

BRIEF UPDATE

FROM THE CONSTRUCTION DIVISION



If an offer looks too good to be true....beware

It has long been established by statute and common law that where both parties to a contract are proceeding under a common misapprehension, for example by wrongly recording the terms of an agreement, the contract can be rectified to reflect the true terms.

In a recent case from the English Technology and Construction Court, the judge considered the position where one party made a mistake in its written tender but the other refused to acknowledge this and proceeded on the basis that the contract was as written down.

Traditional Structures Limited v HW Construction Limited 2010 TCC arose out of a commonplace scenario in all forms of contracting. A sub-contractor (TSL) issued a quote to a main contractor (HWC) for 2 items- steel work and roof cladding. The price for the steel work was £37,573 and the price for cladding £32,365. Unfortunately when the tender was submitted by fax and post to HWC the last line with the cladding price was omitted. TSL's tender was accepted for the "steelwork and roof cladding as per your quotation..." but without

reference to the price. Only afterwards did it become clear that TSL's submission contained a mistake.

HWC claimed that they had in good faith accepted the lower price of £37,573 for the whole job and that it was not now open to TSL to increase this by the cost of the cladding.

The judge analysed all of the evidence and concluded that in the circumstances HWC's managing director "wilfully and recklessly" failed to ask whether the price of £37,753 related to both the structural steel work and the cladding. Since it was self evident that the price only related to steel work the judge described such behaviour as unconscionable.

In the end HWC had to pay not only the additional £32,365 for the cladding but also the legal costs of the dispute.

This was an English court case. The outcome is likely to be the same in Scotland if it can be shown that the accepting party had knowledge of the error. A un-induced unilateral error on the part of the offeror would not be sufficient to set aside the contract.

Moral of the story – if a contract term or a price is ambiguous it will not necessarily be to your advantage to make an assumption and shut your eyes to the alternative. At best this will lead to ambiguity and uncertainty, at worst you will end up by paying a lot more and have your name dragged through the courts. More importantly this could all have been avoided if TSL had taken greater care in submitting its tender- certainty and accuracy is the key .

For further advice and information please contact the Construction team:-

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