

Breaking the chain

There is little case law on the inter-relationship of the contracts within a PPP project, but useful guidance comes from a recent case in the Scottish Court of Session. Shona Frame of MacRoberts analyses its significance.

The decision in Kent County Council (trading as Kent County Supplies) v Robertson Construction Northern Ltd (2009) CSOH 118 from the Outer House of the Court of Session on 19 March 2009 was one of the first cases concerning the inter-relationship of the various contracts within a PPP project.

The facts in the case

The case concerned the Aberdeenshire Schools Phase II PPP project. The authority was Aberdeenshire Council. The authority entered into a project agreement with Robertson Education (Aberdeenshire II) Ltd (Robertson Education) for the design, construction, refurbishment, financing and operation of six schools and associated services.

Robertson Education in turn entered into a construction contract with Robertson Construction Northern Ltd (Robertson Construction) for the design, construction and fitting out of the new school buildings and a facilities management contract with Robertson Facilities Management Ltd (Robertson FM) for the provision of services within the schools once they were in operation.

Robertson Construction sub-contracted to Kent County Supplies the design, supply and installation of loose furniture at the schools. There was also an Interface Agreement between Robertson Education, Robertson Construction and Robertson FM to regulate the relationship between those parties.

The court action concerned Kent County Supplies' claim for payment for work carried out by them. Robertson Construction had withheld payment. They claimed that project tables which had been supplied by Kent County Supplies did not conform to the specification. As a result of that, they claimed that Robertson Education had made deductions from sums due to Robertson Construction under the construction contract and Robertson Construction wished to pass on those same deductions from sums otherwise due to Kent County Supplies in terms of their sub-contract.

The debate

The decision in the case was issued following a legal debate. In that, Kent were arguing that certain parts of Robertson Construction's case should be struck out. This was on the basis, broadly, that the deductions imposed by Aberdeenshire Council against Robertson Education could only then be passed down from Robertson Education to Robertson FM under the facilities management contract and not to Robertson Construction under the construction contract.

Consideration of this issue involved a lengthy review of the provisions of each contract. In essence, this came down to the issue of what were the respective parties' obligations under their contracts. It required the obligations and right to make

deductions to be traced down through the contractual chain to see whether they ended up with Kent, by the route proposed by Robertson Construction.

Kent's argument was that availability and performance deductions could only be applied, in terms of the project agreement, for availability and performance failures. These would involve failure to provide the services to meet the availability and performance standards within the specified response time. It was argued that obligations of Robertson Construction under the construction contract and therefore also those placed on Kent County Supplies in terms of their sub-contract did not include provision of the 'Services'. Services was a defined term contained within Pt 4 of the project agreement. The obligation to provide the services started from the date of issue of an acceptance certificate in respect of a particular school, in terms of the construction contract. Issue of an acceptance certificate followed service availability being achieved by Robertson Construction. In other words, in terms of the project agreement, services provision only commenced following completion of the works under the construction contract. Services provision was within the ambit of the provision of the operational services which were part of the FM contract.

In these circumstances, Robertson Education had no right to apply deductions against Robertson Construction and they in turn had no right to pass on such deductions from sums otherwise due to Kent County Supplies.

Robertson Construction argued that their case should survive the debate. This was on the basis of identifying three routes to link the obligations related to the project tables to the building contract:

- The project agreement required Robertson Education to carry out the works and achieve service availability. The service availability requirements were set out in Schedule Part 5. These would have to be satisfied. That included providing the loose furniture in accordance with data sheets which formed part of the authority's requirements.
- To satisfy the service availability requirements, all the operational services had to be or be capable of being delivered in accordance with the operational services specification. That again directed parties to the authority's requirements.
- The works were to comply with the facilities requirements which again made reference to the data sheets.

These routes meant that this work was part of the construction phase of the project. The obligation of Robertson Education under the project agreement to supply compliance with data sheets which detailed the loose furniture and equipment was therefore placed contracts on Robertson Construction under the construction contract. The construction contract required Robertson Construction to carry out their obligations in accordance with the obligations of Robertson Education under the project agreement and provided for an indemnity where any deductions were made by the authority as a result of failure to do so.

Robertson Construction further relied on the terms of the interface agreement. It had provisions which stated that in the event of a breach by the FM Contractor or the building contractor resulting in Robertson Education incurring a liability or suffering deductions under the project agreement, Robertson Education was entitled to pass on such liabilities or deductions to the FM Contractor or building contractor 'as appropriate'. It was argued that, in terms of that agreement, for Robertson Education to pass on a deduction to Robertson Construction, they only had to show that either

Robertson Construction or Robertson FM were in breach and as a result caused Robertson Education to suffer a deduction.

