

**Langstane Housing Association Limited -v- Riverside Construction  
(Aberdeen) Ltd [2009]  
Rachel Barnes, May 2009**

*Langstane Housing Association Limited -v- Riverside Construction (Aberdeen) Ltd [2009] CSOH 52* is a recent Scottish decision which has been handed down by the Outer House of the Court of Session in an ongoing case between Langstane – a Charitable Housing Association (the Pursuer) and Riverside Construction Ltd. Riverside Construction has joined eight other parties to the dispute, the second of which is Ramsay & Chalmers - a firm of consulting structural and civil engineers (the Engineer). The dispute concerns the partial collapse of renovation works to buildings acquired by the Pursuer. The Pursuer is seeking to recover damages in respect of that collapse which the Pursuer alleges resulted from the breach of contract and/or negligence of the nine Defenders. The Pursuer's claim against the Engineer jointly and/or severally an amount in excess of £3million.

The decision concerns preliminary issues between the Pursuer and the Engineer. Of particular interest to the reader will be the question of what terms were incorporated by reference into the contract between the Pursuer and the Engineer and the extent to which the Engineer is entitled to rely on those terms, which include a net contribution clause.

Incorporation of contract terms

The Pursuer had engaged the Engineer by letter of 15 March 2001. The letter stated "*Basis of Engagement – ACE Conditions of Engagement Agreement – B1*". The Court readily concluded that this letter was sufficiently clear to conclude that the Parties intended to enter into a contract on the basis of ACE B(1) and that the parties intended those conditions to be those which were "*current*" at the time the Engineer was engaged, therefore the 1998 version would apply.

The Court next considered what terms were properly incorporated. The Court found that the whole of the ACE B(1) should apply save where the parties by act or omission indicated that a particular condition should not apply. In this case, the parties had failed to complete the details in the Memorandum of Agreement including the limit of liability in A10. As a result the limit of liability was ineffective. For the same reason the time limit for bringing claims was ineffective. Importantly, the Court refuted the argument that failure to complete the Memorandum would automatically render the incorporation of the ACE conditions ineffective. The Court ruled that "*If the parties have in fact concluded a contract by letter, or by letter and conduct, there is no reason why they should not, if they so wish, incorporate the ACE Conditions by reference without completing the Memorandum of Agreement designed to go with those Conditions*". If, however, failure to do so meant that essential terms were not agreed then there would not be a concluded contract at all.

The Court decided that the whole of the ACE B(1) 1998 was incorporated by reference including Clause B8.2 (the net contribution clause) because this does not depend on completion of the Memorandum. The next question was whether Clause B8.2 might fall to be excluded for any reason. The only argument put forward by the Pursuer was that Clause B8.2 was a particularly onerous and unusual clause such that particular attention should have been drawn to the clause in order for it to be effectively incorporated into the contract, ie the *Interfoto -v- Stilleto* rule for incorporation of terms which materially depart from terms which would reasonably be expected to apply to that type of contract. The Court considered the judgements of Bingham LJ and Dillon LJ in the *Interfoto* case and concluded that the decision in that case (and similar "*ticket*" cases) did not apply to a "*written agreement between commercial parties where the parties have had the opportunity of considering the proffered terms before deciding whether to proceed*". The Court reasoned that the parties had a course of dealing on ACE terms with which the parties were familiar (even if only at a cursory level), that it was the Pursuer who had proffered these terms and the Court would not now infer a need for either party to bring any particular term to the attention of the other. Furthermore, transferring the risk that one of the other parties who contracted with the Pursuer might become insolvent on to the Pursuer (which the Court accepted was the effect of the net contribution clause) was not so onerous

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and unusual that the Pursuer's attention should have been drawn to the net contribution clause. It was for the Pursuer to choose their contracting parties and it is the Pursuer who can insist that their contracting parties carry appropriate insurances.

