New Zealand.

What the law has to say

The principles of contract interpretation have been well laid out in cases over the years. Contractual terms are to be read in the light of the contract as a whole and its overall purpose. When interpreting a contract, the court seeks to determine the parties' intention by reference to *"what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean….in their documentary and factual context"*[1] On applying this legal principle, courts have shown themselves to be slow to find inconsistencies in a contract. As a result, priority clauses, while helpful in providing some 'order' in a contract, are rarely applied by the courts. This means that a term or condition buried in a 'lower priority' contract document will be given effect, so long as the meaning is not inconsistent with higher priority documents.

Recent UK case law

In *Clancy Docwra Limited v E.ON Energy Solutions Limited*[2] *(CDL v E.ON)*, CDL was a subcontractor carrying out trenching works in Central London. It discovered a number of underground objects requiring additional resources and work to excavate. A dispute arose as to who bore the risk of unforeseen adverse ground conditions. CDL argued that addressing adverse ground conditions was outside the scope of the subcontract works, as spelled out in the tender clarification documents appended to the subcontract. E.ON, the contractor, argued that the risk of unforeseen adverse ground conditions lay with CDL under the main conditions

of the contract, which took priority in the priority of documents clause in the subcontract.

The Court sided with CDL, finding that E.ON bore the risk of unforeseen ground conditions. The priority clause didn't even come into play as the Court found there to be no inconsistencies within the contract. Instead, the Court held that the construction work in question did not form part of the scope of subcontract work because this work had been expressly excluded in the appended documents. This meant that E.ON could not rely on the broad risk allocation clause in the main contract terms nor could it rely on the priority clause to avoid bearing the risk and cost of this additional work.

CDL v E.ON demonstrates how parties cannot rely on a priority clause to address contractual interpretation issues where there is no inconsistency found. The case highlights the importance of parties taking time to really understand what the documents being appended to the contract actually mean and how they affect the application of the main contract terms. In this case, it was evident that the post-tender clarifications put the risk of adverse ground conditions on E.ON, whether or not this is what E.ON intended its commercial position to be.

An earlier UK case, *MT Højgaard AS v E.ON Climate and Renewables*[3] *(MT Højgaard v E.ON)* is more commonly known for its discussion of fitness for purpose; however also highlights the risk of appending technical documentation to a contract without being fully aware of its contents. Again, the Court in this case found no inconsistencies within the contract documents and instead used the basic principles of contractual interpretation to determine the contract's effect.

Here the contractor, *MT Højgaard*, argued that an onerous obligation requiring the foundations of an offshore windfarm be designed to ensure a lifetime of 20 years, should not be given effect because it was only found in a relatively obscure part of the tender documents and not spelled out in the prioritised contract conditions on design quality. However, the Court found that because the terms of the contract clearly included the tender documents, the parties must have intended that the onerous obligation would be given contractual effect.

The contractor also tried to argue that because the prioritised conditions of the contract imposed other obligations with respect to the quality of the design and build, the parties must not have intended that a more stringent obligation in the tender documents would be given effect. This argument was rejected as it would render meaningless the requirement that the foundations be designed to ensure a lifetime of 20 years. The contractor had therefore breached the contract and was liable for the cost of remedying the foundations.

Application to New Zealand

There is no analogous New Zealand case law to draw from. However, given the New Zealand courts follow the same approach to contract interpretation as the UK courts, it is highly likely that the UK cases mentioned above would apply to any analogous case heard in New Zealand. It is entirely possible that a case of this nature could arise in New Zealand, particularly in the construction context where numerous technical

documents are regularly appended to construction contracts. Therefore, it pays for contracting parties in New Zealand to take heed of the issues raised in the UK cases to avoid facing the same pitfalls when applying their own contracts.

Lessons to be learnt

The above two cases do not lay down new law or revolutionise contract interpretation. However, they serve as an important reminder that even terms buried deep in technical documentation are part of the contract and so it is essential to know and understand them. Priority clauses will not save the day when the contractual terms in question are not inconsistent. To avoid potentially substantial financial consequences, parties should undertake comprehensive due diligence on a contract to identify inconsistencies, uncertainties or potential misunderstandings, between clauses especially where technical documentation prepared by the contractor or subcontractor is appended.

References:

[1] *Arnold v Britton* [2015] UKSC 36, per Lord Neuberger at [15].

[2] *Clancy Docwra Limited v E.ON Energy Solutions Limited* [2018] EWHC 3124 (TCC).

[3] *MT Højgaard AS v E.ON Climate and Renewables UK Robin Rigg East Ltd and another* [2018] 2 All ER 22.

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