The ruling

Lord Glennie took as a starting point the project agreement. In terms of that, Aberdeenshire Council contracted with Robertson Education for the whole package of design, construction, refurbishment, financing and operation of the six schools and associated services. The package involved two stages, namely the design and construction stage and thereafter the provision of the operational services. The design and construction stage was covered by Pt 3 of the project agreement and the provision of operational services by Pt 4.

Part 3 requires the building contractor to carry out the works in accordance with the facilities requirements so that each phase (school) achieves service availability by a particular date. 'Facilities Requirements' is defined as being that part of the authorities' requirements which relates to design and construction of the work. He therefore took this as a limitation on the building contractor's obligations under Pt 3 of the project agreement to carrying out the design and construction aspects of the works.

Further, the obligation was linked to achievement of service availability or, in other words, satisfaction of the service availability requirements. Those were met when an acceptance certificate was issued so that, Lord Glennie said, the obligations on the building contractor under Pt 3 of the project agreement were to take matters to the end of the design and construction stage. That included provision of furniture and equipment but once that work was complete and an acceptance certificate issued, the building contractor's primary obligations under Pt 3 were complete (subject to their obligation to carry out snagging works and additional works).

Lord Glennie contrasted this with Pt 4 of the project agreement which related to provision of services 'from the Service Availability Date'. This was after the acceptance certificate was issued. He considered the obligations set out there only came into play once the design and construction work was substantially complete and the furniture and equipment had been substantially installed.

He recognised the potential overlap between the provisions of Pt 3 and Pt 4 where there was snagging work outstanding at the date of issue of the acceptance certificate. It was specifically stated that issue of the acceptance certificate would not relieve the building contractor of liability for deductions in terms of Sch 7 which contained the payment mechanism.

The payment mechanism provided for availability deductions and performance deductions. The right to make availability and performance deductions was a right arising out of the obligations in Pt 4 of the project agreement, not the design and construction obligations in Pt 3. A building contractor would not be relieved from liability for deductions just because of issue of an acceptance certificate with unfinished items being treated as snagging. If a building contractor caused an availability or performance failure he would not be able to avoid liability for the deduction by arguing that failure was due to non-completion of an item of work treated as snagging and in respect of which an acceptance certificate was issued. However, the deduction would be applied because of the performance failure which is a failure to provide services under Pt 4 and not because the contractor had failed to complete the works under Pt 3.

Any action or inaction by Robertson Construction under the construction contract could only directly affect the position of Robertson Education under the project agreement if it affected performance by Robertson Education of its obligations in respect of the design and construction part of the project.

He did not see how failures on the part of Robertson Construction in design and construction (included in Pt 3 of the project agreement)' could result directly in Robertson Education suffering availability or performance deductions since those deductions related to failures in provision of operational services under Pt 4 of the project agreement. Any failures in provision of the operational services giving rise to availability or performance deductions were likely to be the result of failures by the facilities management contractor. He thought the natural course would be for deductions made by the authority under the project agreement to be passed down through the FM contract as opposed to the construction contract.

Lord Glennie did note certain routes which might have been open to Robertson Construction. For example there might be a remedy if they were able to make a case that the failure in supply of the project tables under the construction contract caused Robertson Education to be in default so that Robertson Construction could say they had caused Robertson Education to be in breach of the project agreement, therefore triggering deductions. No such case was contained within the written pleadings in front of the judge however.

The interface agreement was also identified as a possible route if it was the case that deductions made against Robertson Education had been passed on to Robertson FM and that Robertson FM had then passed these on to Robertson Construction. There was a suggestion in the pleadings this may have been the case but the factual averments were inconsistent with the primary case and so clarification was required if this argument was to be allowed to proceed.

Comment

This case demonstrates the importance of fully analysing the contractual routes available in a PPP scheme in order to be able to follow through with pursuit of reimbursements of deductions from the correct party. The position is simple at project agreement level since at that stage, responsibility for all aspects of the work remains with the project company. The difficulty in this case arose where these responsibilities were split, as is normal, between the building contractor and FM contractor and this is where the chain was broken on the basis of the case as it was put before the court. The case also highlights the need not just to consider the principal contract documents but also the perhaps less obvious ones when seeking a remedy.

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