## The Unfair Contract Terms Act and the Net Contribution Clause

The question was raised as to whether the Engineer would be excluded from relying upon Clause B8.2 by operation of the Unfair Contract Terms Act. The Pursuer argued that Clause B8.2 fell within section 16(1)b of the Act. Section 16(1)b states that: *"Where the term of the contract purports to exclude or restrict liability for breach of duty arising in the course of any business ..., that term ... shall ... have no effect if it was not fair and reasonable to incorporate the term in the contract"*. The Court adopted the argument put forward by the Engineer that a net contribution clause does not seek to exclude or restrict liability for breach of duty within the meaning of section 16(1)b: the net contribution clause seeks to ensure that the Engineer is only held liable for the consequence of their own breach of duty and were not held liable by joint and several liability for the breaches of duty by others. The Judge referred specifically to that part of the wording of the net contribution clause which says *"such sum as the Consulting Engineer ought reasonably to pay having regard to his responsibility for the loss or damage suffered as a result of the occurrence or series of occurrences in question"* as supporting this finding. So section 16(1) did not apply so as to impose a *"fair and reasonable"* test in this case.

In addition, the Pursuer argued that Clause B8.2 fell within section 17 of the Unfair Contract Terms Act. Section 17(1) states that: *"Any term of a contract which is in a ... standard form contract shall have no effect for the purpose of enabling a party to the contract – (a) who is in breach of a contractual obligation, to exclude or restrict any liability of his to the ... customer in respect of the breach, ... if it was not fair and reasonable to incorporate the term in the contract"*. Section 17(2) then says *"In this section 'customer' means a party to a standard form contract who deals on the basis of written standard terms of business of the other party to the contract who himself deals in the course of a business"*. The Court adopted the argument put forward by the Engineer that section 17(1) did not apply in this case because: firstly, the Pursuer was not dealing on the basis of the Engineer's written standard terms. If they were then they would be a *"consumer"*. If not, section 17(1) had no application. As the ACE Conditions were not the Engineer's standard terms but are drafted and promulgated by the ACE and are widely used in the profession, they are not the Engineer's terms. Secondly, as noted above, it was the Pursuer who put forward the ACE Conditions.

The Court went on to comment that, even if section 16 or 17 had been applicable, the Court would have held that Clause B8.2 was fair and reasonable. It was relevant to the Judge's view that the clause is part of a body of conditions drafted by a professional body and widely used. The Pursuer showed a willingness to contract on that basis. Finally, the Judge repeated that it was of greatest importance that it was open to the Pursuer who chose their contractors and consultants to ensure the proper insurance is in place. *"If proper insurance is in place then it should be possible in the event of insolvency of the contractor or consultant to go against the insurer. I see nothing unfair or unreasonable in the client taking the risk that he has adequately covered himself against the possible insolvency of those who he himself has appointed."*

This does, however, presuppose insurance continues in the event of the insolvency, but this is not necessarily the case.

## Summary

As the decision comes from the Scottish Outer House Court of Session, it is not directly applicable in the English courts but it will have weight.

The ACE conditions which were applicable here were the 1998 version. The wording in Clause B8.2 of the 1998 version is not entirely the same in Clause B8.3 of the 2002 version (as amended in 2004).

Therefore, the decision so far as it relates to the Clause B8.2 in the ACE Conditions 1998 being fair and reasonable cannot be assumed to later versions of the clause.

The majority of this decision relates to incorporation issues. Clause B8.2 was properly incorporated because:

- the parties clearly intended to contract on the basis of the current form of ACE B(1);
- the whole of the ACE B(1) was incorporated by reference despite the failure to complete the Memorandum of Agreement;
- Clause B8.2 was not unusual or onerous so as to require the Engineer to draw particular attention to it because the Pursuer was familiar with the ACE B(1), had proffered the ACE form, intended to contract on the basis of the ACE B(1) and the Pursuer could commercially handle the transfer of risk

This case therefore was decided on its particular facts.

Although there was no detailed consideration of the wording of the net contribution clause itself, the Judge did appear to assume it worked in the manner it is generally thought such a clause would work. Also, while not deciding that net contribution clauses generally will be enforceable and would be outside the Unfair Contract Terms Act, it is useful in showing that in a particular case it was enforceable.

If a consultant contracts on its own individual terms which incorporate a net contribution clause it will be more difficult to overcome the argument that section 17(2) of UCTA should apply. Avoiding the pitfalls of section 16(1) will depend upon the particular drafting of the net contribution clause.

A full copy of the decision can be found at <http://www.scotcourts.gov.uk/opinions/2009CSOH52.html>

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